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LEROY E. CURREN, APPELLANT, V. ALL PERSONS HAVING OR CLAIMING ANY INTEREST IN A PARCEL OF LAND IN SECTIONS 10 AND 11, TOWNSHIP 8, RANGE 19, DAWSON COUNTY, NEBRASKA, ET AL., APPELLEES.

31 N. W. 2d 405

Filed March 19, 1948. No. 32346.

1. **Adverse Possession.** To secure a title by adverse possession, the plaintiff must prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years.
2. **Pleading.** When a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed. Of course, whether or not the evidence is sufficient to support a favorable finding thereon remains a question of fact.
3. **Appeal and Error.** When, in an equity action, such motion is improperly overruled by the trial court and the case is before us for review, we will consider the pleading as having been amended and determine the question of the sufficiency of the evidence in support thereof.

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

George A. Munro, for appellant.

John M. Neff and *Dryden & Jensen,* for appellees.

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

PAINE, J.

This is an action to quiet title to an island in the Platte River by adverse possession for ten years. The trial court found against the plaintiff, and denied title to the plaintiff, who has appealed.

The plaintiff filed a petition against all persons having any interest in an island in the Platte River, therein described by metes and bounds, but naming no persons individually as defendants. The plaintiff alleged that he had been in open, notorious, exclusive, continuous,

adverse, and undisputed possession of this island, located in Sections 10 and 11, Township 8 North, Range 19 West, of the Sixth P. M., in Dawson County, containing 41.7 acres of land in the north half of said Section 10, and 64.7 acres in the north half of said Section 11, under a claim of title and ownership for more than ten years; that any claim of ownership that any of the defendants might have had has been barred by the statute of limitations of Nebraska; and that there were persons who appeared to claim, or have some interest in, or title to, or lien upon, said island, but such right or title did not appear of record in said Dawson County, and that he had been unable to ascertain, and did not know, their names or whereabouts. We will call the island in dispute the Curren Island.

The plaintiff prayed for a decree quieting and confirming the title to Curren Island in him, and that the defendants and all persons claiming by, through or under them be forever barred from asserting any right, title, or interest in and to said real estate.

Plaintiff secured an order for service by publication, and proof thereof was duly filed. On December 12, 1945, the cause came on for hearing before the court. Plaintiff appeared in person and by his attorney. W. A. Stewart, Jr., appointed by the court under the Soldiers and Sailors' Relief Act, filed an answer, which was a general denial. Evidence being taken, the court found that the allegations of the plaintiff's petition were true, and quieted title of this Curren Island in the plaintiff.

In February 1946 motion was filed to vacate and set aside the judgment in favor of the plaintiff for the reason that Theodore A. Peterson and Doris Peterson were proper parties defendant, as shown by the records in the office of the register of deeds; that they were not served with summons and never entered their appearance, although known by plaintiff that they claimed title to a part of the island described in his petition; and they moved the court that after vacation of the decree they

be allowed to file answer and cross-petition.

On February 27, 1946, a similar motion to vacate the judgment was filed on behalf of Helen Crawford and Sybil Kanzler, on the ground that they were proper parties and not served with summons, although it was known by the plaintiff that these parties claimed title to a part of said Curren Island.

On March 5, 1946, the court after a hearing set aside the decree and gave the four parties filing the motions the right to answer in said case.

The answer of Theodore A. Peterson and Doris Peterson denied each and every allegation in plaintiff's petition except the description of the island by metes and bounds. For their cross-petition they alleged that they were the owners of Lots 1, 2, and 3 in Section 10, Township 8, Range 19, Dawson County; that said lots were islands near the south bank of the Platte River, according to the original plat of the United States government survey; also that they were the owners of Lots 5 and 6 in Section 9 and Lots 6 and 7 in said Section 10; that said lots contained the south bank of the river opposite that part of the island described in plaintiff's petition which lies in said Section 10; and that Curren Island was accretive and relictional land, and was therefore owned by these answering defendants, who owned to the thread of the stream. Wherefore, defendants Theodore A. Peterson and Doris Peterson prayed that a decree be entered quieting and confirming in them the title to the island above set out.

On April 2, 1946, a similar answer and cross-petition was filed by Helen Crawford and Sybil Kanzler, setting out that they were the joint owners of Section 11; that that part of Curren Island described in plaintiff's petition which lies east of the west line of Section 11, as extended to the center of the river, the same being partly accretive land, belonged to these defendants, who had been in the open and notorious possession of same since they acquired title under claim of ownership; that

plaintiff had no right, title, interest, or claim upon said island, and was trespassing thereon; that these defendants through their grantors have been in open, notorious, exclusive, continuous, and adverse possession under a claim of ownership for more than ten years; and they prayed that a decree be entered quieting the title of such part of the island in them.

The plaintiff filed a reply to said answer and cross-petition, denying each and every allegation therein, and alleged that his occupancy of and claim of ownership of Curren Island was brought to the attention of said answering defendants more than ten years prior to the filing of his petition; that plaintiff, with full knowledge of such answering defendants, built a cabin on said island and resided thereon, claiming to own the same, with knowledge and acquiescence of the defendants Helen Crawford and Sybil Kanzler; and that any interest they had therein has been barred by the statute of limitations. The plaintiff filed a similar reply to the answer and cross-petition of defendants Theodore A. Peterson and Doris Peterson.

The second trial of the case, on the issues made after the two cross-petitions and replies thereto were filed, began October 2, 1946, and the first witness called was F. E. Tanner, county surveyor of Dawson County, who had made a map, exhibit No. 1, on September 26, 1945, from a survey of the island. This exhibit shows the Curren Island by metes and bounds, its total area being 106.4 acres, of which 64.7 acres at the east end is in Section 11 and 41.7 acres at the west end is in Section 10. It also shows in the northeast corner a line indicating the south boundary of another island northwest of the Curren Island, and gives 44.60 acres area, which island the plaintiff, Leroy E. Curren, had purchased from Nils Brunzell for $50 on June 21, 1934.

The plaintiff testified that at the time of the trial he was living at Palmer, Nebraska; that in 1932 he was living at Elm Creek, and in December he moved out

on the island now called in this opinion Curren Island. Plaintiff said that when he originally moved on the island he intended to homestead it, and filed an application in the Washington Land Office, but they said there was not enough land to justify a homestead, and he would have to advance around $600 for the Department to come out and determine whether a survey should be made. Plaintiff then decided that if he stayed there long enough he could get title to it by an action to quiet title.

He first built a house 22 x 14, and in 1934 an addition 12 x 14, giving a chattel mortgage, filed May 9, 1934, on the house for $25 to secure payment of the addition. Plaintiff then built a place for chickens, ducks, and geese. He testified that the island had numerous cottonwood trees on it, some of them three feet in diameter, also ash and willow trees, and grapevines. In 1933 he began to clear off brush, and also sold wood and timber from the island.

He testified that he lived on the island continuously until 1937. He said he drove through the defendant Crawford's pasture to get in and out to the river, and left his car on the section line on the south bank; that Mary Crawford (now deceased) rode out on horseback to the island in 1934 and told him there was nothing in the river that they were interested in. He said that he fenced in a place in 1934, pastured some cattle in it for two months at $1.25 a head a month, and that he also did commercial trapping on the island. In 1935 plaintiff was working on the Sutherland project, but came to the island on week ends. His father, Jack S. Curren, who had lived in Palmer since 1938, was out at the Curren Island several times a month in 1935. He raised some potatoes and onions there on three patches of cleared land of possibly six or seven acres, but the father's health was such that he could not garden it the next year, and in 1938 he moved from Elm Creek to Palmer.

Plaintiff testified that when he registered for the draft

in the army he gave his legal address or residence as San Gabriel, California, where he was working at that time.

In 1940 plaintiff went to Kingman, Arizona, and worked until May, then went to Long Beach and worked on a navy base until the summer of 1942, was then sent by the Government to the West Indies and worked there until the fall of 1942, when he enlisted in the Marine Corps. He was paid off in the summer of 1943 on a medical disability because he had had his right leg broken, and they discharged him. When he got his furlough in 1943 he came back and repaired the building on the island, as there had been a hailstorm and the roof was in bad shape. He was there about two weeks.

Plaintiff testified that when he was away George Neidigh occupied the island. He was nearing 80 years of age. Plaintiff gave him use of the place for cleaning it up and burning it off so there would be no danger of fire. He kept the keys to the house until in 1945, but Mr. Neidigh also had a home in town, and also had a garden in town. The daughter of this old man objected very much to his living out there alone on the island. It is not shown how frequently the old man made trips out to the island, who took him out, or how he got there, or how long he stayed at any time. Plaintiff testified that during these years he left his household goods there and his winter clothing while he was working in a warmer climate.

The entire 106 acres of this island were never used by plaintiff, but only three small garden patches for a year or two, the clearing made around the house, and land for some cattle pastured for two months of one year.

The evidence discloses that others used the land for various purposes, such as cutting wood, picking grapes, and many hunted on the island. Dr. Peterson, one of the defendants, put a good fence across the island, separating his 41.7 acres of the west half of the island, and pastured it.

As early as 1935 the plaintiff began taking jobs and living at other places, as herein set out, and remaining away until he returned for a couple of weeks in 1943 and repaired the roof of the cabin.

In 23 Neb. Law Review, p. 1, we find the first number of an exhaustive article by the late Dean Foster on "Nebraska Law of Adverse Possession," buttressed by the decisions of this and other courts, and by authoritative texts, and in that article is discussed the various requirements to secure title to land by this means. The possession must be actual; it must include the physical control of the land adversely; it must be exclusive; and it must be continuous for a period of ten years.

These years of absence are attempted to be filled in by the fact that the plaintiff gave the keys to the cabin to George Neidigh, of whom plaintiff's father testified: "Q He wasn't in a position to do any active farming? A Oh, No. He just liked to be out there and do these things for the sake of being out there and being out of town."

The plaintiff cited the case of Cassens v. Wisner, 122 Neb. 408, 240 N. W. 526, for authority to support his adverse possession of Curren Island. An examination of this case shows that the land was ranch or grazing land in McPherson County, a small portion of which was tilled, while hay was cut from another portion, and the whole 80 acres were pastured continuously year after year.

Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180, is a case in certain respects similar to the one at bar. There three islands were involved. A shack or cabin was built on the island, with a cement floor, and underbrush was cleaned away. It was used for week ends during the hunting and fishing seasons and also for picnicking, and during most of the year was continuously used on Sundays for such purposes. This court held that this use of the island had not ripened into a title by adverse possession.

Defendant Dr. Peterson in 1940 built a one-wire electrified fence, extending from his deeded land on the south bank onto the Curren Island, and the next spring changed it into a regular fence straight out on the island on his east line of Section 10, as shown in exhibit No. 20. He has had cattle out there every year thereafter.

We do not think that the evidence, in the light of the legal and factual requirements for establishment of title to land by adverse possession, is sufficient to sustain a decree in favor of plaintiff. See McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326; Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458; Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494; Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737. Therefore, the finding of the court that the plaintiff had failed to establish title to the lands in question was sustained by the record.

A further ground of error assigned by plaintiff as ground for reversal is that the trial court erred in overruling his motion to amend his petition to conform to the evidence. This assignment of error is discussed at such length in the briefs that it requires a rather full consideration.

In this connection the record discloses that on November 30, 1946, the plaintiff filed a motion asking that he be permitted to amend his petition to conform to the proof upon the trial of the case by adding a third paragraph thereto, substantially as follows: That the plaintiff is the owner in fee simple of Lots 1 and 2 in Section 11, Township 8, Range 19, in Dawson County, and that his ownership of said premises is of record in the office of the Register of Deeds; that a portion of said Lots 1 and 2 forms the northeasterly part of the island described in paragraph 1 of plaintiff's petition, and that said Lots 1 and 2 were surveyed in the original United States government survey; that the remainder of the premises described in paragraph 1 has, since the making of the

original government survey, been formed as accretion land physically attached to plaintiff's said deeded land, and that the plaintiff is now the owner of all said lands described in paragraph 1; that said Lots 1 and 2 form a portion of the southerly boundary of a surveyed island shown on the original government survey, which is commonly known as Lloyd's Island; that the southerly boundary of Lloyd's Island was shown on the original government survey to be bounded by a wide channel of the Platte River; and that all of the lands described in paragraph 1 of plaintiff's petition are located to the north of the center or thread of said channel.

Examination discloses that there was some evidence to support the allegations of the proposed amendment to the petition.

The decree of the district court was entered on December 17, 1946, setting forth that the trial began October 2, 1946, and then adjourned until an additional survey was made; that on November 18 the trial continued and further evidence was received and argument made, and the cause taken under advisement; that on December 10 the matter came on for trial, and the court found that the motion of plaintiff to be permitted to add a third paragraph to his petition, to conform with the proof adduced on the trial, should be overruled.

The statute in reference to amendments reads as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made con-

formable thereto by amendment." § 25-852, R. S. 1943.

The plaintiff urges that the plain intent of this statute is to determine in one action all conflicting claims of the parties, citing Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368; Draper v. Taylor, 58 Neb. 787, 79 N. W. 709; that in all cases an amendment should be allowed if it is in furtherance of justice (Zancanella v. Omaha & C. B. Street Ry. Co., 96 Neb. 596, 148 N. W. 158); and should be allowed even after the close of the evidence if the adverse party is not prejudiced (Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574). With this contention we are in accord, and since there was evidence in support of the theory contained in the proposed amendment, it should have been allowed.

When a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed. Of course, whether or not the evidence is sufficient to support a favorable finding thereon remains a question of fact.

When, in an equity action, such motion is improperly overruled by the trial court and the case is before us for review, we will consider the pleading as having been amended and determine the question of the sufficiency of the evidence in support thereof.

On the question of the evidence as to whether or not plaintiff is entitled to anything based on evidence of accretion, plaintiff's own evidence in support of his own original claim is inconsistent with any such claim and with the entire theory on which the case was at first tried.

The plaintiff endeavored to prove that Curren Island had always been a separate island, uncharted in the original United States government survey. He attempted to homestead the island; contended it had always been there; and that there were old cottonwood trees three feet in diameter on the island. He said there

was a stream between this island and the island to the north.

In the cross-examination by counsel for plaintiff of the defendant Dr. Peterson, the counsel stated definitely that the plaintiff was claiming his right by adverse possession only. It was not until after the conclusion of the trial on the original theory that plaintiff indicated a desire to add a third paragraph to his petition and claim that Curren Island is made up of accretions from Brunzell Island, which he owns, and that Curren Island is physically attached to his deeded island.

It thus became important to determine just where the thread of the river was at this point during these years. Veron Johnson, who was born on defendant Petersons' island, and lived there until he was a grown man, testified that the main stream was right south of Lloyd's Island. As the river would go dry, that was the place where there was the best fishing, and that was true all of the time that he knew the river.

Defendant Dr. Peterson testified that the main flow of the river has always been right south of Lloyd's Island; that it was there when he was a boy and it is there today.

Art Peterson testified that when the river was going dry, or practically dry, there would always be quite a little water and fishing along the boundary line of Lloyd's Island on the south.

A. W. Peterson, who is an uncle of Dr. Peterson, the defendant, testified that the channel south of Lloyd's Island was the one that went dry last.

Dr. Peterson testified that the south bank of Lloyd's Island is unchanged, and that in the main body of water the last channel to go dry was between Lloyd's Island and Curren Island.

This court has recently defined the thread, or center, of a stream as that line which would give owners on either side access to the water at its lowest ebb. See State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782; Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

Factually and by evidence, the claim of the amendment was presented fully and a finding thereon made in the decree, which finding was against the plaintiff. On a review of that finding and the evidence in support of it here, it is clear that the finding was correct. The plaintiff failed to sustain the claim contended for in the proposed amendment.

In its decree the court found generally in favor of the defendants and against the plaintiff, finding that there has been no adverse possession of the island in controversy by the plaintiff. The court found that the center of the stream is north of the island in controversy and south of the island commonly known as Lloyd's Island. The court found that the cross-petitioners, as the owners of the lots set out in their cross-petition, are entitled to all lands and accretions from the boundaries of their lots to the center of the stream, and that the island described in plaintiff's petition is within these boundaries and is owned by the defendants as riparian owners in accordance with their separate cross-petitions. The court found for the cross-petitioners and quieted the title of the lands in them as prayed in their respective prayers of their cross-petitions.

It is clear from this record that the evidence is not sufficient to sustain the claim based on plaintiff's proposed amendment, and the refusal to allow it was error without prejudice. Therefore the judgment of the trial court is affirmed.

AFFIRMED.

ANTON SPORCIC, APPELLEE, V. SWIFT & COMPANY, A CORPORATION, APPELLANT.

31 N. W. 2d 404

Filed March 19, 1948. No. 32381.

SUPPLEMENTAL OPINION

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. On oral argument on motion for rehearing. See *ante* p. 246, 30 N. W. 2d 891, for original opinion. *Modified and affirmed.*

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Eugene D. O'Sullivan, Arthur J. Whalen, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

MESSMORE, J.

On motion for rehearing, this court's attention was directed to that part of the original opinion wherein an attorney's fee was allowed under section 48-125, R. S. 1943, which provides in part: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

The contention of the appellant is that according to the record this court, on trial de novo, fixed the date of permanent total disability of the appellee as ascertained on the date of May 26, 1945, and modified the district court's decree to read May 26, 1945, instead of May 22, 1945. Therefore, the appellant obtained a reduction in

the amount of the award and no attorney's fees would be allowable.

In Mulvey v. City of Lincoln, 131 Neb. 279, 267 N. W. 459, this court said: "In a case under the workmen's compensation law wherein the defendant appeals to the district court from the action of the compensation commissioner, and on appeal the date of commencement of payment under the award is fixed at a later date than that fixed by the compensation commissioner, such change in date of commencement of payment amounts to a reduction of the award and thus deprives the district court of the right and authority to allow an attorney's fee for plaintiff's attorney." This court made reference to the portion of section 48-125, Comp. St. 1929, as amended by the Laws of 1935, which is now section 48-125, R. S. 1943, as above set forth.

In Updike Grain Co. v. Swanson, 104 Neb. 661, 178 N. W. 618, we held that the right to tax attorney's fees in compensation cases is purely statutory. We reaffirmed this holding in Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305. See, also, Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571.

We are of the opinion that the words "in like manner" limit the power granted and refer to the provision in the same sentence with reference to the granting of fees in the district court; and that this court shall allow fees in like manner as shall the district court. No other authority is granted to this court to allow fees for service here. Applying the act to the instant case we hold that where the employer appeals to this court and obtains a reduction in the amount of the award, this court is without authority to allow the employee an attorney's fee for services here. See Rexroat v. State, *supra;* Faulhaber v. Roberts Dairy Co., *supra.*

We eliminate from the original opinion that part thereof that provides for an allowance of attorney's fees, and syllabus point No. 5 with reference to the same subject matter. We also modify the allowance for total perma-

nent disability subsequent to the first three hundred weeks from $12 per week to $10 per week, in conformity with section 48-121, R. S. 1943. The original opinion is adhered to as modified. The motion for rehearing, in all other respects, is overruled.

FORMER JUDGMENT AND OPINION MODIFIED.

STATE OF NEBRASKA EX REL. EDWARD F. BOTTCHER, APPELLEE, V. HENRY H. BARTLING, SECRETARY OF THE BOARD OF EDUCATIONAL LANDS AND FUNDS, ET AL., APPELLANTS.

31 N. W. 2d 422

Filed March 19, 1948. No. 32322.

1. **Schools and School Districts.** In the case of sale of bonds belonging to the school funds of the state at a price in excess of par value of such bonds with accrued interest the difference between such par value with accrued interest and the sale price is capital gain.
2. **Trusts.** Generally when bonds, securities, or other properties of a trust are sold at a profit the profit becomes a part of the principal and may not be considered as income.
3. ———. If a trust is a manufacturing or merchandising trust involving buying and selling for profits, the profits are to be considered as income.
4. ———. Capital gains of trusts may be considered as income for income tax purposes.
5. **Constitutional Law: Statutes.** In case of a conflict between the Constitution and a legislative enactment the statute must give way to the Constitution.
6. ———: ———. Where there is a conflict between an act of the Legislature and the Constitution of the State the statute must yield to the extent of the repugnancy.
7. ———: **Trusts.** The State is prohibited under the provisions of the Acts of Congress mentioned herein and the Nebraska Constitution from claiming benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation to keep inviolate such trust funds.
8. **Trusts.** A trustee will not be permitted to offset losses occasioned by his breach of trust against profits to the trust.
9. **Constitutional Law.** A grant of specific power by the Legislature which is contrary to and out of harmony with the fundamental law is unconstitutional and void.

10. ———. The following from section 72-252, R. S. Supp., 1945, is declared unconstitutional, null, and void: "If the bonds in any of such funds shall sell for more than par value, the difference between the par value and the selling price of the bonds sold shall, as a part of the respective permanent funds, be considered as a capital gain and set up as a capital reserve to offset past capital losses, except that if the bonds sold were purchased at a premium and accrued interest, which was taken from the temporary or interest funds of such board, such amount, as shall be necessary to replace such entire sum so taken from said temporary or interest funds and not replaced in said funds, shall be first replaced in said temporary or interest funds from such difference, and only the balance, if any, of such difference shall be so considered to be such a capital gain and set up as such a capital reserve."

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

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Robert A. Nelson,* for appellants.

Van Pelt, Marti & O'Gara, for appellee.

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

YEAGER, J.

This is an action by the State of Nebraska on relation of Edward F. Bottcher, plaintiff and appellee, on his own behalf as an individual, a taxpayer, a citizen, and parent of children of school age, and all others similarly situated, against Henry H. Bartling, Secretary of the Board of Educational Lands and Funds of the State of Nebraska, Edward Gillette, State Treasurer, and Walter R. Johnson, Attorney General of the State of Nebraska, defendants and appellants. The action was brought agreeable to the declaratory judgment act (§§ 25-21,149 to 25-21,164, R. S. 1943). The petition seeks to have construed section 72-252, R. S. 1943, and said section as amended by section 72-252, R. S. Supp., 1945, and to have declared inoperative, unconstitutional, and void that portion thereof which provides that when the

Board of Educational Lands and Funds shall sell any bonds under its management and trusteeship for the purpose of reinvesting in United States government bonds and the sale shall be for more than the par value, the difference between the par value and the selling price shall be transferred and set up as a capital reserve to offset past capital losses. The petition contains a prayer also for general equitable relief.

Trial was had and decree rendered declaring the named act or acts of the Legislature unconstitutional to the extent prayed for by plaintiff.

From the decree the defendants have appealed. As grounds for reversal defendants say that the decision is contrary to law; that it is not sustained by evidence; and that it is contrary to the evidence.

The portion of section 72-252, R. S. 1943, to which reference must be had in the decision and determination here is the following:

"The Board of Educational Lands and Funds is hereby empowered to sell any of the bonds now held in the various funds, under its management and trusteeship, for the purpose of reinvesting the same in United States government bonds. * * * The proceeds received from the sale of any such bonds shall be reinvested in any United States government bonds under the direction of the Board of Educational Lands and Funds. * * * If the bonds in any of such funds shall sell for more than par value, the difference between the par value and the selling price of the bonds sold shall, as a part of the respective permanent funds, be considered as a capital gain and set up as a capital reserve to offset past capital losses, except that if the bonds sold were purchased at a premium and accrued interest, which was taken from the temporary or interest funds of such board, such amount, as shall be necessary to replace such entire sum so taken from said temporary or interest funds and not replaced in said funds, shall be first replaced in said temporary or interest funds from such difference, and

only the balance, if any, of such difference shall be so considered to be such a capital gain and set up as such capital reserve."

The only difference between this and the portion of section 72-252, R. S. Supp., 1945, to which reference must be had is that before "capital," which is the second last word in the quotation, appears the article "a." For all practical present purposes the Act in its original form and substance and as amended is the same. This being true there will not hereinafter be separate reference to the separate enactments.

The particular complaint of the plaintiff is that the Legislature was without constitutional power to provide that in case of sales of bonds held in the various funds under the management and trusteeship of the Board of Educational Lands and Funds for more than the par value of such bonds, the difference between the par value and the selling price should be set up as a capital reserve to offset past capital losses.

It appears from the record that since the passage of this legislation several groups of bonds have been sold under its authority at prices above the par of the bonds. In some instances a premium was paid on the purchase at the time of acquisition and in others there was not. It further appears that at the time of acquisition the par value of those purchased at a premium was paid out of the perpetual school funds but the premium was paid out of the temporary school funds.

It may be well to interpolate here that what is referred to as the perpetual school funds is that portion of the school funds which is constitutionally protected against diminution. The provisions describing it are hereinafter set out at large. The temporary school funds are those which may be used only for support and maintenance of the common schools and the provisions describing them are also hereinafter set out.

In the case of sales of bonds on which premium had been paid the money received was allocated as follows:

Amounts equivalent to accrued interest and to unearned premium were set apart for those purposes, which amounts were carried into the temporary school funds. The par value of the bonds was deducted from the remainder of the sale price and the balance thereafter was set up on the books of the Board of Educational Lands and Funds and the State Treasurer as capital gains and credited to the perpetual school funds to offset past losses.

In the case of sales of bonds on which no premium had been paid the same plan was followed except of course that nothing was credited to the temporary school funds on account of unearned premiums.

In order to ascertain whether or not the plaintiff's claim herein is just it becomes necessary to examine into the history and origin of public school funds such as are considered here together with the powers and functions of the Board of Educational Lands and Funds and of the Legislature in relation thereto.

This history has been set forth in very considerable detail in State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196, and State v. Central Nebraska Public Power and Irrigation District, 143 Neb. 153, 8 N. W. 2d 841. In those cases, likewise in considerable detail, is discussed the status of school lands and funds and the limit of legislative control thereover. All of this detail will not be repeated here.

On April 19, 1864, the Act (13 U. S. St. at Large, p. 47) enabling the territory of Nebraska to gain statehood was approved. By this Act, sections 16 and 36 of each township were granted to the State for common school purposes, except in cases where sale had been made and in that event equivalent other lands were granted in lieu of the lands sold. Also by the Act it was provided that five percent of the proceeds of sales of all public lands lying within the state which had been or would be sold by the United States prior to or subsequent to the admission of Nebraska into the Union, after deduct-

ing incidental expenses, should be paid to the State for the support of the common schools.

This grant was accepted by the State of Nebraska on its admission to statehood on March 1, 1867. State ex rel. Walker v. Board of Commissioners, *supra.*

With a clear design to preserve and protect the grant of lands made by the United States to Nebraska for support of common schools and the benefits flowing therefrom, a provision was placed in the Constitution of 1866, which was the first state Constitution, in part as follows: "The principal of all funds arising from the sale, or other disposition of lands or other property, granted or intrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations." Const., 1866, art. VII, § 1.

With an equally clear design to protect the grant and its benefits, together with other funds coming to the State for school purposes, the following was placed in the Constitution of 1875:

"All lands, money, or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance." Art. VIII, § 2.

"The following are hereby declared to be perpetual funds for common school purposes, of which the annual interest or income only can be appropriated, to-wit: *First.* Such percentum as has been, or may hereafter be granted by congress on the sale of lands in this state. *Second.* All moneys arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected in lieu thereof. *Third.* The proceeds of all lands that have been, or may hereafter be granted to this state, where, by the terms and conditions of such

grant, the same are not to be otherwise appropriated. *Fourth.* The net proceeds of lands and other property and effects that may come to the state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons. *Fifth.* All moneys, stocks, bonds, lands, and other property, now belonging to the common school fund." Art. VIII, § 3.

These sections appear without change in our present Constitution as sections 2 and 3, article VII.

By the Constitution of 1875 a board of commissioners was set up for control of 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 should be provided by law. Const., 1875, art. VIII, § 1. There has been constitutional change in the components of this board but no change in its function. Const., art. VII, § 1.

Sections 2 and 3, article VII, of the Constitution, contain the limits within which the Legislature may act in its direction of this board of commissioners in the sale, leasing, and general management of the lands and funds set apart for educational purposes, and for the investment of school funds. Of course they are also a limitation upon the power of the board to act. State ex rel. Walker v. Board of Commissioners, *supra;* State v. Central Nebraska Public Power and Irrigation District, *supra;* State v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 23 N. W. 2d 300.

The original source of the funds used in the purchase of the bonds which were sold at a profit is not ascertainable from the record but it is clear that they were funds in the hands of the Board of Educational Lands and Funds for the support of the common schools. It also appears that the funds so invested were what is declared by section 3, article VII, to be perpetual funds for common school purposes concerning which the same section of the Constitution provides that only the annual

interest or income can be appropriated for support and maintenance of schools.

These funds were not only perpetual funds but trust funds and in case of loss therefrom the State is under a constitutionally imposed obligation to replace the same in case of loss on any account or for any reason.

"All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; * * *." Const., art. VII, § 9. See State ex rel. Walker v. Board of Commissioners, *supra;* State v. Central Nebraska Public Power and Irrigation District, *supra;* State v. Platte Valley Public Power and Irrigation District, *supra.*

The plaintiff herein substantially contends that the provision complained of in section 72-252, R. S. Supp., 1945, and hereinbefore pointed out, is unconstitutional and void for the reason that it is violative of the duty of the State imposed by section 9, article VII, of the Constitution, to supply all losses that may accrue in funds belonging to the State for educational purposes, the interest and income only of which are to be used, and for the further reason that it is contrary to the general obligation of the State as trustee to protect the res of the trust.

The defendants do not contend that the considered bonds and the proceeds obtained from sale are not trust funds.

In one of their propositions of law they make the contention that the difference between the cost to the State with accrued interest and the selling price of the bonds is to be considered as capital gain and set up as a capital reserve to offset past capital losses.

The proposition fails to find support in the citations found in the brief. They do sustain the proposition that this difference generally must be considered capital

gain but have no reference to reserve to offset loss.

In another proposition of law the defendants contend that in cases where the profit on sale of bonds is brought about because of the fact that the bonds were tax-exempt the profit must be considered as income and credited to the temporary school funds for support and maintenance of the common schools.

The authorities generally do not sustain the contention of defendants in this respect. Generally when bonds, securities, or other properties of a trust are sold at a profit the profit becomes a part of the principal and may not be considered as income. Restatement, Trusts, § 233 (b), p. 682; 4 Bogert, Trusts & Trustees, § 823, p. 2393; 2 Scott, Trusts, § 233.1, p. 1258; Estate of Gartenlaub, 198 Cal. 204, 244 P. 348, 48 A. L. R. 677; Thomson's Estate, 11 Pa. Co. 198.

There are recognized exceptions to this general rule. If the trust is a manufacturing or merchandising trust involving buying and selling for profits, the profits are to be considered as income. Restatement, Trusts, § 233 (c), p. 683.

The other instance is in the matter of an exaction of income tax. Capital gains of trusts are considered as income for income tax purposes. Merchants' Loan & Trust Co. v. Smietanka, 255 U. S. 509, 41 S. Ct. 386, 65 L. Ed. 751, 15 A. L. R. 1305; Commissioner of Internal Revenue v. Simmons Gin Co., 43 F. 2d 327; Brown v. Commissioner of Corporations & Taxation, 242 Mass. 242, 136 N. E. 188.

Even though the contention that these profits were, properly speaking, income it would avail defendants nothing, first, for the reason that no such issue was presented by the pleadings or by any theory supported by evidence or legal principle on the trial of the case, and second, as income they could no more be set up to offset past capital losses than if they were considered as capital gain.

By the provision complained of the Legislature sought

to relieve the State from its constitutional obligation to supply all losses to the perpetual school funds. We have not been cited to any precedents and we think there are none which would permit the Legislature in any such manner to override and render for naught the will of the people as expressed through the Constitution. It is fundamental that in case of a conflict between the Constitution and a legislative enactment the statute must give way to the Constitution. The Constitution is the paramount law. Where there is a conflict between an act of the Legislature and the Constitution of the State, the statute must yield to the extent of the repugnancy. Scott v. Flowers, 61 Neb. 620, 85 N. W. 857; Merrill v. State, 65 Neb. 509, 91 N. W. 418; Logan County v. Carnahan, on rehearing, 66 Neb. 693, 95 N. W. 812; Koepke v. State, 68 Neb. 152, 93 N. W. 1129; State v. Insurance Co. of North America, 71 Neb. 320, 100 N. W. 405, on rehearing, 71 Neb. 335, 102 N. W. 1022; State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101.

To permit that which the Legislature has attempted to authorize by the provision complained of would be to permit the State to be relieved of its obligation to restore losses to the perpetual school funds by a mere bookkeeping arrangement by the Board of Educational Lands and Funds over which funds the Legislature has no control and in which it and the State have no interest except in a supervisory capacity, and from which the State may not profit.

The State under the provisions of the Acts of Congress and the Nebraska Constitution herein referred to may not claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation as a state to keep inviolate such trust funds.

The provision of the Act in question, if a valid exercise of legislative power, would permit the offset of losses occasioned by breach of trust against profits as well as

losses not involving breach of trust. No different treatment is accorded the one than the other.

Even in the absence of constitutional obligation upon the trustee to restore funds, as is true here, a trustee would not be permitted to offset losses occasioned by his breach of trust against profits and no valid statute could be enacted legalizing any such transaction.

The rule in this connection is well stated in Restatement, Trusts, § 213 (b), p. 595, as follows: "If the trustee is liable for a loss occasioned by a breach of trust in respect of one portion of the trust property, he cannot reduce the amount of his liability by deducting the amount of gain which has accrued with respect to another part of the trust property through another and distinct transaction which is not a breach of trust."

This proposition is fundamental in the law of trusts and it would therefore be necessary, even in the absence of constitutional obligation of the State to supply the losses to the perpetual school funds, to say that the provision permitting offset of past losses against profits would not be a valid exercise of legislative power.

A grant of specific power by the Legislature which is contrary to and out of harmony with the fundamental law is unconstitutional and void. Scott v. Flowers, *supra;* Tiernan v. Rinker, 102 U. S. 123, 26 L. Ed. 103.

It is therefore the opinion of this court that the following from section 72-252, R. S. Supp., 1945: "If the bonds in any of such funds shall sell for more than par value, the difference between the par value and the selling price of the bonds sold shall, as a part of the respective permanent funds, be considered as a capital gain and set up as a capital reserve to offset past capital losses, except that if the bonds sold were purchased at a premium and accrued interest, which was taken from the temporary or interest funds of such board, such amount, as shall be necessary to replace such entire sum so taken from said temporary or interest funds and not replaced in said funds, shall be first replaced in said

temporary or interest funds from such difference, and only the balance, if any, of such difference shall be so considered to be such a capital gain and set up as such a capital reserve" is and is declared to be an invalid exercise of legislative power, and that it is unconstitutional, null, and void; that all acts thereunder and pursuant thereto should be and they are declared to be void and of no effect; and that the defendants and each of them should be and they are hereby directed to correct the record and adjust the public school funds so as to conform herewith.

The decree of the district court is affirmed.

AFFIRMED.

RUTH STEVENSON WADE, APPELLEE, V. WILLIAM H. WADE, APPELLANT.

31 N. W. 2d 420

Filed March 19, 1948. No. 32387.

Divorce. In the division of property and the allowance of alimony in a divorce action it is the duty of the court to take into consideration the estate of the parties, if any, at the time of the marriage, the wife's loss of interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed, the conduct of the parties leading up to the divorce, to which party the divorce was granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Frost, Peasinger & Meyers, for appellant.

Bremers & Hunt, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER,

CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

YEAGER, J.

This is an action for divorce instituted by plaintiff and appellee against defendant and appellant. In the action the defendant filed a cross-petition in which he prayed that a divorce be granted to him.

The action was tried to the court with the result that a decree of divorce was granted to plaintiff. By the decree the accumulated property of the parties was divided and set off to them.

From the decree the defendant has appealed. He, however, does not seek to have that part of the decree which grants a divorce to plaintiff disturbed. He seeks only a modification of that portion devoted to a disposition of the accumulated property of the parties. He insists that by the decree plaintiff was awarded an inequitably large amount of this accumulated property.

The parties were married October 13, 1942. No children were born of the marriage. At the time of the marriage neither of the parties was possessed of any property or estate. During the marriage they acquired a dwelling house. The original cost of the property was $1,500. With improvements which had been added it was worth, at the time of the hearing, about $3,600. The place had been fully paid for but on account of improvement and repair of the property there was a mortgage against it for $600 or $620. This is the only property which the parties possessed concerning which the record contains any competent evidence of value. The house contained six rooms of furniture and household goods and equipment. No evidence of its value appears in the record. There was a Hudson automobile. There is no evidence as to its value. It appears that it was encumbered to the extent of from $700 to $780. There was a bank account out of which plaintiff on May 17, 1947, drew $400. This she kept. These items, an in-

surance policy on the life of plaintiff for $300 and one on the life of defendant for $245, together with clothing and personal belongings constituted the accumulated property of the parties.

There is a sharp dispute as to the amount of the respective contributions of the parties to the accumulation of property. The effect of plaintiff's testimony is to say that the major portion of the contributions were made by her. The reasonable purport of the evidence of defendant is that the parties by their combined efforts in the light of their ability to earn over the years accumulated this property.

Both of the parties were gainfully employed during the period of the marriage. The record fails to disclose the actual earnings of the parties during this marriage. The plaintiff is a registered nurse. Defendant is a houseman engaged in domestic service. The plaintiff, it appears, at first was employed at St. Joseph's Hospital at Omaha, Nebraska, at a salary of $80 a month. About four months later it was increased to $90. About five months later it was increased to $125 a month. About three months later it was increased to $130. About three months later it was increased to $150 a month and it continued at that rate for about a year when it was increased to $175 a month. Her salary remained at that amount until January of 1947 when she discontinued her employment at this hospital. She was then employed at the Douglas County Hospital, Omaha, Nebraska, from January 1947 to the time of trial at a salary of $160 a month. After she went to work at the Douglas County Hospital she took a few private cases. The compensation received for these cases is not disclosed by the record.

The record is none too clear on the matter of income of the defendant but it appears that at the time of the marriage he was receiving a salary of perhaps $10 a week. He had increases in salary from time to time. Before 1944 his salary appears to have been increased

to $25 a week, in 1944 to $28.20, in 1945 to $35, and in 1947 first to $37.50, then to $40. In addition to his salary he at all times obtained board at the place of his employment. After the separation he also roomed at his place of employment.

The record does not disclose whether or not plaintiff took her meals at the places where she was employed but she was on regular duty as a nurse at hospitals and it is highly probable that meals were available for her.

This we think, as fairly as the record will permit, reflects the earnings out of which came the described accumulated property of the parties.

It may be well to state here that there is no evidence that during the married life of the parties separate accounts of income or expenditures were kept by the parties. It appears that these two people joined their respective incomes and efforts in a common purpose and to a common end.

Everything considered it would appear that the contributions of the parties to the common purpose and end were substantially equal. There is no competent evidence of an attitude of either one toward the other which should cause one to be favored over the other in a division of property. The evidence indicates that both parties are gainfully employed and that their earning capacities are about equal.

By the decree herein plaintiff was awarded title to the dwelling house, all household goods and effects, the afore-mentioned insurance policy on her life, and her personal effects.

The defendant was awarded the automobile, his personal effects, and the insurance policy on his life.

The decree is silent as to the $400 which the plaintiff withdrew from the bank in May of 1947.

In the division of the property it was the duty of the court in this case to take into consideration the estate of the parties, if any, at the time of the marriage and their respective contributions since, the duration of the mar-

riage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed, the conduct of the parties leading up to the divorce, to which party the divorce was granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appeared to be fair and equitable. Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790.

In the light of the evidence in the record it appears that this rule could be complied with only by decreeing as nearly as possible an equal division of the accumulated property of these parties. Exactness cannot be reached because of an absence of proof of values. However we think we may reasonably conclude that the value of the household goods and the equity in the automobile are substantially equal and for the purposes of this opinion they will be so treated. We think the $400 which was withdrawn should be treated as money belonging to the parties and not to plaintiff alone.

We therefore conclude that the decree should have awarded to each of the parties a one-half interest in the dwelling as tenants in common; that plaintiff should have been required to pay $200 to defendant, the amount representing a one-half interest in the withdrawn bank deposit; that all household furniture and equipment should have been awarded to plaintiff; that the automobile should have been awarded to defendant with payment of the encumbrance against it to be made by him; that the parties should have respectively their own personal effects; and that the parties should have respectively their life insurance policies.

Accordingly the decree of the district court is reversed and the cause remanded with directions to enter decree

in conformity herewith. The parties shall each respectively pay their own costs.

REVERSED AND REMANDED WITH DIRECTIONS.

LINCOLN FEDERAL LABOR UNION NO. 19129 ET AL., APPELLANTS, V. NORTHWESTERN IRON AND METAL COMPANY, A CORPORATION, ET AL., APPELLEES.

31 N. W. 2d 477

Filed March 19, 1948. No. 32342.

Constitutional Law: Master and Servant. Sections 13, 14, and 15, article XV, Constitution of Nebraska, are not in violation of any provision of the Constitution of the United States or in conflict with or repugnant to any federal law, but integrated therewith and, having a relationship to the public welfare, are a reasonable and valid exercise of police power by the state.

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

Bernard S. Gradwohl and *Herbert S. Thatcher,* for appellants.

Walter R. Johnson, Attorney General, *Clarence S. Beck, Robert A. Nelson, Edward R. Burke, Ralph W. Slocum, Swarr, May, Royce, Smith & Story,* and *Louis B. Finkelstein,* for appellees.

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

CHAPPELL, J.

By virtue of and in conformity with the self-executing provisions of section 2, article III, Constitution of Nebraska, the people of this state lawfully initiated, and on November 5, 1946, by a substantial majority adopted a constitutional amendment, which was proclaimed by the Governor as effective December 11, 1946. The

amendment is now designated as sections 13, 14, and 15 of article XV, Constitution of Nebraska. See R. S. Supp., 1947. Hereinafter in this opinion it will be called the amendment.

This action was originally instituted by plaintiffs in the district court for Lancaster County to obtain a declaratory judgment with respect to the interpretation and constitutional validity of the amendment and to obtain equitable relief by specific performance and injunction. Defendant State of Nebraska filed a general demurrer to plaintiffs' petition, and all other defendants filed motions for judgment on the pleadings, thus making the issues entirely of law under such facts as were well pleaded in plaintiffs' petition.

The constitutional issues arose by virtue of plaintiffs' allegations that defendant Northwestern Iron and Metal Company, engaged in intrastate and interstate commerce, had breached its contract with plaintiff, Lincoln Federal Labor Union No. 19129, by the terms of which defendant company had agreed to discharge any employee who ceased to remain a member of the union in good standing. When defendant Dan Giebelhouse was suspended from plaintiff union for non-payment of dues, the company, upon notice thereof and demand by the union for his discharge, refused to do so, taking the position that the union shop provisions of the contract were invalidated and made unenforceable by virtue of the adoption of the amendment. Plaintiff Henry Reichel, an employee of defendant company and president of plaintiff Lincoln Federal Labor Union No. 19129, an affiliate of plaintiffs American Federation of Labor and Nebraska State Federation of Labor, took the position that the union shop provisions of the contract were not invalidated by the adoption of the amendment, because it was unconstitutional for the reasons hereinafter set forth.

As held by this court in Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366: "A general demurrer admits all

allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law." See, also, 41 Am. Jur., Pleadings, § 244, p. 463, and Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

Since a motion for judgment on the pleadings is in the nature of a demurrer and is in substance both a motion and a demurrer, it has application in like manner as a demurrer under circumstances similar to those presented in the case at bar. See, Vaughan v. Omaha Wimsett System Co., 143 Neb. 470, 9 N. W. 2d 792; State ex rel. Western Reference & Bond Assn. v. Kinney, 138 Neb. 574, 293 N. W. 393, reversed on other grounds as Olsen v. Nebraska, 313 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500.

In the light of the foregoing rules, the trial court sustained the demurrer and motion for judgment on the pleadings. Plaintiffs having elected to stand upon their petition, a judgment was entered in favor of defendants, declaring the amendment not in conflict with any federal law and constitutional as within the police power of the state, thereby making unlawful and unenforceable in Nebraska the provisions of the agreement between the parties whereby defendant agreed to discharge any employee who ceased to remain a member of the union in good standing, regardless of whether such agreement was executed before or after the effective date of the amendment.

Plaintiffs' motions for new trial were overruled, and they appealed to this court. In their brief they set

forth at length some 12 assignments of alleged error. They may be summarized, however, as contending that the judgment of the trial court was contrary to law. Plaintiffs argued primarily that the amendment: (1) Impairs and previously restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment, and as protected against state invasion by the Fourteenth Amendment; (2) constitutes class legislation and is highly discriminatory, denying unions and union members the equal protection of the laws, contrary to the Fourteenth Amendment; and (3) arbitrarily and unreasonably impairs the obligations of existing contracts in violation of article I, section 10, and arbitrarily and unreasonably deprives plaintiffs of rights, liberties, and freedoms protected under the due process clause of the Fourteenth Amendment. We conclude that those contentions cannot be sustained.

The amendment specifically provides: "Sec. 13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization. Sec. 14. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Sec. 15. This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

At the outset it should be stated that we are not permitted to base our decision of the issues upon a

judicial interpretation of the wisdom of its adoption. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451. We are confronted primarily with a question of sovereign power. As stated in the opinion of Chief Justice Taney in the License Cases, 5 How. 504, 582: "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power." See, also, Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

In Arizona Employers' Liability Cases, 250 U. S. 400, 419, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537, it was said: "The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts."

In Hennington v. Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166, it was said: "The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend * * * upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature."

As recently as Olsen v. Nebraska, *supra,* the Supreme Court of the United States said: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where * * * it was left by the Constitution - to the States and to Congress.' "

In S. Buchsbaum & Co. v. Beman, 14 F. Supp. 444, it was said: "Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. In no doubtful case should a legislative act be pronounced contrary to the Constitution. One branch of the government cannot encroach upon the domain of another with-

out danger. The safety of our institutions depends upon a strict observance of this salutary rule." See, also, Sinking-Fund Cases, 99 U. S. 700, 25 L. Ed. 496; Nicol v. Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. Ed. 786; Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862; Lennox v. Housing Authority of City of Omaha, *supra;* 16 C. J. S., Constitutional Law, § 99, p. 250.

In National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, it was said: "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." See, also, S. Buchsbaum & Co. v. Beman, *supra;* Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Blodgett v. Holden, 275 U. S. 142, 48 S. Ct. 105, 72 L. Ed. 206; Lucas v. Alexander, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851, 61 A. L. R. 906.

As a matter of course, the above rules have application in determining the validity of a constitutional amendment adopted by virtue of the initiative, the first power constitutionally reserved by the people of this state.

All of which brings us to an interpretation of the amendment. It will be observed that section 14 thereof defines the term "labor organization" in the equivalent language used not only in the National Labor Relations Act, Title 29, U. S. C. A., § 152 (5), but also in the Labor Management Relations Act, 1947, c. 120, Public Law 101, § 2 (5). Therefore, nothing provided therein could effect the constitutionality of the amendment. No contention is made otherwise.

The constitutional questions are involved primarily because of sections 13 and 15. As we construe section 13, the first part thereof, down to the ";" simply provides that the hiring and firing of no individual shall

be dependent upon his membership or non-membership in a labor organization. He is thereby made free to "associate with his fellows" in a union entirely upon its merits, or to "decline to associate with his fellows" without imperiling his right either to obtain employment or to continue therein after having obtained it. In other words, the lawful right of the individual to enter employment and his lawful right to continue in his employment cannot be lawfully made to depend either upon the one condition or the other, and he is given a cause of action for violation of that right.

The second part of section 13, after the ";" is simply a correlation of the first and imposes the quality of illegality upon the provisions of any contract which would violate the first by excluding any person from employment because of membership or non-membership in a labor organization, and makes such provisions of any contract invalid and unenforceable as between the parties, without in any logical sense impairing or abridging the right of employees to self-organization and collective bargaining, established by Title 29, U. S. C. A., § 157, hereinafter discussed.

It will be noted that section 15 makes the amendment self-executing, and it thereby became operative upon all such contracts as of its effective date. Therefore, if constitutionally valid as an exercise of the police power of the state, the amendment has application to prevent the enforcement of such provisions in all contracts, whether executed prior to or after the effective date of the amendment. As we view the matter, however, and as the parties involved herein, as well as the trial court, must also have viewed it, the amendment was not intended to and could not so operate as to invalidate and make unenforceable all the other valid provisions of the collective bargaining agreement then existing between the parties. In other words, valid collective bargaining agreements, either existent on the effective date of the amendment or entered into there-

after, would be enforceable in all respects except the provisions in such agreements which would be in conflict with the amendment.

It was argued in the district court that the amendment was invalid because in conflict with the National Labor Relations Act. However, since that argument was made, Congress has passed the Labor Management Relations Act of 1947, which, after specifically amending the National Labor Relations Act, provided, among other things: "Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

While such provision would seem to conclusively dispose of plaintiffs' argument, the constitutionality thereof has not yet been determined, and, since plaintiffs still contend that the amendment conflicts with paramount federal law, we feel impelled to discuss and decide plaintiffs' contention.

The constitutionality of the National Labor Relations Act has been conclusively affirmed, and in a manner clearly indicating that the validity of the above provision of the Labor Management Relations Act will also be constitutionally affirmed. See National Labor Relations Board v. Jones & Laughlin, *supra*. In any event, we conclude that the amendment was not in conflict with the National Labor Relations Act, and, having been adopted prior to enactment of the Labor Management Relations Act, the amendment is integrated therewith.

It was said in Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 887: "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delega-

tion other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state."

Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, is authority for the proposition that the intent of Congress to exclude the states from exercising their police power in the field of commerce must be clearly manifest. In discussing the National Labor Relations Act and its relationship to that premise, the court said: "* * * an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' * * * We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard. * * * Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. Cloverleaf Butter Co. v. Patterson, *ante,* p. 148) as to prevent Wisconsin, under the familiar rule of Pennsylvania R. Co. v. Public Service Comm'n, 250 U. S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its 'fundamental right' (Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by sec. 7. * * * If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in

connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See Sinnot v. Davenport, 22 How. 227, 243."

In Phelps Dodge Corporation v. National Labor Relations Board, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, it was said: "And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free. * * * The prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. * * *

"The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.

"We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. Labor Board v. Jones & Laughlin, 301 U. S. 1."

As stated in Associated Press v. National Labor Relations Board, 301 U. S. 103, 132, 57 S. Ct. 650, 81 L. Ed. 953: "The act does not compel the petitioner to employ any one; * * *."

In National Labor Relations Board v. Jones & Laughlin, *supra,* it was said: "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may

not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

As stated in National Labor Relations Board v. National Casket Co., 107 F. 2d 992: "The purpose of the Act is not to compel an employer to hire members of one union rather than another, or union men rather than non-union men."

In International B. of P. M. v. Wisconsin E. R. Board, 249 Wis. 362, 24 N. W. 2d 672, the principal contention of the union was that section 8 (3) of the National Labor Relations Act conferred upon unions and employers the right to enter into an agreement for a closed shop, and that the Wisconsin Employment Peace Act, limiting that right, was in conflict with it.

In that opinion it was said: "Counsel have repeatedly argued to this Court that sec. 8 (3), National Labor Relations Act, already quoted, confers a right. Departing from the precise language of sub. (3), the proviso is as follows: Nothing in this act shall preclude an employer from making an agreement with a labor organization which requires as a condition of employment membership in a union. Just how this clause grants a right, it is difficult to see."

At another point in the opinion it was said: "It is well settled that reports of committees of the house of representatives and of the senate may be consulted to ascertain the intent of Congress as to the meaning of a statute enacted by it. Wright v. Vinton Branch, etc. (1937) 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455, and cases cited in Note 8, p. 1463.

"Referring now to Senate Reports 74th Congress, 1st session (1935) Report No. 573, we find the following (p. 11):

" 'PROBLEM OF THE CLOSED SHOP.

" '* * * Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. * * * The committee feels that this was not the intent of Congress * * *; that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several states on this subject.

" 'But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any state where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.

" 'The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. * * *

" 'Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been "established, maintained, or assisted" by any action defined in the bill as an unfair labor practice. * * *.' "

The opinion then went on to say: "This report sustains the construction of the proviso that we have adopted (International B. of E. W. v. Wisconsin E. R. Board, 245 Wis. 532, 15 N. W. (2d) 823), that is, that it granted no right but if there were any impediments to such an agreement in the laws of the United States, they were removed by the provisions of sec. 8 (3), * * *.

"From the report of the committee it appears that

Congress intended to leave state laws regarding the closed shop in force."

Section 14 (b) of the Labor Management Relations Act, which cannot be construed as an invalid delegation of legislative authority, re-established that intent beyond per adventure of a doubt.

The federal public policy in regard to compulsory membership in labor unions was stated in Title 29, U. S. C. A., § 102, wherein it was said: "* * * he should be free to decline to associate with his fellows, * * *."

Title 29, U. S. C. A., § 157, provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The amendment involved here cannot be construed as impairing, denying, or abridging the right of employees to join and organize into a union and bargain collectively with an employer in conformity with federal law, as provided in that section. It is a matter of common knowledge that many collective bargaining agreements have been and are now being entered into in this state since the adoption of the amendment, which brooks no interference therewith by the employer, and makes the employee directly free from coercion or discrimination by either the employer or the union or members thereof. It does not prohibit such contracts or the enforcement thereof. It does, however, simply make invalid and unenforceable as between the parties, any provision therein agreeing to exclude persons from employment because of membership or non-membership in a labor organization.

We are unable to find any labor legislation enacted by Congress requiring an employee to belong or not belong to a labor organization in order to receive the benefits thereof, or for any other purpose. As a matter of fact. the Railway Labor Act, Title 45, U. S. C. A., c. 8, the

constitutionality of which was conclusively affirmed in Virginia Ry. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789, and discussed by laudatory language in Labor Board v. Jones & Laughlin, *supra,* specifically provides in § 152 (5): "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way." The amendment at bar certainly does no more than exemplify and apply that policy to all employers and employees in this state.

Plaintiffs argued that the amendment impairs and restrains the exercise of civil rights of assembly and free speech guaranteed by the First Amendment and protected by the Fourteenth Amendment to the Constitution of the United States. The wording of the act is not ambiguous. We cannot by any construction conclude that it violates the First Amendment by abridging freedom of speech, or the press, or the right of assembly, or the right of petition to the government for redress. As a matter of fact, it preserves to all employees the right to organize and join a union and the right to bargain collectively without fear of reprisal. Instead of preventing or abridging rights of speech, press, assembly, or petition, guaranteed by the First Amendment, the amendment preserves it for all employees, not only to those who join but also to those who do not join a union. Therefore, the amendment does not abridge the privileges or immunities of any citizen of the United States in violation of the Fourteenth Amendment, but affirmatively protects those rights. See American Federation of Labor v. Watson, 60 F. Supp. 1010; State v. Whitaker, — N. C. —, 45 S. E. 2d 860; American Federation of

Labor v. American Sash & Door Co., — Ariz. —, 189 P. 2d 912.

Plaintiffs argued that the amendment constituted class legislation and denied unions and union members equal protection of the laws, contrary to the Fourteenth Amendment. We cannot sustain that contention. The amendment prohibits no one from joining a union, but undertakes to lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed. See American Federation of Labor v. Watson, *supra.*

The amendment complies strictly with the guiding principle most often stated by courts to the effect that: "* * * this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." 12 Am. Jur., Constitutional Law, § 469, p. 129.

As stated in Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, and approved in Truax v. Corrigan, 257 U. S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In Hayes v. Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, the court, in speaking of the equal protection clause of the Fourteenth Amendment, said: "It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It was said in Truax v. Corrigan, *supra*: "* * * the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so."

In Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, speaking of due process and the equality clause of the Fourteenth Amendment, the court said: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

We come then to plaintiffs' contention that the amendment deprives them of rights and privileges under the due process clause of the Fourteenth Amendment. We conclude that it does not. In that connection, we are required to discuss and decide whether or not the amendment is within the police power of the state and whether or not it is reasonable and has a relationship to the public welfare. As related to legislation, it is generally held that due process is satisfied if there was legislative power to act on the subject matter, if that power was exercised in a reasonable and indiscriminatory manner, and if the act, being definite, has a reasonable relationship to a proper legislative purpose. 16 C. J. S., Constitutional Law, § 569, p. 1156; Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548.

It will be noted at the outset that by virtue of the Tenth Amendment, Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That provision cannot be amended or obliterated by judicial decree, but only by the source from which it derived original validity.

Therefore, in construing a federal law, courts look to see if the power has been delegated, but in construing a state law they look to see if it has been prohibited,

realizing that the people of a state, by reason of the sovereign power vested in them, may enact a law or alter and amend their own constitution by the method prescribed in the instrument itself, subject, however, to every limitation or restraint lawfully imposed upon them by virtue of some authority derived from the Constitution of the United States. See 11 Am. Jur., Constitutional Law, § 245, p. 966, et seq.

"Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits. * * * As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states." 16 C. J. S., Constitutional Law, § 174, p. 537. See, also, 11 Am. Jur., Constitutional Law, § 255, p. 986.

In Reid v. Colorado, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108, it was said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said - and the principle has been often reaffirmed - that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243."

As recently as Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, which involved the state par-check law, this court, in conformity with federal precedent, held that: "No provision of the Constitution of the United States was ever intended to take from states the right to properly exercise their police powers which generally extend to all the great public needs which are lawfully

recognized as immediately necessary to promote the public welfare."

It was said recently in Abeln v. City of Shakopee, — Minn. —, 28 N. W. 2d 642: "Clearly, the original Constitution did not deprive the states of their police power, which they might exercise for the protection of the public health, welfare, and morals. * * * No restraints were imposed upon the police power by the adoption of the Fourteenth Amendment."

As early as Wenham v. State, 65 Neb. 394, 91 N. W. 421, in which the constitutionality of a statute regulating and limiting the hours of employment for female employees was sustained, this court said: "The police power of the state can not be put forward as an excuse for oppressive and unjust legislation, but it may be lawfully resorted to for the purpose of preserving the public health, safety or morals; and a large discretion is vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Fansteel Metallurgical Corporation v. Lodge 66, 295 Ill. App. 323, 14 N. E. 2d 991, is authority for the proposition that Congress, by its enactment of the National Labor Relations Act, did not deprive or attempt to deprive the states of their police power.

In Thomas v. Collins, 323 U. S. 516, 532, 65 S. Ct. 315, 89 L. Ed. 430, it was said: "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation." See, also, Railway Mail Assn. v. Corsi, 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072, sustaining the New York anti-discrimination statute.

In Carpenters & Joiners Union v. Ritter's Cafe, *supra,* it was said: "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment

does not deny her the power to enact that policy into law."

In that opinion the court also said: "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in Aikens v. Wisconsin, 195 U. S. 194, 205, and Mr. Justice Brandeis in Truax v. Corrigan, supra, at 372, Dorchy v. Kansas, 272 U. S. 306, 311, and Senn v. Tile Layers Protective Union, 301 U. S. 468, 481. * * * We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' Thornhill v. Alabama, 310 U. S. 88, 103-04."

In Barbier v. Connolly, *supra,* it was said: "But neither the amendment - broad and comprehensive as it is - nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915, it was said: "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Willson v. Black-Bird Creek Marsh Co., 2 Pet. 245, and Cooley v. Board of Wardens, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the

state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."

In Parker v. Brown, 317 U. S. 341, 359, 63 S. Ct. 307, 87 L. Ed. 315, it was said: "The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

At another point in the opinion, the court said: "Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. * * * There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

In speaking of police power reserved to the states, it was said in the opinion of Chief Justice Taney in the License Cases, *supra*: "It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States."

The above-quoted statement was approved in Nebbia v. New York, 291 U. S. 502, 525, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, wherein it was also said: "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit

governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * * The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power." See, also, 16 C. J. S., Constitutional Law, § 569 (3), p. 1156.

The legislative and judicial history of the exercise of police power, together with a synopsis of its elasticity, adaptability, and appropriate application to the relationship between employers and employees, will be found in the dissenting opinion of Justice Brandeis in Truax v. Corrigan, *supra*. Like history will also be found in State v. Whitaker, *supra*, which held constitutional a statute of North Carolina, sections 2, 3, and 4 of which were similar to the Nebraska amendment in all material respects.

It was said in American Federation of Labor v. Watson, *supra*: "Labor and labor unions are affected with a public interest and are subject to the regulatory power of the states for any reasonable regulation which will not be inconsistent with the Constitution of the United States and statutes enacted within the scope delegated by the Constitution to the Congress."

Without doubt the amendment was within the police power of this state. Therefore, we turn to the question of whether or not it is reasonable and has a relationship to the public welfare. In that connection we conclude that it is reasonable and that it does have such relationship.

In Gundling v. Chicago. 177 U. S. 183, 20 S. Ct. 633,

44 L. Ed. 725, it was said: "* * * unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

It was said in the opinion of Justice McLean in the License Cases, *supra:* "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power."

In Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, a statute regulating and limiting the hours of labor for female employees was sustained. In the opinion it was said: "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

In West Coast Hotel Co. v. Parrish, 300 U. S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330, it was said: "The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adop-

tion of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

We call attention to an appropriate statement appearing in Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 442, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the condi-

tions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning - 'We must never forget that it is *a Constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407) - 'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' Id. p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'

"Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice

Johnson in Ogden v. Saunders, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, *supra,* which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts * * *."

In Duplex Printing Press Co. v. Deering, 254 U. S. 443, 488, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, Mr. Justice Brandeis in a dissent, said: "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands."

The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 FOR and 142,702 AGAINST. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate action. Thus it was decided that its provisions were reasonable and necessary to safeguard the integrity of government and preserve the economic structure and security of the people for the protection of their welfare. With that decision, courts have no right to interfere.

As conditions arising out of powerful industries required legislative regulation thereof to protect first the public generally, and then labor itself, which legislation courts generally have sustained, so now the people of this and other states have evidently decided that conditions have arisen in powerful industries and powerful labor forces as well, requiring legislative regulation of them both in order to protect the public. The Labor Management Relations Act of 1947 was ostensibly enacted for that purpose. As a basis for its enactment, Congress recognized, as disclosed by its committee reports, that such conditions were nation-wide in scope, and specifically provided for the integration of state laws therewith, characterized by the amendment already adopted in this state.

We take judicial notice of the fact that at this writing no less than 18 states have enacted similar legislation, 6 by constitutional enactment and 12 by statutory provisions.

Florida's constitutional amendment was sustained by an able opinion in American Federation of Labor v. Watson, *supra*. True, upon appeal therefrom, the Supreme Court of the United States (327 U. S. 582) refused to finally pass upon the constitutionality of the Florida amendment until it had been authoritatively construed by the state court, but nevertheless the opinion established a yardstick for its constitutional measurement which affirmatively parallels and sustains our construction of the amendment in the case at bar.

The Supreme Court of Arizona in American Federation of Labor v. American Sash & Door Co., *supra,* sustained the constitutionality of that state's constitutional amendment, which is very similar to the one here involved.

Likewise, the Supreme Court of Tennessee, in Mascari v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, — Tenn. —, — S. W. 2d —, sustained the constitutionality of that state's legislative act, sections 1 and 2 of which are almost

identical with this state's constitutional amendment.

In the light of the foregoing, we conclude that the amendment is a reasonable and valid exercise of the police power of the state, and as such has a real and substantial relation to its object, the public welfare.

Bearing in mind the foregoing related propositions of law, we turn to the question whether the amendment impairs the obligations of existing contracts in violation of article I, section 10, Constitution of the United States. We conclude that it does not.

Wenham v. State, *supra,* involved the constitutionality of an act regulating and limiting the hours of employment for female employees. In that opinion this court specifically held that such an act was not class legislation, and that the act was only a fair and reasonable exercise of the police power, in that it did not prohibit the right of contract but merely regulated the same in a reasonable manner as in the case at bar. In that connection, the court said: "The right of contract itself is subject to certain limitations which the state may lawfully impose in the exercise of its police power, and this power has been greatly expanded in its application during the past century, * * * ."

In Patterson v. Bark Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002, it was said: "That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment, may be conceded, yet such liberty does not extend to all contracts. As said in Frisbie v. United States, 157 U. S. 160, 165: 'While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may * * * restrain all engaged in any employment from any contract in the course of that employment which is against public policy.' "

As stated in Muller v. Oregon, *supra:* "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract."

In Nebbia v. New York, *supra,* it was said: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

In speaking of deprivation of freedom of contract, it was said in West Coast Hotel Co. v. Parrish, *supra:* "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

"This essential limitation of liberty in general governs

freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

" 'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567.

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable." Many such illustrations are cited and discussed by the court in its opinion at page 393.

In Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165, it was said: " 'But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all and need never, therefore, be carried into express stipulation, for this could add nothing to their force.' "

In that regard, Home Bldg. & Loan Assn. v. Blaisdell, *supra,* said: "* * * the State also continues to possess authority to safeguard the vital interests of its people.

It does not matter that such legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile, - a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

In Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, it was said: "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *."

In Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420, it was said: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

In Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, it was said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers * * * for the general good of the public, though contracts previously entered into by individuals may thereby be affected."

In Atlantic Coast Line R. R. Co. v. City of Goldsboro, 232 U. S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721, it was said: "* * * it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of

overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the recent case of East New York Savings Bank v. Hahn, 326 U. S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A. L. R. 1279, it was said: "The formal mode of reasoning by means of which this 'protective power of the State,' * * * is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize as was said in Manigault v. Springs, *supra,* that the power, 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the * * * general welfare of the people, and is paramount to any rights under contracts between individuals.' * * * Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' * * * So far as the constitutional issue is concerned, 'the power of the State when otherwise justified,' * * * is not diminished because a private contract may be affected."

In Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, it was said: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."

It is evident that parties cannot lawfully deprive the state of its police power simply by making a contract between themselves. Since this power of the state to pass legislation which may affect existing contracts is

implied in every contract drawn, then we must read the contract between plaintiff, Lincoln Federal Labor Union, and defendant, Northwestern Iron and Metal Company, as if it actually provided that it was subject to any legislation which the state might adopt under its police power. With such sovereign power implied in the contract, the amendment in question did not impair the existing provisions in their contract but was actually a part of it, and therefore not in violation of any provision of the Federal Constitution.

For the reasons heretofore stated, we conclude that the amendment is a reasonable, proper, and valid exercise of the police power of the state. As such, it is not in conflict with or repugnant to any federal law, but integrated therewith, and does not violate any provision of the Constitution of the United States, but on the contrary guarantees all those rights to all persons whomsoever within this state, whether employers or employees, union members or non-union members.

Therefore, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

DANIEL J. HORRIGAN, APPELLANT, V. THOMAS F. QUINLAN ET AL., APPELLEES.

31 N. W. 2d 430

Filed March 19, 1948. No. 32410.

1. **Limitations of Actions.** The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action.
2. **Pleading.** A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated.

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

Donovan & Frohm, for appellant.

Harry Silverman and *Richard A. O'Connor,* for appellees.

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

WENKE, J.

Plaintiff Daniel J. Horrigan appeals from the order of the district court for Douglas County sustaining the defendants' general demurrers to his third amended petition and dismissing his action. The nature of the action alleged is a conspiracy to defraud.

Appellant filed his original action on December 12, 1942, and summons was served upon each of the defendants as of December 14, 1942. The original action was against Thomas F. Quinlan, doing business as T. F. Quinlan & Sons, Midland Realty Company, a corporation, and Robinette Malone. Thomas F. Quinlan died before the third amended petition was filed and the action was never revived against his legal representatives.

The action was filed within the time as limited by section 25-207, R. S. 1943, which, insofar as here material, provides: "The following actions can only be brought within four years: * * * (4) an action for relief on the ground of fraud, * * *."

Thereafter, on June 11, 1947, appellant filed his third amended petition based on the same cause of action. The appellees' general demurrers thereto were sustained and the action dismissed. It is from this ruling that the appeal was taken. The third amended petition was filed more than four years after the cause of action arose.

We stated in Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106: "Where it appears from the statement of facts in the petition that the cause of action is on its face barred by the statute of limitations, and there are no allegations tolling the statute, a demurrer can be prop-

erly interposed to such cause of action." And, in In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923, we stated: "In determining whether an amended petition states a cause of action the court will not ordinarily look beyond the pleading against which the attack is directed."

It is the appellees' thought, in view of these holdings, that the court is limited to the allegations of the third amended petition in determining whether or not the appellant's cause of action is barred by the statute of limitations applicable thereto. However, this court has often held: "The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276. See, also, Chicago, R. I. & P. Ry. Co. v. Young, 67 Neb. 568, 93 N. W. 922; Duffy v. Scheerger, 91 Neb. 511, 136 N. W. 724; Witt v. Old Line Bankers Life Ins. Co., 92 Neb. 763, 139 N. W. 639; Kennedy v. Potts, 128 Neb. 213, 258 N. W. 471; Macumber v. Gillett, 138 Neb. 714, 294 N. W. 854.

In view thereof it is clear that the appellant's cause of action has not been barred by the statute of limitations applicable thereto.

As to whether or not the third amended petition alleges facts sufficient to constitute a cause of action, the rule applicable thereto is stated in Meeske v. Baumann, 122 Neb. 786, 241 N. W. 550, as follows: "A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated."

Examining the appellant's third amended petition in the light thereof we find it states a good cause of action for if appellant can establish, by competent proof, that he lost his property to the appellees in the manner as therein set forth then he was defrauded thereof and is entitled to recover.

The action of the trial court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WALTER MELCHER, APPELLANT, V. LEANDER S. MURPHY ET AL., APPELLEES, IMPLEADED WITH CITY OF FREMONT, A CORPORATION, APPELLANT.

31 N. W. 2d 411

Filed March 19, 1948. No. 32321.

1. **Trial.** In stating the issues to the jury, it is error which may be prejudicial for the trial court to include allegations of which there is no proof.
2. **Negligence.** The violation of a statute enacted in the interest of public safety is not negligence as a matter of law, but evidence of negligence to be considered in connection with all the other evidence in the case.
3. ———. Negligence is the failure to do that which an ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do, under the same circumstances.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but on the other hand, where the evidence shows, beyond a reasonable dispute, that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Cook & Cook and *Charles H. Yost*, for appellants.

Sidner, Lee & Gunderson, for appellees.

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

WESTERMARK, District Judge.

The plaintiff brought this action against Leander S. Murphy and Fremont Ice & Fuel Company to recover

damages for injuries sustained in a collision between the truck on which plaintiff was riding and a Chevrolet coupé driven by the defendant Murphy and owned by the Fremont Ice & Fuel Company. The City of Fremont was made a defendant under the provisions of the Workmen's Compensation Act.

On the morning of the accident the plaintiff, an employee of the City of Fremont street department, was cleaning weeds out of ditches on L Street which runs north and south between Jackson and Washington Streets. Harry Betts, a driver of a city dump truck, came by to inform a Mr. Maynard, who was working with plaintiff, that he should go to the city light plant to do other work. Plaintiff then requested Betts to take him to a truck used by plaintiff and located about two and a half blocks north. The truck driven by Betts was a Dodge truck equipped with the usual cab and a steel dump box which was loaded with trash. The plaintiff stepped on the right running board, facing north, with his back against the dump box, his left hand holding on the dump box, and his right hand on the door frame, with a pitchfork on the running board, resting against his body.

He testified that he was standing so that no part of his body was over the window. His testimony in this respect was verified by Betts, the driver of the truck, and by Maynard, the other occupant. Betts stated that plaintiff did not obscure his vision to the east, that he saw the Murphy car and "saw him coming." This testimony was not contradicted by any of the defendants' witnesses.

The plaintiff testified that they proceeded north on L Street. When about 50 feet from the intersection of Jackson Street, where the collision occurred, he observed the Chevrolet coupé coming west on Jackson Street about 225 feet from the intersection. As the truck entered the intersection the coupé was about 80 feet away. He also observed that the coupé was traveling about 50 miles per hour. Plaintiff fixed the distances by certain

houses situated on the north side of Jackson Street. He further testified that the truck was traveling approximately 10 or 12 miles per hour as it was driven north on L Street. He did not warn the truck driver of the approaching car.

Defendant Murphy, the driver of the Chevrolet coupé, testified that he was driving west on Jackson Street about 20 to 25 miles per hour, and as he approached L Street he observed the truck coming from the south. He further testified that the truck was not speeding.

The plaintiff's testimony was to the effect that the Chevrolet coupé ran into the truck, while defendants Murphy and Fremont Ice & Fuel Company claimed that the truck ran into the left front fender of the coupé. After the collision the truck took a northwesterly course and stopped at the northwest corner of the intersection. The coupé was in the northeast quarter of the intersection. Neither vehicle was severely damaged. Immediately after the accident plaintiff was found lying between the vehicles, injured, and requiring hospitalization.

The accident occurred in the forenoon of August 19, 1946. The streets involved were graveled. It was stipulated that the scene of the accident was not in a congested district.

At the close of plaintiff's evidence, and again at the end of all the evidence, the defendants Murphy and Fremont Ice & Fuel Company moved for a directed verdict, principally on the ground, in substance, that plaintiff was guilty of contributory negligence more than slight by riding on the running board of the truck. The motions were overruled and the case was submitted to the jury, which found against the plaintiff.

Plaintiff first contends that the court substantially copied the pleadings in the instructions. This court has repeatedly held that if prejudice results by such presentation of the issues to the jury, it is sufficient ground for reversal.

In the case of Franks v. Jirdon, 146 Neb. 585, 20 N. W.

2d 597, this court said: "The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal." This rule was followed in Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439. See, also, McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757.

On examination of Instruction No. 2, wherein the court set forth the contentions of the parties as shown by the pleadings, we find the court presented, except as to the specific charges of negligence, a condensed form of the issues. It is our opinion that, with the exception of the charges of negligence, the court presented the issues clearly and that no prejudice resulted to plaintiff.

Plaintiff's next contention is that the court erred in submitting to the jury the question of speeding on the part of the driver of the truck on which plaintiff was riding, when there was no evidence of speeding. The pertinent parts of Instruction No. 2 relating to contributory negligence of plaintiff are as follows: "Defendants further allege that the sole cause of the collision and the resulting injury to plaintiff was the negligence of the plaintiff and the negligence of Harry Betts, driver of the city truck, as follows: * * * (d) The said Harry Betts, the driver of the city truck was driving his truck in a reckless, negligent and careless manner and at a speed in excess of 25 miles per hour and contrary to the ordinances of the city of Fremont as set out in Paragraph 5 of plaintiff's petition. * * * (g) Said Harry Betts, the driver of the city truck drove said automobile at a high, dangerous and unlawful rate of speed, contrary to the ordinances of the city of Fremont and to the rules of the road and at a greater rate of speed than was reasonable under the circumstances and at a time when there was a man standing on each running board of his vehicle and he could not see out on either side thereof."

There appears to be no evidence that the truck was driven recklessly, or that it was speeding. The occupants of the truck testified that the truck was traveling 10 to 12 miles per hour. Defendant Murphy, in answer to the question, "What was the fact as to the speed of the truck of the City of Fremont?" replied, "I couldn't tell you. I wasn't on his truck. I had no way of knowing how fast it was going. I don't think it was going above the city ordinance speed limits." Further, in answer to the next question, "In other words, you don't claim that they was speeding?" he said, "No."

In this case there was no evidence that the truck on which plaintiff was riding was speeding. But this matter was given emphasis by the two charges of negligence, above stated. Herein was an issue of negligence not supported by any evidence and the instruction could only have had the effect of confusing the jury. We therefore conclude that for two reasons the court erred in submitting the issue of speeding as a defense. This court has repeatedly said in effect that where an element of negligence is pleaded and there is no evidence to support such element, it is prejudicial error to submit such issue to the jury. See McClelland v. Interstate Transit Lines, *supra;* Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872; Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19. On the other hand, while the fact as to excessive speed, if any, of the truck on which plaintiff was riding, might become material in determining what was the proximate cause of the accident, however such alleged negligence would not be imputed to plaintiff as a guest, but such guest may be responsible for the consequences of his own negligence in failing, if such was the fact, to perform the duties imposed upon him as such. See Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

The defendants Murphy and Fremont Ice & Fuel Company, hereinafter designated as appellees, urge that the plaintiff was guilty of contributory negligence more

than slight by reason of riding on the running board of the truck in violation of section 39-742, R. S. 1943, that therefore they were entitled to a directed verdict, and the instructions referred to above, if erroneous, were not prejudicial to plaintiff.

In support of this contention, the appellees cite Seiffert v. Hines, 108 Neb. 62, 187 N. W. 108, and other cases where riders on running boards of motor vehicles have been barred from recovering on the ground of contributory negligence. In that case the deceased was riding on the running board of a motor vehicle and was killed by a train on a railroad crossing. This court denied recovery because of contributory negligence but gives its reason therefor. In the opinion the court said: "Deceased was standing on the running-board of the automobile * * * he had a clear opportunity of seeing the approaching train * * * and had even a better opportunity of observing the approaching train than the other occupants of the automobile. In this position, knowing that they were approaching the railroad crossing, it was his duty to look and listen for approaching trains. In this regard the same obligation rested upon him as though he were driving the car himself." But applicable to the instant case the opinion states, "It can be readily conceived that cases may arise in which a passenger, or a person other than the driver of the car, may be placed in such a situation that a failure to look and listen may be reasonably excused, but the facts in this case do not present such a situation."

In the case of Wiese v. Polzer, 212 Wis. 337, 248 N. W. 113, plaintiff was injured while riding on a fender of a motor truck. Here recovery was denied because the plaintiff was negligent in riding on the fender in violation of statute. The case, however, was decided on the theory that the violation of a statute was negligence as a matter of law. The court held: "This statute is a safety statute. It imposes on every person the absolute duty of obedience to it. By it the legislature has

fixed the standard of care by which the conduct of all persons is measured. It covers the elements of want of ordinary care and reasonable anticipation of injury involved in actionable negligence. Osborne v. Montgomery, 203 Wis. 223, 240, 234 N. W. 372. Where the statute is violated no jury question can arise as to these elements."

The appellees cite Central Transfer & Storage Co. v. Frost, 20 Ohio L. A. 592, 36 N. E. 2d 494, in which a boy riding on a fender was injured and was denied damages. In this case the driver of the roadster was speeding, and the boy did nothing to discourage him from speeding. It is clear that riding the fender under such circumstances was negligence. In another case, Hinch v. Elliott, 119 Conn. 207, 175 A. 684, a guest who sat on a front fender of an automobile which was traveling between 35 and 40 miles per hour on a much-traveled road was held to be guilty of contributory negligence, barring recovery. In Smith v. Ozark Water Mills Co., 215 Mo. App. 129, 238 S. W. 573, the court took into consideration other circumstances than the mere act of riding on a running board. The court said: "If there can be any recovery whatever in this case it must be based on the humanitarian doctrine, because the action of the deceased in standing on the running board of an automobile which was traveling up a dark road, on which the lights of the machine on which he was traveling could not, owing to the curve in the road, shine and throw light, traveling at a rate of twenty-five to thirty miles an hour and being on the outside or curve side of the road, and on the wrong side, when there was a seat in the automobile where passengers riding in automobiles are supposed to be, and which had been offered to him, is an act of negligence concerning which reasonable men could not have a difference of opinion."

In the case of Ferrell v. Beaumont Traction Co., (Tex. Civ. App.) 207 S. W. 654, the same consideration of

other circumstances was made in determining the case. Here, the plaintiff, a boy, was riding in a wagon. On seeing a friend in an automobile, he jumped off the wagon and stepped on the running board of the automobile, when he was hit by the approaching street car. In this case plaintiff testified: "I didn't know anything about the street car, didn't think about it, and didn't look for it." The court, in denying recovery for plaintiff, commented as follows: "He simply acted upon an impulse without using his judgment in the slightest degree, or doing anything to ascertain the situation."

In this state, the violation of a statute enacted in the interest of public safety is not negligence as a matter of law, but evidence of negligence to be considered in connection with all the other evidence in the case. See Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805; Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444.

In the instant case the question now is, Was the plaintiff's conduct in stepping on the running board to ride two and one-half blocks contributory negligence as a matter of law? To determine this question it is necessary to review the surrounding circumstances. The truck was loaded with trash and the distance to go was short. The street on which the truck was to be driven was not in a congested district. It was daylight. Plaintiff could anticipate that if any other driver operated a vehicle on the street, or expected to cross the street at the intersections to be traversed, he would use due care. In other words, the circumstances surrounding the fact of riding on the running board did not present any element of danger or risk except in the act of violating the statute relative to riding on a running board of a motor vehicle.

It might be pertinent to point out that in attempting to apply certain cases to the one for discussion it is easy to overlook the fundamental definition of negligence. "Negligence is the failure to do that which an

ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do, under the same circumstances." McCullough v. Omaha Coliseum Corporation, 144 Neb. 92, 12 N. W. 2d 639.

We turn to other principles of law. "'What is reasonable care must in each case be determined by its own peculiar facts and circumstances.' Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670.

"'Acts that might be considered prudent in one case may be deemed to be negligent in another.' 20 R. C. L. 9, sec. 7. 'The surrounding facts and circumstances are of controlling importance. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be negligence. Negligence is essentially relative and comparative.' 20 R. C. L. 24, sec. 18.

"Negligence is the absence of care according to the circumstances." McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

Being guided by the foregoing principles, we cannot say as a matter of law that plaintiff was guilty of contributory negligence more than slight. Reasonable minds might draw different conclusions from the facts and circumstances presented herein. "Only when the standard is clear should it be determined by the court." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. In the case of Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883, the court held: "Even if it were established that the plaintiff was of full age and discretion and 'cut the corner' in violation of the ordinance, yet this would not necessarily establish contributory negligence as a matter of law." See, also, Chicago, B. & Q. R. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824; Missouri P. Ry. Co. v. Geist, 49 Neb. 489, 68 N. W. 640.

May we also call attention to the case of McDonald v. Omaha & C. B. Street Ry. Co., 128 Neb. 17, 257 N. W. 489, wherein this court held: "It has been the

settled rule in this state, that, where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but on the other hand, where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. Anderson v. Altschuler, 125 Neb. 853; Kudrna v. Sarpy County, 125 Neb. 83; Allen v. Omaha & S. I. R. Co., 115 Neb. 221; 25 R. C. L. 1283, sec. 135; De Griselles v. Gans, 116 Neb. 835; Richardson v. Southern P. R. Co., 88 Cal. App. 648."

We must conclude that the riding on the running board by plaintiff under the facts and circumstances as shown by the evidence and the law applicable thereto was a question for the jury. It therefore follows that in submitting to the jury the issues of speed of the truck on which plaintiff was riding was reversible error and plaintiff is entitled to a new trial.

The plaintiff further argues that appellees' counsel was guilty of misconduct while presenting his argument to the jury. May we point out that since the bill of exceptions does not contain all of the argument objected to, the court cannot draw proper conclusions from the part preserved in the bill of exceptions. Since the case will be for retrial we deem it unnecessary to pass thereon.

REVERSED AND REMANDED.

IN RE ESTATES OF CHRISTINA C. ANDERSON AND ALFRED A. ANDERSON, DECEASED. NAN HENGEL, ADMINISTRATRIX DE BONIS NON, WITH WILL ANNEXED, APPELLEE, V. NEBRASKA CONFERENCE CLAIMANTS SOCIETY OF METHODIST EPISCOPAL CHURCH, A CORPORATION, APPELLANT.

31 N. W. 2d 562

Filed April 1, 1948. No. 32393.

Courts. The district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice. When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity.

APPEAL from the district court for Dawes County: EARL L. MEYER and ARTHUR C. THOMSEN, JUDGES. *Affirmed.*

Greydon L. Nichols and *Robert R. Wellington,* for appellant.

J. E. Porter and *George M. Porter,* for appellee.

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

SIMMONS, C. J.

This appeal involves the allowance or disallowance of claims filed against two estates being probated in Dawes County. The claims are based upon an alleged deficiency judgment. The county court allowed the claims. The district court reversed the judgment of the county court and disallowed the claims. We affirm the judgment of the district court.

The transcript here consists of a part of the record in the probate proceedings and the district court proceeding in this matter. The bill of exceptions consists of stipulations of the parties and of other parts of the probate proceedings, and of parts of the foreclosure proceeding

upon which the purported judgment is based. As we said in Jameson v. Bartlett, 63 Neb. 638, 88 N. W. 860, from this record we have endeavored "* * * to winnow the evidence and lay hold of the essential facts * * *." We state the facts so winnowed as they happened chronologically.

On January 9, 1926, Alfred A. Anderson and Christina C. Anderson, husband and wife, made, executed, and delivered their promissory note for $2,000 to one C. A. Minick. The note was secured by a real-estate mortgage on land in Dawes County. The mortgage was recorded. July 16, 1926, the note and mortgage were sold and assigned to claimant, hereinafter referred to as plaintiff.

The Andersons had a joint will. Christina C. Anderson died July 2, 1926. The will was admitted to probate in her estate proceedings on May 12, 1927, and Alfred A. Anderson was named as administrator. On July 5, 1928, an order for notice to creditors was entered giving creditors three months in which to present their claims, and the administrator twelve months from August 1, 1928, in which to settle the estate. Notice was published. An inventory was filed August 20, 1929, appraisers were appointed, and the estate appraised.

On January 3, 1931, Alfred A. Anderson executed an extension agreement on the indebtedness for five years and executed interest coupon notes to plaintiff.

Alfred A. Anderson died October 6, 1933. The will was admitted to probate as his will on November 27, 1933, and letters of administration issued to Charles W. Anderson. An inventory was filed June 20, 1934, appraisers were appointed, and an appraisement made. Order of notice to creditors was issued on June 27, 1935, giving creditors three months in which to present claims and the administrator twelve months from July 15, 1935, in which to settle the estate. Notice was published.

On January 18, 1936, plaintiff started an action in the district court for Dawes County, alleging the issuance and delivery of the note and mortgage, the extension

agreement and coupon notes, and alleging default in the payment of principal, interest, and taxes, and praying for foreclosure. The defendants named were the administrator of the estate of Alfred A. Anderson, heirs at law of the two Andersons, and all parties interested in the estates of the two Andersons and in the land described in the mortgage. There was an affidavit for and an order authorizing service by publication. The service is not shown. Charles W. Anderson, as administrator and in his own behalf, appeared, demurred, and answered. On October 5, 1936, a foreclosure decree was entered finding the sum of $3,230.30 due. In default of payment the premises were ordered sold. A request for a nine months' stay of the order of sale was filed. An application for a moratorium was made and granted.

On April 19, 1938, the moratorium was set aside. Plaintiff moved for confirmation of the sheriff's sale had on August 10, 1937, and for a deficiency judgment. Defendants requested and were granted leave to file objections to confirmation. It was stipulated that the motion for confirmation and objections thereto could be presented on affidavits to the court at chambers. It was ordered that plaintiff's motion for confirmation and defendants' objections thereto be submitted on affidavits to be furnished within 30 days to the court at chambers at Alliance, "or where the court may be found."

On May 19, 1938, the district judge in chambers at Alliance, Box Butte County, signed a journal entry in which the sale was confirmed and sheriff's deed was ordered to be issued. The order of confirmation went further and found that a deficiency existed in favor of the plaintiff in the amount of $750, payable from the estates of the two Andersons, and judgment for the deficiency and interest was entered. The trial docket in the office of the clerk of the district court for Dawes County shows no entry as of that date or any date subsequent to April 19, 1938.

On April 28, 1939, a claim for $750 for a "contingent

debt becoming absolute after time limited for presenting claims" was filed in each of the Anderson estates, founded on the judgment entered on May 19, 1938. On May 8, 1942, and again on April 17, 1947, an execution was issued on the deficiency judgment and returned unsatisfied.

On March 10, 1943, Charles W. Anderson died.

On November 1, 1943, the county court of Dawes County on petition of Nan Hengel entered an order consolidating the two estate proceedings and appointing "said Nan Hagel" (sic) administratrix with joint will annexed.

On September 19, 1944, Nan Hengel, administratrix of said estates, filed objections to the allowance of the plaintiff's claims filed on April 28, 1939.

On September 25, 1944, the objections were overruled, the claims allowed, and the administratrix ordered to pay the same "out of the assets of said estate."

After motion for rehearing was overruled, a transcript of the proceedings was filed in the district court for Dawes County on October 16, 1944, and refiled October 23, 1944.

On October 17, 1946, the district court entered judgment reversing the judgment of the county court, disallowing the plaintiff's claim, and remanding the cause with directions to carry the judgment into effect.

On October 18, 1946, a motion for new trial was filed. On October 14, 1947, this motion was overruled.

On November 20, 1947, transcript was filed in this court.

The objections to the allowance of the claims were that the claims were not filed within the times limited by the orders of the county court; that the foreclosure action was based on instruments executed only by Alfred A. Anderson and that as to Christina C. Anderson the action was barred; that the court in the foreclosure action had no jurisdiction of the administrator of the estate of Christina C. Anderson or of her heirs; that the petition

did not pray for a deficiency judgment against the administrator of Christina C. Anderson or against her estate or her heirs; that the claims were not founded upon any valid judgment; that no valid judgment exists against the estate of either of the Andersons; and that a claim for money due from the estates could originate only in the court having jurisdiction of the estates.

Answering these objections, plaintiff alleged that notice to creditors was not given within the period of one year of the granting of the letters of administration; and that the action (heretofore denominated the foreclosure action) was commenced under the provisions of section 30-714, Comp. St. 1929, now section 30-714, R. S. 1943. Plaintiff made denials and asserted that the claims were based on a valid and subsisting judgment of the district court for Dawes County.

Plaintiff's assignments of error are that the court erred in sustaining the objections for the reason that the claims on the deficiency judgment were valid; that the record of the deficiency judgment shows that the court had jurisdiction of the parties and of the subject matter; that the deficiency judgment was obtained under the terms and in harmony with section 30-714, R. S. 1943, and is not barred by the Statute of Limitations; that the deficiency judgment cannot be attacked collaterally; that the claims are not barred by the Statute of Limitations; and that the belated notice to creditors did not bar the right to file claims on the deficiency judgment.

The first question to be decided here is whether or not plaintiff has a valid deficiency judgment.

The evidence establishes that the district judge sitting at chambers in Alliance, Box Butte County, there determined and signed the order of confirmation of May 19, 1938, which included the claimed judgment for $750.

The jurisdiction of a judge at chambers is set out in section 24-317, R. S. 1943. This statute, as it then was, was considered in Shold v. Van Treeck, 82 Neb. 99, 117

N. W. 113. The statute provides that a judge sitting at chambers anywhere within his district and upon ten days' notice to the adverse party or his attorney of record shall have power to "enter judgment by default" (subsection 11), and "hear and enter judgments in equity cases upon agreement and stipulation of both parties to the action" (subsection 12). However, here no notice as provided by the statute was given and the agreement and stipulation appearing in the record do not in anywise go to the extent of authorizing a hearing on and entry of a deficiency judgment. We held in the Shold case: "The district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice. When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity." That holding is controlling here. It follows that the deficiency judgment is void and that the claims based thereon were properly disallowed by the district court.

This conclusion makes it unnecessary to determine the other questions presented.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF YANCEY OAKLEY, DECEASED. CHARLES ELLIOTT ET AL., APPELLANTS. V. DORIS OAKLEY, APPELLEE.
31 N. W. 2d 557

Filed April 1, 1948. No. 32293.

1. **Children Born Out of Wedlock.** Where a statute provides in part: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *" a person claiming to be an heir

under such statute has the burden of proving (1) that he is illegitimate, (2) that his alleged father was actually his illegitimate father, and (3) that the alleged father recognized the claimant as his illegitimate child in accordance with the statute.

2. ———. Illegitimacy is a prerequisite to recovery under section 30-109, R. S. 1943. The failure of proof of illegitimacy by one claiming to be an heir under the statute bars his right of recovery thereunder.

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

Eugene D. O'Sullivan, Arthur J. Whalen, Ernest S. Priesman, and *Eugene D. O'Sullivan, Jr.,* for appellants.

S. L. Winters, J. J. Krajicek, and *H. C. Winters,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

MESSMORE, J.

This is an appeal from a judgment of the district court decreeing that Doris Oakley was the daughter of Yancey Oakley, deceased, also known as Dude Oakley, his sole issue and heir at law, and entitled to inherit his estate; and that Charles and George Elliott, nephews of the deceased, were not his heirs at law, nor entitled to inherit any of his estate. The judgment of the district court sustained a judgment of the county court to the same effect. Jury was waived and trial was had to the court.

The pleadings in the county court and district court raise the issue as to whether or not Doris Oakley was the daughter of Yancey Oakley, known as Dude Oakley, who died intestate February 12, 1945, the sole and only heir at law of the deceased, and entitled to inherit his estate. Charles and George Elliott, nephews of the deceased, claimed to be the sole and only heirs at law of his estate, and alleged that Doris Oakley was a

stranger to the estate, an interloper, and not entitled to inherit.

From the overruling of the motion for new trial, Charles and George Elliott appeal from the judgment as heretofore indicated.

The record discloses that Hugh N. Wheelock and Georgie McBride were married October 28, 1894, at Hopkins, Michigan. The certified copy of the marriage license in evidence shows the name Georgie McBride. Throughout the record she is referred to as Georgia, which we assume was her correct first name. They came to Nebraska where Wheelock was employed at a rendering plant located between Bellevue and LaPlatte. They resided in a company house north of the plant. They had lived at that location for two years when a man named Reynolds brought Yancey Oakley, commonly referred to as Dude Oakley, to the Wheelock home. Oakley had had some trouble at Fort Crook. Wheelock worked nights, and Oakley stayed at the Wheelock home for two or three days.

In a petition for divorce filed by Wheelock on or about August 22, 1903, he alleged that he and Georgia McBride were married on November 28, 1894, at Hopkins Station, Michigan, where they lived as husband and wife for three years before they removed to LaPlatte, Nebraska, where they resided until February 1901, and then moved to Griswold, Iowa, where they resided until February 1903. This petition indicates that the Wheelocks moved to Nebraska in 1897. If this be true, they became acquainted with Yancey Oakley two years from that date, or in 1899.

About six months after Oakley left the Wheelock home they moved to the Palmtag farm. Wheelock, at the request of his wife, went to Omaha, secured a baby girl, and brought her home. He did not remember where he obtained her, what her name was, who her parents were, or what his wife named her. Six or eight months after the Wheelocks procured the baby girl,

Oakley came to the Wheelock home and took Georgia Wheelock and the baby, who at that time was less than a year old, with him. After that, Wheelock continued at his work and boarded with an aunt for a period of time that is not disclosed by the testimony. He paid no further attention to his wife or Oakley, but moved to Griswold, Iowa. A year or so after he and Georgia had been separated she sent for him. He came with a team and wagon to the vicinity of Twentieth and Vinton Streets in Omaha, and took Georgia and the little girl to Griswold, Iowa. The three lived together in Griswold for six or eight months when Oakley came and took Georgia and the little girl away with him. Wheelock obtained a divorce from Georgia Wheelock on September 23, 1903, at Atlantic, Iowa. The petition in the divorce action charged that in February 1903, Georgia Wheelock left Hugh Wheelock, went to live with Oakley, and was guilty of repeated acts of adultery with him.

During the marriage relation between the Wheelocks, Georgia was never pregnant with child, nor did they adopt a child. Wheelock testified that he would not be able to recognize the appellee as the little girl he obtained in Omaha because it was so long ago.

The appellee testified that she would be 46 years old the 17th of March, 1946; that she was born in Omaha on March 17, 1900, and was a daughter of Yancey Oakley, commonly known as Dude. Her earliest remembrance was that she lived at Fort Crook with Yancey Oakley as her father, and her mother was referred to as Georgia Oakley. She attended school at Fort Crook under the name of Doris Oakley; attended the Bellevue high school, St. Mary's Seminary and Van Sant's School. Her tuition and board, when required, were paid by Yancey Oakley. He at all times introduced her as his daughter, and referred to himself as her father. Georgia Wheelock died in 1908. The appellee was unable, by investigation, to find a birth certificate, or a marriage

certificate to show the marriage of Yancey Oakley and Georgia Wheelock. She knew Georgia's maiden name was McBride and that she came from Michigan, but she did not know who brought her. She could find no record where she had been adopted by the deceased.

The evidence further discloses that the appellee was married at an early age and removed from Nebraska, and from such time there was no evidence of any further communication between her and her alleged father.

There is evidence by persons who attended school with her corroborating the appellee that she was held out by Yancey Oakley as his daughter and was so known and recognized by him. There is a school record in evidence showing Doris Oakley to have been born March 17, 1900, at Omaha, age seven years in 1907, and to be the daughter of Y. R. Oakley.

A former agent of an insurance company testified that he became acquainted with Yancey Oakley in 1913, at his place of business; that on or about June 11, 1915, an application was made by Yancey Oakley for a policy of insurance wherein Doris Oakley was made the beneficiary. Yancey Oakley, as the applicant, signed the application in the presence of this witness who identified Oakley's signature and his own signature to the application. Doris Oakley was therein designated as Yancey Oakley's daughter. This witness likewise testified to applications for additional insurance insuring Doris Oakley and designating Yancey Oakley as her father.

One of the appellants testified that he was 61 years of age. He lived two blocks from where mother Oakley lived when he was 15 years old, which would be either in 1899 or 1900. He saw Georgia Wheelock at mother Oakley's home on two or three occasions. Yancey and Georgia stayed awhile at mother Oakley's home, but due to difficulties that arose to the effect that the little girl was not Yancey Oakley's little girl and that Yancey and Georgia were not married, Yancey's

mother requested Yancey and Georgia to move. This witness believed they moved to South Omaha. He saw the child when she was 12 years old and used to come and play with his sister at Ralston. He did not visit Yancey Oakley very often, and never heard that he was the father of the child.

A witness testified that she knew the Oakley family, but did not know definitely where they lived; that Yancey Oakley and Georgia lived at the home of mother Oakley for a short time. She never saw Georgia at the mother's home, but knew she lived on Twentieth and Vinton Streets after she had moved. Yancey Oakley's mother talked of the trouble that Yancey had with Wheelock about taking his wife and baby away from him. This witness saw the child when she was 16 years old.

Another witness testified that she was acquainted with Hugh and Georgia Wheelock when the Wheelocks lived at the Palmtag farm south of Bellevue. The occasion of her first meeting Georgia Wheelock was when Georgia came after this witness and wanted her to go and stay with her a few days as she had a felon on her finger and a baby to take care of, and needed help. The witness at that time was about 16 years of age. She could not remember the date. She stayed with the Wheelocks a few days. Hugh and Georgia were living there with a very young baby girl, possibly a month or two old. She knew Yancey Oakley at the time. Georgia Wheelock told her that she had adopted the baby, but did not say where she got it. They called the child Doris.

The appellants contend the trial court erred, for the reason that the evidence failed to support the contention of the appellee that she was the sole and only heir at law of Yancey Oakley, deceased, either as his legitimate daughter, his adopted daughter, or his illegitimate daughter.

It is apparent from the record that Georgia Wheelock

and Yancey Oakley were never united in marriage, or that Yancey Oakley married any other woman. There is no competent evidence that Georgia Wheelock was ever pregnant with child. Likewise, there is no evidence that the appellee was ever legally adopted by Yancey Oakley. We conclude that there is no competent evidence in the record to show that the appellee was the legitimate or adopted daughter of Yancey Oakley.

The remaining question to determine is whether or not the appellee was the illegitimate daughter of Yancey Oakley.

In this connection, "* * * the party who assumes the fact of illegitimacy must disprove every reasonable possibility of legitimacy, * * *." 10 C. J. S., Bastards, § 6, p. 38.

In this state, the burden of proof is on the appellee, since she seeks to bastardize herself, to prove (1) that she was illegitimate; (2) that Yancey Oakley was actually her illegitimate father; and (3) that Yancey Oakley recognized the appellee as his illegitimate child in accordance with the provisions and requirements of section 30-109, R. S. 1943.

The evidence fails to show that the appellee was the child of Georgia Wheelock and, as heretofore stated, that Georgia Wheelock was ever pregnant with child. The evidence is rather to the effect that Hugh Wheelock obtained a girl child somewhere in Omaha and took her to live in his home with his wife Georgia and himself. This evidence is corroborated by a witness who was in the Wheelock home doing some work for Georgia when a baby girl, a month or two old, was there, and Georgia Wheelock informed this witness that they had adopted the baby. Further, at the time Yancey Oakley came to the Wheelock home and took Georgia Wheelock and the baby to live with him, the baby was less than a year old.

With the foregoing facts in mind, it is true that the

record is in doubt as to whether the appellee was born in wedlock or out of wedlock. Insofar as the record in this case shows, she may have been born in wedlock. If this be true, the rule settled by the weight of decisions in this country is that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife. See Schmidt v. State, 110 Neb. 504, 194 N. W. 679; In re Estate of McDermott, 125 Neb. 179, 249 N. W. 555.

"This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have been the father of the child." Schmidt v. State, *supra.* See, also, Wright v. Hicks, 12 Ga. 155; Powell v. State, 84 Ohio St. 165, 95 N. E. 660; State v. Lavin, 80 Iowa 555, 46 N. W. 553; Eversley on Domestic Relations (4th ed.), c. VI, p. 582.

"The facts rebutting the presumption of legitimacy of a child born in wedlock must be established by clear, satisfactory, convincing, and competent evidence, * * *." In re Estate of McDermott, *supra.*

It is apparent that the appellee seeks to rebut the presumption of legitimacy by attempting to prove that Hugh Wheelock had no access to his wife, that he was absent at such time as in the course of nature a child was begotten, or that under the circumstances he could not have been her father. She makes reference to the evidence as to the time when the Wheelocks became acquainted with Yancey Oakley, which would either bring him to their home in 1896 or 1899; the evidence appearing in the record as to her birth being March 17, 1900; and the separation of Hugh and Georgia Wheelock for a period of a year after Yancey Oakley had broken up the Wheelock home.

"The law is not willing that a person shall be declared a bastard merely because no act of intercourse is proved

to have occurred between husband and wife at about the time of pregnancy; the proof must go further, and show impossibility of access." In re Estate of McDermott, *supra.*

"The proof must be such as to show the impossibility of access, and this the evidence fails to prove. Boulden v. McIntire, 119 Ind. 574, 12 Am. St. Rep. 453; Powell v. State, 84 Ohio St. 165." In re Estate of McDermott, *supra.*

"This legal presumption is not to be rebutted by circumstances which create only doubt and suspicion, such as adultery by the mother." Eversley on Domestic Relations (4th ed.), c. VI, p. 582.

When opportunity existed for sexual intercourse within such period that the child in question might have been begotten by the husband, mere probabilities can have no weight against the legal inference. Bury v. Phillpot, 2 Myl. & K. 349. See, also, note in 36 L. R. A. n. s. 257. It was said in that case there was nothing against the evidence of access except evidence of adulterous intercourse with the wife, which the court said would not affect the legal inference.

"Improbability alone will not break the cogency of the presumption (Matter of Findlay, 253 N. Y. 1, 10), nor will a result of illegitimacy be reached by a balancing of probabilities. (Matter of Findlay, 253 N. Y. 1, 8; Van Aernam v. Van Aernam, 1 Barb. Ch. 375, 377; * * *.)" Matter of Smith, 136 Misc. 863, 242 N. Y. Supp. 464. See, also, Godfrey v. Rowland, 16 Hawaiian Rep. 377.

The appellee has failed to show the impossibility of access of the husband, Hugh Wheelock, to her alleged mother, Georgia Wheelock. Therefore, had it been proved that Georgia Wheelock gave birth to a girl child, the appellee's proof would be insufficient to overcome the presumption of legitimacy. However, in the instant case there is no evidence, as before stated, that Georgia Wheelock was ever pregnant with child. It is clear

that the appellee has failed to prove that she is the illegitimate daughter of Yancey Oakley, deceased.

The appellee cites section 30-109, R. S. 1943, which has read substantially the same since 1861. See Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630. This statute provides in part: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *."

Appellee's contention is that the evidence discloses Yancey Oakley, in writing, met the requirements of the statute and acknowledged her as his heir. We deem it unnecessary to determine the sufficiency of the evidence as to whether or not it meets the requirements of the cited statute. The right to inherit, as provided for in this statute, depends upon whether or not the illegitimacy of the person claiming such right has been established. In the instant case the appellee has failed to prove that she was the illegitimate child of Yancey Oakley. The fact of recognition of the appellee by Yancey Oakley as his daughter could confer on her no inheritable rights as his heir unless her illegitimacy was first established. See Bethany Hospital Co. v. Hale, 64 Kan. 367, 67 P. 848.

We conclude that the judgment of the trial court must be reversed and the cause remanded to enter judgment against the appellee and in favor of the appellants, declaring the appellants to be the sole and only heirs at law of Yancey Oakley, deceased.

REVERSED AND REMANDED.

DALE STUBBLEFIELD ET AL., APPELLANTS AND CROSS-APPELLEES, V. LAWRENCE OSBORN ET AL., APPELLEES AND CROSS-APPELLANTS.

31 N. W. 2d 547

Filed April 1, 1948. No. 32350.

1. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
2. ———: ———. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period.
3. ———: ———. A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued.
4. ———: ———. To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.
5. **Waters.** Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river.
6. ———. The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.
7. ———. Under the evidence adduced, the trial court was not in error in determining the plaintiffs' rights superior to those of the defendants in the use and occupancy of the islands in question.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Dryden & Jensen, for appellants and cross-appellees.

Blackledge & Sidner, for appellees and cross-appellants.

Heard before SIMMONS, C. J., MESSMORE, YEAGER,

CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

MESSMORE, J.

This is an action for an injunction to enjoin the defendants from preventing the plaintiffs from crossing over certain lands of the defendants; to adjudge and decree the plaintiffs to have a prescriptive right to enter upon the premises of the defendants; to enjoin the defendants from interfering with the plaintiffs' claimed right to the use and occupancy of certain unplatted islands in the Platte River; and to declare the plaintiffs to be the owners of such islands and to quiet title in them.

It appears from the record that on October 7, 1943, defendants Osborn acquired title, by administrator's deed, to Lot 9 in Section 27, and Lot 1 in Section 34, Township 9 North, Range 13 West, of the Sixth P. M. By referee's deed dated July 24, 1944, they acquired title to Lot 10 in Section 27. By deed dated July 31, 1944, they conveyed a one-half interest in the premises to the defendants Bateman, which deed was filed of record January 8, 1945. All of the lands hereinbefore described are situated in Buffalo County, Nebraska. Previous to the defendants acquiring title to the above-described lands, the east portion of the land was owned by one Bolton, and Lot 1 in Section 34, which is the west portion of the land, was owned by one Stearley. These lands are situated on the north bank of the Platte River, a nonnavigable stream which runs east and west.

The islands in question are all south of the lands heretofore described, and are designated in an exhibit in evidence as Islands Nos. 1, 2, and 3. These islands are approximately 500 yards south of the north bank of the Platte River. Island No. 1 was described as being approximately 75 to 100 yards in length and 20 yards in width. Island No. 2 was 30 to 40 yards west

of Island No. 1, and Island No. 3 was 50 yards south of the west point of Island No. 2.

The plaintiffs do not have a patent from the United States Government, nor any deed or other instrument in writing, purporting to convey to them any title or interest in the three islands. In 1925 or 1926, the plaintiffs went together to construct blinds on the islands for the purpose of hunting ducks. In 1926, they constructed a shack about 10 or 12 feet in width and 22 feet in length with a board floor and shingled roof on Island No. 1, and installed a pump. They fenced the west end of this island for the purpose of using live decoys. On Island No. 2 they sunk a duck-hunting box on the west point, and constructed a blind at that place. On Island No. 3 they constructed a box and a permanent blind to use when the water was so that they could take advantage of it. Later another blind was constructed on this island. These improvements on the islands were clearly visible.

At the time of the foregoing construction, the entire bed of the river was about half a mile wide with the deepest water right next to the north bank which ran along the Bolton and Stearley land. That portion of the river north of the islands went dry last. The river channel was clear over to the islands.

The manner of crossing the land now owned by the defendants was described. In 1927 or 1928, the road used was a private road that led up to the improvements on the Bolton place starting at a point right at the river bank and going in a direct line towards the dwellings of the farmstead, in a southwesterly direction. It was wide enough for a car or wagon to travel. About 50 to 80 yards east of the improvements they opened a gate and drove through a pasture, after making a trail and trimming out brush. The road through the brush ended at the fence line dividing the Stearley and Bolton lands, at the river bank. At first they used a boat to get to the blinds, and later were able to wade.

They would wade directly south, approximately 500 yards, to the blinds. This method of access to the islands continued up to the time this action was brought.

During the period of more than 20 years these plaintiffs, with certain invited guests, used the afore-described method of getting to the islands for the duck-hunting season. At certain times in the spring they would look over and repair their equipment on the islands, and on occasions three or four times each year would hold picnics on the islands. The plaintiffs left personal property in the shack at all times. On occasions when the water was low they would spear fish in what is termed the north channel, heretofore described. They were never questioned by those occupying the land as to their right to cross over it. They opened gates to get in and out of the property, which were constructed to keep the stock from getting out in the fall. At times they had conversations with the owners as to the weather, the hunting conditions, and their success in hunting. Apparently there were no other conversations with reference to the plaintiffs' claimed right of an easement across the lands. Other hunters recognized and looked upon the plaintiffs as the owners of the islands during the 20 years or more that the plaintiffs used the islands for the purpose of hunting.

It is admitted by the plaintiffs who testified that others used the facilities to cross the lands in question for the purpose of hunting practically every year, and there is no evidence of exclusive right in the plaintiffs to cross such lands. There is no evidence that taxes were paid on the islands by the plaintiffs or any other person or persons.

There is further testimony describing the channel of the river as testified to by the plaintiffs.

The first time they were notified that they could not go upon the defendants' lands was the second day of the hunting season of 1946, when they were informed

that they could not use the islands, had no right to them, and that the defendants had the right to use the islands and would deny them and all others permission to cross over their lands for the purpose of using the islands. The defendant Osborn posted "no trespassing" signs on the premises at the fence line separating the public road from the driveway that led to the improvements on defendants' farm.

One of the defendants testified that the road down to the river from the premises was just a trail through the pasture, angling through the brush with several turns, terminating at the river, and was not a well-defined road; and that he saw no signs of a road leading from the premises to that point. This testimony was rebutted to the effect that the tracks to the river from the Bolton premises were eight to ten inches deep, or from four to six inches deep; that there was not more than one path, and that the plaintiffs always used the same path in going down to the river. They cut brush each year in three places in order to make this path down to the river.

The trial court dismissed the plaintiffs' petition as to the claimed prescriptive right-of-way and easement over and across the described Lots 9 and 10, and dissolved the restraining order against the defendants insofar as any right-of-way or easement over and across the defendants' land or any part of the same was concerned. The court found that the plaintiffs' use of the lands had not been continuous, hostile, adverse, or under any claim of ownership or color of title; that such use had been seasonal, occasional, and permissive. The court found that as to the unplatted islands in the Platte River, a nonnavigable stream, adjoining the premises of the defendants described in the evidence as Islands Nos. 1, 2, and 3, the main channel of the river at that point lies between the islands and the lands of the defendants; that by reason thereof and the seasonal use and occupancy thereof by the plaintiffs, the rights of

the plaintiffs were superior to those of the defendants; and permanently enjoined the defendants, and each of them, from in any manner interfering with, prohibiting, or molesting the plaintiffs in the use and occupancy of the islands.

The plaintiffs filed a motion for new trial to set aside that portion of the trial court's judgment finding that the plaintiffs were not entitled to an easement for right-of-way across defendants' land.

The defendants filed a motion for new trial to set aside that portion of the trial court's findings and decree that were adverse to and against the defendants, alleging that the trial court was without jurisdiction to make any findings or decree in favor of the plaintiffs as to the disputed and unplatted islands in the Platte River.

Both motions for new trial were overruled. The plaintiffs appealed, and the defendants cross-appealed.

The plaintiffs contend the judgment of the trial court finding that the plaintiffs were not entitled to an easement for right-of-way across defendants' premises is contrary to the evidence and to the law.

"An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse." Onstott v. Airdale Ranch and Cattle Co., 129 Neb. 54, 260 N. W. 556. See, also, Omaha & R. V. Ry. Co. v. Rickards, 38 Neb. 847, 57 N. W. 739.

The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. See 28 C. J. S., Easements, § 10, p. 645.

"A prescriptive right is not looked on with favor by

the law, and it is essential that all of the elements of use and enjoyment, stated above, concur in order to create an easement by prescription." 28 C. J. S., Easements, § 10, p. 645.

"A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued, * * *." 28 C. J. S., Easements, § 14, p. 655.

To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. See Sachs v. Toquet, 121 Conn. 60, 183 A. 22, 103 A. L. R. 677.

In the instant case the evidence by the plaintiffs shows the original entry and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs.

We have analyzed the cases cited by the plaintiffs as to the presumption arising where there has been open, visible, continuous, and unmolested use of a roadway across the land of another for a period exceeding ten years, placing the burden on the defendants to show that the use was permissive and not under claim of right. If he fails to overcome such presumption by a preponderance of the evidence, his case must fall. The cases cited by the plaintiffs in such respect show affirmative participation or negative acquiescence by the

owner that placed him in a position that would make it properly necessary for him to establish the facts that the claims are inconsistent with his own acts of commission or omission.

The facts in the instant case establish that the original entry and use were permissive, and the trial court correctly so determined.

The defendants, as cross-appellants, contend that the trial court erred in finding that the main channel of the Platte River lies between the islands and the defendants' deeded land; further that the trial court erred in finding that the rights of the plaintiffs were superior to those of the defendants; and that the trial court erred in finding that a seasonal use was sufficient to support a permanent injunction.

The evidence is in preponderance that the main channel of the Platte River at the point in question is between the premises of the defendants and the islands claimed by the plaintiffs.

"Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. * * * 'The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.' Higgins v. Adelson, *supra.*" Hardt v. Orr, 142 Neb. 460, 6 N. W. 2d 589.

On page 466 of the above-cited opinion, this court said: "The parties to this litigation are in agreement that grants of land bounded upon rivers carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. * * * In this connection, this jurisdiction is committed to the view: 'Where title to

an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel.' Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502. See, also, Wiggenhorn v. Kountz, *supra.* * * * 'In the very nature of things, the thread or center of a stream must be the line which would give to the owner upon either side access to the water, whatever its stage might be, and particularly at its lowest flow. Upon principle, therefore, it would appear that the thread of a nonnavigable river is the line of the water at its lowest stage. The weight of authority, in this state at least, upholds such contention. Halsey v. McCormick, 13 N. Y. 296; Child v. Starr, 4 Hill, 369, 380; Ex parte Jennings, 6 Cow. 518; People v. Canal Appraisers, 13 Wend. 355; Micelli v. Andrus, 16 Or. 78, 89.' We have, in effect, adopted the foregoing reasoning of the New York courts and have announced the rule applicable in this state as follows: 'The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.' Higgins v. Adelson, *supra.*" Hardt v. Orr, *supra.*

Under the decisions in this jurisdiction, the islands in controversy cannot be claimed by the defendants and appellees, for the reason that they are to the south of that portion of the main channel of the Platte River which goes dry last and consequently, if any claim has to be made by way of riparian ownership, it would have to come from the south part of the Platte River. It is noted that the owners of the land on the opposite, or south, side of the river are not parties to this action.

Under the evidence we can make no determination of adverse ownership to the islands in the plaintiffs as against the riparian owners on the south bank of

the river because they are not made parties to this litigation. We can only determine, as did the trial judge, that by the seasonal use and occupancy of the islands by the plaintiffs, as shown by the evidence, and the other facts as heretofore set out with reference to the main channel of the Platte River at the place in question, the rights of the plaintiffs to the islands are superior to the rights of the defendants thereto.

Judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF UNION PACIFIC RAILROAD COMPANY. UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

31 N. W. 2d 552

Filed April 1, 1948. No. 32270.

1. **Public Utilities.** The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals.
2. **Railroads.** The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. Whether or not such company may discontinue its agency service at any of its stations depends upon the facts and circumstances of the particular case.
3. ———. It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient.
4. ———. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of

importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency.

5. **Public Utilities: Railroads.** A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence.

6. ———: ———. The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

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

Walter R. Johnson, Attorney General, *Erwin A. Jones,* and *Crosby & Crosby,* for appellees.

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

CHAPPELL, J.

Appellant, hereinafter called the company, filed an application with the Nebraska State Railway Commission for authority to discontinue its agency service at Keystone for the reason that its agent at Martin could render the same essential services, and public convenience and necessity no longer required agency service at Keystone because of the kind and amount of business transacted at that station. Objections were filed, and, after hearing, the company's application was denied. Motion for rehearing was overruled and the company appealed, assigning as error substantially that the order of denial was arbitrary and unreasonable. We sustain that contention.

Applicable law is well established in this jurisdiction.

This court has held that: "The prime object and real purpose of Nebraska state railway commission control is to secure adequate, sustained service for the public at minimum cost and to protect and conserve investments already made for this purpose. In doing this, primary consideration must be given to the public rather than to individuals." Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552.

That case is also authority for the proposition that a final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence.

The opinion further affirmed that the service and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered, and whether or not a railroad company may discontinue its agency service at any of its stations depends upon the facts and circumstances of the particular case.

In Thomson v. Nebraska State Railway Commission, 141 Neb. 697, 4 N. W. 2d 756, it was held: "'It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the * * * public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient.'"

In Thomson v. Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607, it was held: "The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an appli-

cation for the discontinuance of an agency. * * *

"The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented."

In Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735, it was said: "But, broad as is the power of regulation, the State does not enjoy the freedom of an owner."

In that connection it was said in Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 85 Neb. 818, 124 N. W. 477: "But, unless public necessity requires, the discretion of the railroad company in establishing and maintaining its stations should not be interfered with."

Therefore, in arriving at decision in the light of the foregoing authorities, this court will, with due regard for the welfare of the public, take into consideration all the facts and circumstances peculiar to the Keystone station and attendant thereon, such as its proximity to and the accessibility of other open stations; the character and volume of services rendered to and the business transacted with the public; the revenue derived therefrom, together with the cost and expense incidental thereto; the time necessarily devoted by the company's agent in the performance of his duties; and whether or not an open agency is necessary as a safety precaution in the operation of trains between stations.

Bearing that in mind, we have examined the record. It discloses that according to the 1940 census Keystone had a population of 39 persons. It is located on Highway 49, which runs south from Arthur to Keystone 27 miles, and thence west 5 miles to main Highway 61, which crosses the state from north to south and extends from Arthur south through Martin to Ogallala. It is seven miles by graveled and cindered road from Key-

stone to Martin. The depots of both are located on the company's North Platte branch line, which has its junction with the main line a short distance west of North Platte, and generally follows the North Platte River to Gering. The depot at Keystone, however, is not now located in the village itself.

Insofar as important here, the company now maintains open agency stations at Sarben, Keystone, Martin, and Lewellen, over a distance of 46.5 miles. It is 15.6 miles by rail from Keystone east to Sarben, and 6.5 miles by rail from Keystone west to Martin, or a total of 22.1 miles from Sarben to Martin. From Martin it is 24.4 miles by rail west to Lewellen. It will be observed, then, that if the agency at Keystone is discontinued, there will still be open agency stations at Sarben, Martin, and Lewellen, with Martin located approximately midway between the other two.

There is evidence that such a situation would be more satisfactory from a train-operations standpoint than having two of the stations located within close proximity, as at present. In the light of the proximity to and accessibility of Martin from Keystone by highway or rail, and the distance between Sarben and Martin, or Martin and Lewellen by rail, those factors could have but little significance in sustaining the order of the commission.

Prior to construction of the Kingsley Dam the company's line went directly through Keystone. However, when the dam was constructed a short distance to the west thereof, it was necessary for the company to leave the river valley to the east of Keystone and reconstruct its line in the hills north of the lake created by the dam. Thus the railroad no longer went through Keystone and the station itself was of necessity moved from its former location to a point 2.2 miles northeast of the village. There are no buildings now on the line at Keystone except the depot, which is identical with the one at Martin. Agents at both stations live in the depots.

The village of Keystone has two general merchan-

dise stores, one of which handles coal, gas, and oil; a bank; a telephone office; two churches; a public library; and an eighth-grade school. Its high school has been discontinued, and its high school students are now transported to Ogallala. The post office is in one of the stores, from which a mail route extends out into Arthur county. The agent at Keystone does not now handle the mail, thus discontinuance will in no substantial manner change that situation. Keystone and Martin are both on the same telephone exchange, with telephones in both depots. The one can be called as conveniently as the other. In that regard, a discontinuance of the one at Keystone could cause no inconvenience. Martin has good shipping facilities but has no business establishments.

Since construction of the dam was undertaken, Keystone has lost several of its business establishments. A lumber company and a hotel have closed. A beer parlor has closed and its building has been dismantled. An elevator has closed and been dismantled, and buildings which contained a lunch counter, pool tables, beer parlor, and candy and tobacco business were moved to Roscoe. As one of the objectors put it: "Well we still need about all we got at Keystone. During the la(s)t 20 years we haven't gained much, we have lost."

The territory surrounding Keystone is devoted mostly to the raising of livestock by ranchers who are few in number. Such livestock is the principal commodity, and, with rare exceptions, the only commodity forwarded by rail at Keystone. The shipments are usually made by ranchers during the months of September and October in cars ordered in person, by mail, or telephone from any of the company's agents or representatives at any of its accessible open stations. The cars are spotted by train crews and it has been the company's practice in the past, and will be in the future, to have one of its traffic representatives present when large shipments are made. It is not necessary to have an agent at Keystone

in order to permit the shipper to accompany his livestock shipments from Keystone. He can board the train and have his contract signed at the first available open agency. The evidence is that the company does not now accept shipments of livestock to be forwarded on bill of lading with sight draft attached at any of its stations. In that connection, the bank at Keystone could be of little importance as a factor.

The commodities received in carload quantities are mostly coal, with a few cars of feed. They average less than one a month. There are, generally speaking, only two less-than-carload receivers. They receive all such shipments except in isolated cases. Less-than-carload shipments forwarded average less than one a month while such shipments received average less than two a day. In that regard, the company now has and will continue to have pick-up and delivery service for all less-than-carload shipments received. A few such shipments are received for patrons who live in or near Arthur, but they are delivered by the mail carrier.

In the future, both carload and less-than-carload shipments received at Keystone must be prepaid, unless credit has been established by the receiver thereof with the railroad company. If prepaid, the freight charges are remitted on the invoice as one transaction, or if the merchandise received is shipped on bill of lading with sight draft attached, payment is made to the bank. If credit is established, freight charges will be remitted by mail or personally to the agent at Martin. There is evidence that some shipments even now arrive prepaid or with sight draft attached, and that some companies always ship merchandise prepaid even where there are open stations. In any event, the same essential services can be rendered with the agency discontinued, although, frankly, it will be less convenient in some respects.

Exhibits and other evidence appearing in the record illustrate beyond dispute that the revenue received at, or assignable to Keystone from all freight forwarded

and received, together with ticket sales, milk and cream traffic, less the necessary costs and expenses of handling the same, including those of the agency itself, left the company with a very substantial deficit thereat during 1944 and 1945, and a more substantial one for the first nine months of 1946. As a matter of fact, the record discloses that several of defendant's non-agency stations of comparable population produce more revenue per year than the open agency at Keystone.

It is true that Keystone has been the accounting station for three so-called blind sidings or non-agency points, but the record contains no evidence showing that the handling of such accounts at other stations will in anyway inconvenience the public. While the revenue therefrom, together with the costs and expenses incidental thereto, are not disclosed by the evidence, the small amount of business so handled is readily ascertainable, and, if included in the Keystone accounting, could not change the result.

Admittedly, the agent could and did perform all the necessary duties at the station, including menial tasks, in from two to three hours per day. He did at times receive train orders, but they averaged only one a week during 1945 and in 1946 they averaged less than three a month. The evidence is that most of them were probably only slow orders. In any event it is not disputed that such orders as would be necessary for the safe operation of trains could as well be handled by either Sarben, Martin, or Lewellen. There is a 42-car siding at Keystone which could be used for passing of trains, but in fact it has been used only for storage of cars. There are but four trains per day, and they are mixed trains, two westbound a. m. 55 minutes apart, and two eastbound p. m. three hours apart. We cannot conclude that services rendered by the agent or safety precautions required the continuance of an agent at Keystone.

It is true that there are shipping facilities at Keystone

which do not exist at Martin, but the discontinuance of the agent at Keystone will not substantially interfere with their use at either station.

Appellee argued that the company was simply attempting in this proceeding to transfer agency service from Keystone to Martin. This argument resulted from an application by citizens of Arthur County in December 1943, requesting that full agency service should be inaugurated at Martin. At that time, the company did not feel that open agency was needed at Martin, and in the alternative requested that if agency service was required at Martin, the agency service at Keystone, then handling the Martin accounts, should be discontinued. After a hearing, the railway commission on December 21, 1943, denied both contentions, from which no appeal was taken. However, it appears from the record that reenforcement of the Kingsley Dam was necessitated, and the increased volume of business from that source and others at Martin, together with the resulting difficulty of maintaining demurrage records and keeping other proper records, not only made an agency at Martin necessary but more desirable than at Keystone. Therefore, in September 1944, the company voluntarily, as they had a right to do, established an open agency at Martin. Since that time, revenue for forwarding shipments from Martin has not been as large as that from Keystone, but the revenue for freight received at Martin has been many, many times as great as that at Keystone. Since it appears from the record that such a situation has been existent and progressive since 1944, we cannot conclude that the business transacted at Martin was only temporary and non-recurrent. In any event, since 1943 the conditions have materially changed, not only at Martin but also at Keystone, and the order of the railway commission entered at that time could not now be binding upon the company or control the situation presented here.

We conclude that the order of the Nebraska State

Railway Commission denying the company permission to discontinue its agency should be and the same hereby is reversed and remanded, with directions to grant such authority.

REVERSED AND REMANDED WITH DIRECTIONS.

HARVEY YOST, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

31 N. W. 2d 538

Filed April 1, 1948. No. 32356.

1. **Bailments: Larceny.** Section 28-540, R. S. 1943, requires that there be a bailment of the property; that while so held that the bailee convert the property to his own use; and that such conversion must be with the intent to steal the same.
2. ———: ———. In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use.
3. **Bailments.** The term bailment may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished.
4. ———: **Larceny.** In a prosecution for larceny of money by a bailee, where the transaction constituting the offense extends through different counties, the venue may be laid and the prosecution had in the county where the bailment arose, and where the defendant has to account for and pay over the money on demand to the one entitled to its possession.
5. **Criminal Law.** Where an offense consists of a series of acts, or various acts in connection with an offense take place in different counties, the prosecution for such offense may be had in any county where any one of the various acts, which constitutes an essential element of the crime, took place.
6. ———. Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty

intent, design, purpose, or knowledge, even though such facts show the commission of another crime.

7. **Trial: Appeal and Error.** Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism.

ERROR to the district court for Hall County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Miles W. Johnston, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for defendant in error.

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

WENKE, J.

Harvey Yost, plaintiff in error and defendant below, was charged in the district court for Hall County with two crimes: The first, that of obtaining $2,100 from Helen Hofrichter by false pretenses, and the second, that of converting to his own use $2,100 belonging to Helen Hofrichter, which he was holding for her as bailee. A jury found the defendant guilty of converting to his own use the $2,100 which he held as bailee for Helen Hofrichter. His motion for new trial having been overruled, the court sentenced him to serve a period of seven years in the Nebraska penitentiary. By this error proceeding the defendant seeks reversal of his conviction and sentence. For convenience we shall refer to the petitioner in error as the defendant.

The incident here involved grew out of an acquaintance that developed between the complaining witness Helen O. Hofrichter, a married woman, and defendant Harvey Yost when the former was taken to the county hospital of Douglas County on September 20, 1946, because of a sudden attack of poliomyelitis. At that time defendant was working in the hospital as an orderly.

Bearing in mind the principle that in a criminal action the State is required to prove all of the essential elements of the offense charged beyond any reasonable doubt, we find, from the evidence adduced at the trial, that after the complaining witness left the hospital on October 27, 1946, and went to the Hill Hotel in Omaha to stay, the jury could have found the following happened.

It should here be stated that any facts relating to their associations during this period, except as it relates itself to the crime of which the defendant has been convicted, will not be set out as it would serve no useful purpose.

When the complaining witness left the hospital and went to the hotel the defendant immediately quit his job at the hospital and became her companion. He continued in that relation until he deserted her at a tourist court located at North Platte, Nebraska, in the late afternoon or early evening of November 4, 1946. After she got out of the hospital they stayed at the Hill Hotel for several days. There they caused a disturbance in her room early on the morning of Wednesday, October 30, 1946, when he abused her physically. At that time she received a severe laceration on her head. As a result of this disturbance they were taken into custody by the police. They arranged for their release without any apparent publicity. Then they moved to the Hotel Chieftan in Council Bluffs, Iowa. On October 31, 1946, they went to the Omaha National Bank in Omaha and she withdrew $1,700 of her funds on deposit in the Commercial National Bank of Grand Island, Nebraska, by means of a customer's draft. This money she turned over to the defendant and he used $1,600 thereof to buy a 1941 Buick automobile, being the means they subsequently used to travel. She withdrew an additional $200 of her funds on deposit at the Commercial National Bank of Grand Island on November 2, 1946, in the same manner. Because of her health she desired to return to the hospital but he advised her against it saying he could

do everything for her that they could and did not take her there. She then desired to go home but he told her if she did he would scandalize her by publicizing the trouble she had been in. He told her he was going to take her to Phoenix, Arizona, to her sister's where she could stay to improve her health. He then took her to Grand Island for the purpose of having her draw out the balance of the money she had on deposit in the Commercial National Bank as funds with which to go on that trip. They drove to Grand Island on November 4, 1946, and both went to the bank. He directed her to get cash and waited in the lobby of the bank for her to do so. She then had on deposit a balance of $2,105.08. However, the banker advised her not to take cash but induced her to take a draft for $1,599.73 and travelers' checks totaling $500. These she turned over to the defendant before they left the bank. He became angry because she had not obtained cash. As they were leaving Grand Island they stopped at a filling station at which time he took from her $200 which she had in her purse. They then drove to Kearney, Nebraska. There they cashed the draft and travelers' checks. They both went to the Platte Valley Bank in Kearney and, after they had entered the lobby, he handed her the draft so she could endorse and cash it. When it was cashed he immediately took the proceeds and never returned any part thereof to her. They also went to the Fort Kearney National Bank in Kearney where they cashed the travelers' checks. The same procedure was followed. He handed her the travelers' checks after they had entered the bank so she could endorse and cash them. After she had cashed them he immediately took over the proceeds, none of which he has ever returned to her. They then drove to Cozad, Nebraska, where he bought $500 of travelers' checks, taking the same in his own name. They then proceeded to North Platte, where he registered at a tourist court. She, because of her condition, being weak and exhausted, laid down to rest. This was

about 4 to 4:30 p. m. She awakened between 10 and 10:30 p. m. of the same day, November 4, 1946, and defendant was gone. She contacted the police. Her condition at the time showed evidence of physical violence, having a laceration on her head and bruises on her body. She was weak, fatigued, seemed under a strain, had a faulty memory, was in a run-down condition, and had four or five prick marks on the upper part of her right arm. At all times she seemed to be under the complete domination and influence of the defendant. After the defendant left North Platte he went to Kansas City to get some clothes. He then went on to California, taking the Buick car which had been purchased in Omaha with him and using it as a means of conveyance. No part of the money he obtained from the draft and travelers' checks, which were turned over to him at Grand Island, has ever been returned to the complaining witness. The defendant took it with him when he deserted the complaining witness at North Platte.

It is true that defendant tells a somewhat different story and offered in evidence a letter written and signed by complaining witness at North Platte on November 4, 1946, to the effect that she gave him everything as a gift and exonerated him for his conduct. Of course, the weight of this evidence, under the circumstances, was for the jury and from the record as a whole it is readily understandable why they would give it little, if any, consideration.

Defendant complains because the court failed to sustain his motion to dismiss count one because of the lack of any evidence to support it. He contends that submitting it resulted in prejudice to his rights. Without discussing the question of fact, as relating to the lack of evidence, we think what was said in Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602, under a similar situation, is applicable here. There we said: "The second assignment is that the court erred in refusing to sustain defendant's motion to dismiss count two of the informa-

tion. Whether or not the court was in error is of no consequence since the jury found the defendant not guilty on this count."

Defendant complains on the ground that the evidence fails to establish all the essential elements of the crime charged. It is, of course, true that the State has that burden. Hans v. State, 147 Neb. 730, 25 N. W. 2d 35.

As to the crime of which the defendant here stands convicted, section 28-540, R. S. 1943, provides: "If any bailee of any money, bank bill or note, goods or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and upon conviction thereof shall be punished accordingly."

It will be observed that the statute requires there be a bailment of the property; that while so held the bailee must convert the property to his own use; and that such converting to his own use must be with the intent to steal the same.

We said in Morrow v. State, *supra:* "In order to prove a charge of larceny as bailee the burden is on the state to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use."

This court has also said that the gist of the offense is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same. See Ford v. State, 46 Neb. 390, 64 N. W. 1082, and Frades v. State, 131 Neb. 811, 270 N. W. 314. The statute does not require that it be without the knowledge of the bailor. Of course, it must be without his consent. If done without the bailor's consent, although he might have knowledge thereof, and all other elements being present, it would still be a crime under this statute. What these cases actually mean is that it must be done without the consenting knowledge of the

bailor for conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another.

"On a charge of larceny as bailee, the proof must show that the defendant was a bailee." State ex rel. Haley v. McCutchan, 104 Neb. 80, 175 N. W. 660.

Here there was evidence to establish that defendant was going to take the complaining witness to her sister's at Phoenix, Arizona, for her health and that she withdrew the funds from the bank and turned them over to the defendant to enable her to go on that trip.

As stated in 6 Am. Jur., Bailments, § 4, p. 141: "* * * the term (bailment) may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished, * * *."

As has already been quoted from Morrow v. State, *supra:* "In order to prove a charge of larceny as bailee the burden is on the state to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use." The opinion then goes on to state: "There is no requirement that a bailment within the meaning of this statute shall be created in any particular way. With the reported cases as illustrations it becomes clear that the statute is satisfied if it be proved that the property be received lawfully and thereafter converted with intent to steal."

Under the facts as disclosed by the record the jury was fully justified in finding the defendant came into possession of the property as bailee. See Adams v. State, 138 Neb. 613, 294 N. W. 396.

The State must also prove, beyond a reasonable doubt, that the complaining witness did not consent to or authorize the defendant's assumption and exercise of

the right of ownership to the funds. As stated in State v. Omaha Nat. Bank, 66 Neb. 857, 93 N. W. 319: "No one would contend that if the owner of property delivered it to a person and requested him to dispose of it in a prescribed manner and the request was complied with, an action of conversion would lie against such person; * * *."

Here the evidence shows the defendant deserted the complaining witness at North Platte and took with him all of the funds received from the draft and travelers' checks. He departed at a time when she was sleeping and such departure was unknown to her until she awakened, when she immediately became aware thereof. What was said in Rema v. State, 52 Neb. 375, 72 N. W. 474, is applicable here: "If we are able to comprehend the effect and force of the testimony, the answer must be that there was an entire lack of consent, although no witness in express terms so stated at the trial."

We think the jury was fully justified in finding from the evidence that the defendant's taking and his use of these funds, which had been entrusted to him, was unauthorized and without the consent of the complaining witness.

Defendant also contends that the evidence fails to show the commission of the crime charged to be within Hall County so as to give the district court for that county jurisdiction.

"All criminal cases shall be tried in the county where the offense was committed * * *." § 29-1301, R. S. 1943.

The facts relating to what transpired has been sufficiently set forth in the statement of what the jury could have found. After the draft and travelers' checks were turned over to defendant in the bank at Grand Island they were subsequently endorsed and cashed by the complaining witness in the two banks at Kearney in the manner as has already been set forth.

As held in Cohoe v. State, 82 Neb. 744, 118 N. W. 1088: "In a prosecution for larceny of money by a bailee,

where the transaction constituting the offense extends through different counties, the venue may be laid and the prosecution had in the county where the bailment arose, and where the defendant has to account for and pay over the money on demand to the one entitled to its possession." It is stated in the opinion: "Like questions have been decided by many courts of last resort, and it is said in their opinions that it often appears that the venue cannot be laid in the county where the conversion actually took place. We think the authorities agree that, if the transaction constituting the offense extends through different counties, the county in which the conversion took place has not the exclusive jurisdiction. 1 Bishop, New Criminal Procedure, 61; 7 Ency. Pl. & Pr. 412."

Thus, when the crime consists of a series of acts the place where the actual conversion took place does not have exclusive jurisdiction for if the evidence is such that a jury could find the intent to convert to his own use existed from the beginning then the defendant could be held in the county where the bailment took place. See Severin v. State, 146 Neb. 506, 20 N. W. 2d 377. In this case the jury determined that was Hall County. Therefore, if the intent to convert these funds to his own use with the intent to steal the same existed in Hall County, where he took possession of the draft and travelers' checks as bailee, he could be prosecuted in that county although he subsequently caused other acts to be done in Buffalo County such as having the complaining witness endorse and cash them. There is ample evidence in the record to sustain such a finding, in fact, it is about the only one the jury could arrive at.

We find the evidence is sufficient to establish all of the essential elements of the crime beyond a reasonable doubt. Thus, the court did not err in overruling the defendant's motion to dismiss count two. We also find that the crime was properly prosecuted in Hall County.

Defendant further complains that the court erred in admitting certain testimony over his objection. This particularly relates to the $1,700 and $200 customers' drafts which have already been referred to. We held in Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458, that: "Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime." See, also, Adams v. State, *supra*. This contention is without merit.

As to the defendant's contentions that there was error in the giving of instructions Nos. 3, 4, and 11½, we have examined all of the instructions, including the three complained of, and think they come within the rule that we have so often announced, namely: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism." Fullerton v. State, 148 Neb. 811, 29 N. W. 2d 618. However, we will separately discuss the three instructions complained of.

Instruction No. 3 submitted to the jury the essential elements of the crime charged and required the State to prove them beyond a reasonable doubt before the defendant could be found guilty. This instruction fully complied with the statute to which it relates, that is, section 28-540, R. S. 1943, and which has hereinbefore been fully discussed. We find no error in this instruction.

Instruction No. 4 correctly states the statutory elements of the crimes charged in counts one and two. As stated in Alt v. State, 88 Neb. 259, 129 N. W. 432: "In a criminal prosecution, the trial court in giving instructions may describe the offense in the language of

the statute." See, also, Harrison v. State, 133 Neb. 794, 277 N. W. 96.

The principle stated in instruction No. 11½ has been sufficiently answered in this opinion as it relates to the facts and crime here charged. It was properly given.

The sentence imposed is the maximum provided by the statute. Defendant contends this is excessive and asks us to reduce it under the authority provided by section 29-2308, R. S. 1943. There is nothing in this record that would lend itself to leniency. It is hard to conceive how a man, in so short a time, could so completely cast aside the moral code of civilized society and violate so many laws that have been enacted to safeguard it. We do not think the sentence excessive.

After careful consideration of the entire record we find the conviction and sentence should be affirmed.

AFFIRMED.

CHESTER WILSHUSEN, ALIAS C. C. WILSON, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.
31 N. W. 2d 544

Filed April 1, 1948. No. 32376.

1. **Criminal Law.** The rule is that to sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt.
2. ———. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it.
3. ———. Where an accused is identified by a witness who has had a reasonable opportunity to observe him such evidence is admissible and the probative value of such evidence is a question for the jury.
4. ———. Where corpus delicti is proved, an unsupported extrajudicial admission may be sufficient to prove the defendant's connection with the criminal act.
5. ———. A person charged with a felony may not be convicted upon his unsupported extrajudicial admission that a crime has

been committed, but such admission may be sufficient to prove his connection with the criminal act.

ERROR to the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Colfer, Russell & Colfer, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Walter E. Nolte,* for defendant in error.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

WENKE, J.

Plaintiff in error Chester Wilshusen, alias C. C. Wilson, defendant below, brings this error proceeding from the district court for Red Willow County seeking reversal of his conviction of the crime of breaking and entering a liquor store with intent to steal property of value therein. His motion for new trial having been overruled, defendant was sentenced to serve two years at hard labor in the Nebraska penitentiary. We will refer to the plaintiff in error as defendant.

The principal complaint relates to the sufficiency of the evidence. Defendant contends that the evidence relating to his identity is not sufficient to establish his connection with the crime charged and that the evidence of extrajudicial admissions is not sufficient to warrant his conviction.

To sustain a conviction the evidence must show, beyond a reasonable doubt, that the crime was committed and that the accused was the person who committed the act, or aided, abetted, or procured another to commit it. If the State fails to do so, the charges should be dismissed.

The evidence establishes that shortly after midnight of April 27, 1946, the police officers of McCook, Nebraska, discovered that the Rutt liquor store located at 114 West First Street in that city had been broken into

and some 21 or 22 cases of liquor valued at between four and five hundred dollars taken therefrom. The entering had been accomplished by tearing off the screen door and breaking in a wooden door located in the rear of the building. This screen door had been secured by two hooks and the wooden door by a bar. The cases of liquor removed had been stacked just south and at the west end of a sheet-iron fence extending west from the north side of the building. This sheet-iron fence was about 20 or 25 feet in length, six feet in height and extended within five feet of the alley. The liquor store faces east and is located on the west side of First Street. To the north are vacant lots. They extend to B Street which is north of the block. These vacant lots are 100 feet in width north and south. To the west and in the rear is an alley.

After the discovery the police officers, including the sheriff of Red Willow County, placed themselves in position to try and apprehend the parties who had broken into the liquor store and removed this liquor should they return to get it. One officer concealed himself south of the sheet-iron fence and near the cases of liquor. The sheriff, later joined by a police officer and one of the owners of the liquor store, parked his car on the north side of B Street, facing west, just about five feet west of the east side of the alley back of the liquor store if extended north across B Street.

As the officers were thus awaiting what might develop a tan or light-colored Hudson coupé came down B Street from the west and drove south into the alley, which is in back of the liquor store. As it turned into the alley its headlights were turned off. It then drove onto the vacant lots just north of the liquor store. Then one of the men got out. He walked back toward the west end of the sheet-iron fence where the stolen liquor was stacked and as he did so the car backed up to the same spot. The man walking had a flashlight which he flashed on the cached cases of liquor.

As this was happening one of the officers in the sheriff's car got out and started across the vacant lots. As he did so the coupé suddenly started up. The driver "gunned" it northeast across the vacant lots, drove through a fence located on the east and part of the north side thereof, across the curb and then speeded east down B Street to Main Street, turned south on Main Street and out of sight. The officer who had rushed out onto the vacant lots fired two or three shots at the car as it speeded by. The man who had gotten out of the car ran east along the north side of the liquor store and disappeared after he entered First Street.

"The rule is that to sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt." Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627.

"The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it." Andersen v. State, 141 Neb. 306, 3 N. W. 2d 447.

That the corpus delicti, or the body or substance of the crime, which in its primary sense is the fact that the crime has actually been committed, was proved by sufficient evidence is beyond question. The question remaining is the identity of the person or persons who committed it.

For this purpose the State offered the evidence of the sheriff. He testified that as he was sitting in his car parked on B Street, which was well lighted by street lights, that a tan or light-colored Hudson coupé came down B Street from the west and drove past his car at a speed approximating some 12 to 15 miles per hour; that the coupé was only occupied by the driver whom he observed; that later the same tan or light-colored coupé again came down B Street from the west and turned into the alley back of the liquor store; that it was then occupied by two men but the same man was driving; and that he again had the opportunity of observing him. Later, on July 14, 1947, while he was

being held in custody in the Federal Building in Pittsburgh, Pennsylvania, the sheriff identified the defendant as the driver of the tan or light-colored Hudson coupé and did so at the time of the trial.

The evidence shows that the sheriff had two opportunities to observe the driver of the car. Where an accused is identified by a witness who has had a reasonable opportunity to observe him such evidence is admissible and the probative value of such evidence is a question for the jury. See Buckley v. State, 79 Neb. 86, 112 N. W. 283; Lee v. State, 124 Neb. 165, 245 N. W. 445; Froding v. State, 125 Neb. 322, 250 N. W. 91; 23 C. J. S., Criminal Law, § 864, p. 73.

The sheriff further testified to voluntary admissions made by the defendant while they were returning from Pittsburgh, Pennsylvania, in the sheriff's car. The sheriff testified that defendant said he wished somebody would have "hollered" that they were the law, for he did not realize they were officers; that he had abandoned the car near Borger, Texas; that he looked for bullet holes in the car but did not find any; and that he asked what had ever been done to the other party.

It should here be stated that early on the morning of April 28, 1946, Jack B. Ponder was arrested in McCook and confined in jail for several days but was never charged with this crime but released to the California authorities for parole violation.

"Voluntary statements made by an accused to officers, while he is under arrest and in custody, tending to show his connection with the commission of the alleged crime, are admissible in evidence against him." Fields v. State, 125 Neb. 290, 250 N. W. 63. See, also, Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586.

While, as stated in Whomble v. State, *supra*: "Extrajudicial admissions against interest by one charged with a crime must be received and considered with caution

and are not sufficient of themselves to support a conviction."

Nevertheless, as stated in Fields v. State, *supra*: "This court has held on numerous occasions that, after the corpus delicti has been sufficiently established, voluntary confessions or statements made by the accused may be admitted in evidence for the purpose of connecting the accused with the commission of the offense. Ashford v. State, 36 Neb. 38; Bode v. State, 80 Neb. 74; Fouse v. State, 83 Neb. 258; Johnson v. State, 88 Neb. 565; Hardin v. State, 92 Neb. 298; Witty v. State, 105 Neb. 411."

We think what was said in Andersen v. State, *supra*, as to extrajudicial confessions is applicable to extrajudicial admissions. Therein we said:

"Where corpus delicti is proved, an unsupported extrajudicial confession may be sufficient to prove the defendant's connection with the criminal act.

"A person charged with a felony may not be convicted upon his unsupported extrajudicial confession that a crime has been committed, but such confession may be sufficient to prove his connection with the criminal act."

We find the evidence adduced at the trial sufficient to support the jury's verdict and that the conviction should be affirmed.

AFFIRMED.

IN RE ESTATE OF HATTIE L. DOWELL, DECEASED. THE COUNTY OF RICHARDSON, NEBRASKA, APPELLANT, V. LUELLA D. STALDER ET AL., APPELLEES.

31 N. W. 2d 745

Filed April 8, 1948. No. 32392.

Taxation. The words "to any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent," contained in section 77-2004, R. S. 1943,

do not refer to natural children exclusively. The provision includes persons coming within its terms, whether or not they are relatives of the blood.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Bayard T. Clark, Joseph C. Reavis, Walter R. Johnson, Attorney General, and *Homer L. Kyle,* for appellant.

Wiltse & Wiltse, for appellees.

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

CARTER, J.

This is an appeal from a judgment of the district court for Richardson County allowing the exemption of $10,000 in the assessment of an inheritance tax as provided in section 77-2004, R. S. 1943.

The evidence shows that Hattie L. Dowell died on April 26, 1946, leaving a will by which Luella D. Stalder inherited the sum of $13,127. It is established by the evidence that the mother of Luella D. Stalder died when the latter was approximately three years of age. Immediately thereafter Luella D. Stalder was taken into the home of her paternal uncle, M. L. Dowell, where she resided with her uncle and his wife, Hattie L. Dowell. She was treated as a daughter from that time onward and she thereafter treated the Dowells as her parents. She remained in the home of the Dowells until she married at the age of 28. The relationship continued until the time of the death of Hattie L. Dowell. The evidence is clear that for more than ten years before her death Hattie L. Dowell stood in loco parentis to Luella D. Stalder.

The record shows that Luella D. Stalder inherited an estate from her mother which was used in part for her support. Her father, J. W. Dowell, is still living and is reputed to be a man of some means. It is assumed by the appellant that Luella D. Stalder received

an exemption of $10,000 under section 77-2004, R. S. 1943, in her mother's estate and that she will be entitled to another $10,000 exemption in her father's estate at the time of his decease. It is argued that this precludes the allowance of the exemption under the terms of the statute in the present case. The trial court allowed the exemption and the county has appealed.

The statute provides in part: "When the beneficial interest to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or husband of the daughter, or any child or children adopted as such in conformity with the laws of the State of Nebraska, or to any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock, in every such case the rate of tax shall be one dollar on every one hundred dollars * * * in excess of ten thousand dollars received by each person."

The foregoing provision contemplates that persons falling within three classes are to be considered within the parental relation for the purposes of the inheritance tax law. The first is the actual relationship of parent and child, the second is the relationship created by adoption proceedings, and the third embraces any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent. It is the latter provision only that claims our attention in the present case.

It is the contention of the appellant that the provision with which we are here concerned applies only to illegitimate children and that it should be so interpreted. Such an interpretation would exclude one standing in loco parentis and leave within this class illegitimate children only whose relationship had been acknowledged for a period of ten years. The statute as written clearly intends no such meaning.

The inheritance tax statute, section 77-2004, R. S. 1943, was enacted in 1901. It must be presumed that the Legislature knew of the existence of section 30-109, R. S. 1943, which became a part of the statutes when the state entered the union in 1867. By this latter statute, a child born out of wedlock is an heir of the person who acknowledges in writing that he is the father of such child. Construing the two sections together, it would appear that a child acknowledged as provided in section 30-109, R. S. 1943, would fall within the first classification, rather than the third. If the statute be interpreted in accordance with appellant's views, we can see no reason for excluding illegitimate children who have been acknowledged in writing during the first ten years of their lives or within ten years of the death of the acknowledged father. If, as contended, the provision under discussion was intended to benefit illegitimate children only, it would be most unjust to exclude some acknowledged illegitimate children while including others. We do not think this was the legislative intent. If it had been the intention of the Legislature to restrict the third named classification to acknowledged illegitimate children, it would have been a simple matter to have expressly so stated.

The use of the words "any person to whom the deceased * * * stood in the acknowledged relation of a parent" indicates that its provisions were not limited to illegitimate children or even to blood relatives. It was clearly the intention of the Legislature to include any person including unacknowledged illegitimate children within the scope of the exemption if it could be established that an acknowledged relationship of parent and child existed over a period of ten years or more. Relationship by blood is not made a condition to the existence of the relationship of parent and child as the term is used in the statute. To confine the meaning of the words "any person" to natural children is not in accord with the evident legislative intent. Persons

standing in loco parentis for ten years prior to death are within the intent and scope of the provision. This construction of the statute has been generally adopted by the courts of the state of New York from which state our statute was taken. Matter of Beach, 154 N. Y. 242, 48 N. E. 516; In re Spencer's Estate, 1 Conn. Surr. (N. Y.) 208, 4 N. Y. S. 395; In re Capron's Estate, 30 N. Y. St. Rep. 948, 10 N. Y. S. 23.

In the absence of an express contrary intention, the adoption of a statutory provision from another state ordinarily carries with it the construction placed upon it by the courts of such other state. First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762. In applying this rule of construction, we find support for the interpretation we have announced.

The appellant argues that an exemption from each of two parents is all that was intended. No such meaning can be obtained from a reading of the act. If such a limitation is in the public interest, it is a matter for the Legislature and not the courts.

AFFIRMED.

ELMER C. GEE ET AL., APPELLEES, V. CITY OF SUTTON, CLAY COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

31 N. W. 2d 747

Filed April 8, 1948. No. 32389.

1. **Municipal Corporations.** Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received.
2. ———. In such case where services are accepted without protest, defendant must pay the reasonable value of the services. The principle applied is that of reimbursement, and the plaintiff can only recover the actual cost of the services rendered and

material furnished, without the allowance of profits, and not exceeding the legal rate of interest.

3. **Partnership.** Where a partnership is employed to perform services in accordance with its business, and certain partners superintend and supervise the work on the project, the partnership is not barred from charging compensation for such services as the same constitute part of the cost of doing the job, as distinguished from partners' profits.
4. **Interest.** Where the reasonable value of services rendered pursuant to an irregular contract can only be ascertained by an action at law, and interest thereon could not be computed with a reasonable degree of mathematical certainty, the legal rate of interest runs from the date of rendition of the judgment wherein the reasonable value of the services are liquidated.
5. **Trial: Appeal and Error.** Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Affirmed as modified.*

John A. Bottorf, for appellant.

Krebs & Sullivan, for appellees.

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

MESSMORE, J.

This is an action at law brought by the plaintiffs to recover from the defendant city the reasonable value of street resurfacing and repairs performed by a partnership of which they were members under an oral agreement with the city officials. The agreement failed to comply with the statutory requirements and was an irregular contract. Jury was waived and trial had to the court. The court entered judgment in favor of the plaintiffs and against the defendant in the amount of $2,139.01, with interest thereon at six percent per annum from and after July 1, 1945. Upon the overruling of the motion for new trial, defendant appealed.

The plaintiffs' amended petition, insofar as it need be considered on this appeal, alleged in substance that prior to October 26, 1944, plaintiffs consulted with the officials of the city with reference to repair and resurfacing of certain streets. An agreement was reached whereby six separate blocks were to be repaired and treated with armor coat surfacing, for which the plaintiffs were to receive the sum of 30 cents per square yard. When the work was completed a settlement agreement was entered into by the parties wherein plaintiffs agreed to accept 24 cents per square yard, or a total of $2,500. Thereafter, in June 1946, plaintiffs again met and conferred with the mayor and council with reference to some holes which appeared in some of the streets surfaced by it. It was agreed that plaintiffs should repair the holes and leave a stock pile of material for defendant's further use in repairing and maintaining the streets. Certain repairs were made and a stock pile of material was left, accepted, and used by the defendant. By reason of a change of personnel in the city administration, and for the further reason that the agreements and proceedings with reference to the services rendered by plaintiffs were not fully or properly recorded in the minutes of the city council, the matter has not been adjudicated. Plaintiffs prayed for a judgment of $2,500 and interest, as the reasonable value of the services rendered.

The defendant, by answer, in effect denied that any agreement was entered into by and between the city and the plaintiffs, and all other elements with reference to the repair and resurfacing claimed by the plaintiffs. Defendant admitted "That both parties are desirous of having this obligation settled and the only issue in this action is the reasonable value of said repairs and surfacing. That said matter has not heretofore been settled and paid by reason of the fact that the present Mayor and Council are all different individuals than were the officials of the city in 1945 * * * and proceed-

ings were not fully or properly recorded in the minutes of the Council." Defendant prayed for dismissal of the plaintiffs' petition.

For convenience the appellant will be referred to as the city and the appellees will be referred to as the partnership.

The record discloses that Arthur I. Gee, one of the partners, in October 1944 contacted the mayor and some of the councilmen of the city with reference to repairing and surfacing some of the city streets. After some consultation, six city blocks were designated to be surfaced. Two members of the council testified that one or two blocks were to be surfaced as an experiment, and not six blocks; that the cost would be $250 to $300 a block, and if the work did not stand up no charge would be made; and that no payment would be required until July 1, 1945. The partnership brought its equipment, material and workmen to the city and repaired and surfaced six city blocks. The work took six days. Arthur I. Gee in his testimony denied that he made any agreement that if the work did not stand up it would not have to be paid for; and that during the progress of the job he had conversations with the mayor and different members of the council. The mayor testified that he saw the surfacing being done from time to time during the progress of the work.

It is apparent that the defendant city, by its officers, permitted the repair and surfacing of six city blocks without objection or protest.

The trial court, on this issue, resolved the facts in favor of the partnership. We consider this appeal on the basis of the repair and surfacing of six city blocks.

Elmer C. Gee, a member of the partnership and a graduate construction engineer, testified that the work was commenced on October 26, 1944. The original understanding with the city for the surfacing was on the basis of 30 cents a square yard. The total items of cost, including profits and engineering, at 30 cents a

square yard as originally computed, made a total of $3,086. Subsequently, when the work was completed, members of the partnership met with the city council and agreed to accept $2,500 to settle the job, thereby taking off the profit. Subsequent to the completion of the surfacing, in June 1946, the partnership, after meeting with the council, ascertained some holes had developed in the surfacing. The partnership agreed to repair the same, and agreed to and did leave a stock pile of material for the city to use on the repair of the streets.

This witness further testified to items of $373.61, the amount actually expended for oil; $318.75 for gravel; and an item for labor in the amount of $302.40, which included transportation of the men to the work from Minden where they were housed due to war conditions. There was a discrepancy in the figures with reference to the labor, too trivial to be of consequence and not seriously contested by the city. An item of $496.86, with reference to technical skill, engineering and profit was eliminated by the court. We deem it unnecessary to discuss this item; it was properly eliminated as it constituted profit and is covered to some extent in the item of supervision. This witness further testified to an item of $859 for equipment rental for the time the equipment was used on the job, in the following particulars: The cost of the equipment used, its life expectancy, and the amount per hour rental value of each item of equipment for the time used. Also, he testified to an item of $735.38, as constituting the fair and reasonable cost of supervision of the project, designated as wages, expenses and car for the superintendent, $300; wages, expenses and pickup used by the foreman on the job, $200; and office expense in the amount of $235.38.

The city set up a chart in its brief with reference to the items of equipment; the initial cost of equipment used; the life expectancy of equipment as given by the

partnership; the hours of use; the rental basis per hour; the total rental charged by the partnership for use; the actual cost to the partnership per hour for machinery; and the actual cost to the partnership for machinery used and repairs, including $9 for heating oil, making the total of the actual cost to the partnership, from the city's viewpoint, for the machinery used, and repairs, $89.05.

The two items testified to by the witness Elmer C. Gee, the rental use of equipment and the supervision of the project as heretofore mentioned, are the principal items which the city attacks on this appeal. The trial court reduced the item for the rental use of the equipment from $859 to $644.25, and reduced the item of supervision from $735.38 to $500.

It is conceded that the city had the authority to enter into a contract for street improvements such as in the instant case. There is no fraud shown, and while there is an attempt made on the part of the city to show that the partnership was not acting in good faith or no benefits were received, by evidence showing the condition of the surfacing and its deterioration, this evidence failed to convince the trial court that the partnership was not acting in good faith or that the city did not receive benefits from the work.

The sole issue involved in this appeal is the reasonable value of the street repairs and surfacing done by the partnership for the city. The rule that governs in the instant case is expressed in the following authorities.

In State ex rel. City of Tekamah v. Marsh, 108 Neb. 835, 189 N. W. 381, it was said that: "* * * where the contract was within the general powers granted the city, and it has received and retained the benefits thereof, natural justice requires that it pay to the extent of the benefits received; but the doctrine must not be extended, and its application should be considered with

particular regard to the facts of each case in which it is recognized."

Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. See Lincoln Land Co. v. Village of Grant, 57 Neb. 70, 77 N. W. 349.

The rule is based upon the doctrine that one shall not take and keep another's property inequitably, even though no legal right to recover exists. While the action is legal in form, the doctrine upon which this court and other courts have allowed recovery in such cases is essentially equitable in its nature. Under strict legal principles no recovery could be had upon the contract, but it would be manifestly unfair that one party should have the benefit of the labor and property of another without recompense. Generally, the courts will not allow profits which might have been obtained if the contract had been legal and valid, and if recovery were had according to its terms, but confines recovery to such sum as will reasonably compensate the party whose services or property have been devoted to the advantage of the other.

In Miles v. Holt County, 86 Neb. 238, 125 N. W. 527, there appears language to the following effect. In such case where services are accepted without protest, defendant must pay reasonable value of services. The principle applied is that of reimbursement; and the plaintiff can only recover the actual cost of the services rendered and material furnished without the allowance of profits, and not exceeding the legal rate of interest.

The question presented in such cases is whether or not one who furnishes material and performs services for a county, or in this case a municipality, under an unenforceable contract from the result of which services the municipality has secured a municipal gain, can

be permitted to recover the value thereof, and if so, what is the rule to ascertain such reasonable value. See, also, Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287; Rogers v. City of Omaha, 76 Neb. 187, 107 N. W. 214, and on rehearing, 80 Neb. 591, 114 N. W. 833.

With reference to the item as to the rental value of the equipment heretofore appearing, the city contends the trial court, without consideration of the actual cost of the equipment, substituted its personal knowledge of the life expectancy of the machinery; that the partnership is entitled to the actual cost of the equipment as used on the project, plus the expense of operation; and that the actual cost is the basis of recovery. Reference is made to Miles v. Holt County, *supra*.

The evidence on this item given by the witnesses for the partnership is as to the standard practice in the industry. The rental value of equipment is based upon the time on the job, not the use on the job but the time it is tied up from other work. The figures given constituted the reasonable rental value of the equipment by the hour use for the same, which is normally charged to small jobs. A witness for the city, an engineer, testified that the items as detailed by the witnesses for the partnership were the fair and reasonable cost for the type of work then engaged in.

The amount deducted by the court as profit was in excess of the amount the partnership claimed as profit on this item, which was 16 percent, and more than the city's expert allowed as profit, which was 15 percent. The city, by its expert witness, made no attempt to refute the reasonableness of this item.

Considering the standard practice in the industry as to the rental value of equipment, and the evidence with reference to the profit as testified to by the several witnesses and which the court eliminated, the court did not err in determining this item under the authorities as heretofore cited.

The city contends that the item for supervision of

the project wherein the court allowed an amount of $500, constitutes wages, expense, and transportation of two members of the partnership, one acting as superintendent and one as foreman of the project, and that the city is under no obligation to pay this amount. In this connection the city cites Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29, as follows: "A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services." The case was one of accounting of the affairs of a partnership.

The case of Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N. W. 2d 641, is also cited, as follows: "Ordinarily, when a partner renders service to the partnership, as is required of him in the partnership contract, he performs his obligation as a member of the partnership, and is not acting as a servant or employee." In this case, one partner was employed as the manager of the partnership by the other partners. This was a compensation case.

Section 67-318, R. S. 1943, is cited to the same effect.

The foregoing cited authorities are not pertinent to the facts in the instant case.

The testimony discloses that on a project such as here involved, supervision is necessary to obtain a proper result; the reasons are detailed in the evidence. This service was performed by two of the partners, one as superintendent, the other as foreman, and the city was charged certain compensation for this service. This service constituted a part of the costs of street surfacing, and would exist whether the workman was a partner or an employee. The city received the benefit of this work and service in the same manner and to the same extent as it was benefited by the work of other employees who worked in the construction of the street. This item was an element of cost, and not profit to the partnership. The authorities cited by the city are upon the issue of the right of a partner to recover from other

partners for personal services. We find no error on the part of the trial court in the allowance of this item. It goes to the issue here involved, the reasonable value of the street repair and surfacing.

The trial court allowed interest on the judgment rendered by it from and after July 1, 1945. The city contends the trial court erred in such respect.

In the case of Wittenberg v. Mollyneaux, 59 Neb. 203, 80 N. W. 824, this court refused allowance of interest until after the determination of the amount due on an action for breach of contract. This case was modified by Parkins v. Missouri P. Ry. Co., 76 Neb. 242, 107 N. W. 260, to the extent of allowing interest on breach of a contract where the amount to be recovered was capable of being determined by mathematical computation. It will be observed that the foregoing cases involved a breach of contract, as distinguished from the case at bar which involves the reasonable value of services rendered by the partnership to the city under an irregular contract, and are not pertinent to the factual situation in this case. It is apparent from the facts in the instant case that the amount of recovery could only be determined by suit at law. Interest on the amount could not be computed or ascertained by mathematical computation as of July 1, 1945, when the court found the amount to be due and allowed interest from that date.

"In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped; the amount of the claim must be known and determined, or readily determinable." 47 C. J. S., Interest, § 19, p. 30.

Where the reasonable value of services rendered is not ascertained and adjudication thereof is required, interest is allowable only from the rendition of judgment. This is especially true where the account was not rendered before suit, and a greater sum was claimed than was allowed. See 47 C. J. S., Interest, § 19, p. 30.

We hold that where the reasonable value of services rendered pursuant to an irregular contract can only be ascertained by action at law, and interest thereon could not be computed with a degree of mathematical certainty, the legal rate of interest runs from the date of rendition of the judgment. We conclude that the trial court erred in allowing interest from July 1, 1945, and should have allowed the regular rate of interest from the date of rendition of the judgment.

"Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence." Neill v. Dakota County, 140 Neb. 26, 299 N. W. 294. See, also, Donald v. Heller, 143 Neb. 600, 10 N. W. 2d 447.

For the reasons given in this opinion, the judgment of the trial court is modified to provide for the legal rate of interest from the date of rendition of the judgment, and as modified, is affirmed.

AFFIRMED AS MODIFIED.

HUGO MCAVOY, APPELLANT, V. JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY, LANCASTER, NEBRASKA, APPELLEE.

31 N. W. 2d 740

Filed April 8, 1948. No. 32374.

1. **Habeas Corpus.** Habeas corpus will not lie to discharge a person from a sentence of penal servitude when the court imposing the sentence had jurisdiction of the offense charged and the person of defendant, and the sentence was within the power of the court to impose.
2. **Criminal Law.** The judgment or sentence of a court of record in a criminal case, when challenged by habeas corpus, is supported by the usual presumptions of validity and regularity.
3. **Habeas Corpus.** Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judg-

ment sentencing a defendant. It cannot be used as a substitute for a writ of error. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.

4. ———. A relator cannot by habeas corpus collaterally attack increased punishment under the habitual criminal statute upon the ground that he was mentally incompetent at the time of a former conviction and sentence.

5. ———. In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine the questions of fact presented. But if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied.

6. ———. The sufficiency of the allegations of relator's petition to support a writ of habeas corpus allowed by virtue thereof may be questioned before making return thereto by a motion to dissolve or quash the writ.

7. ———. Such a motion admits all ultimate facts well pleaded in relator's petition as distinguished from conclusions of law appearing therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ dissolved or quashed.

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

Hugo McAvoy, pro se.

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Robert A. Nelson,* for appellee.

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

CHAPPELL, J.

On July 11, 1947, appellant, hereinafter called relator, filed a petition in the district court for Lancaster County, praying for a writ of habeas corpus. His petition alleged in substance that he was being unlawfully deprived of his liberty by virtue of a pretended judgment, sentence,

and commitment, rendered, imposed, and ordered by the district court for Chase County on October 31, 1945, after trial to a jury which found him guilty as charged in an information, copy of which was attached to the petition.

The information charged in substance that on or about January 30, 1945, in Chase County, State of Nebraska, Hugo McAvoy, under the name of J. H. McAvoy, did then and there unlawfully and feloniously make, utter, draw, and deliver a certain described no-fund check, with intent to defraud. The information also separately charged that he was an habitual criminal by reason of three separately described prior convictions for felonies, upon each of which he received a sentence of not less than one year in prison. Admittedly, upon trial to a jury, after previous appointment of counsel to represent him, and after his arraignment and plea of not guilty, a verdict was returned by the jury finding him guilty of the offense charged, and further finding that on two previous occasions he had been convicted of felony charges, for each of which he had been sentenced and committed to prison for terms of not less than one year.

He alleged that thereupon the trial court sentenced him to a term of ten years in the Nebraska State Penitentiary, but that such sentence was null and void because the maximum sentence which could have been imposed upon him for the offense charged was two years, and that since he had served that period, under the law he was entitled to be discharged from custody by respondent.

His petition also alleged in substance that the judgment, sentence, and commitment involved herein, were void because at the time of one previous sentence and commitment to prison for a term of not less than one year upon conviction of a felony, he was in such a state of mind, having had a nervous breakdown, that he knew nothing of the sentence until his power of reasoning had been thereafter restored.

The record discloses that on July 18, 1947, the trial court allowed the writ, which was duly served upon appellee, hereinafter called respondent. On return day, July 31, 1947, respondent filed a motion to dissolve the writ of habeas corpus and dismiss the petition for failure to state facts therein sufficient to constitute a cause of action. Upon the same day, respondent also filed a verified return to the writ.

On August 5, 1947, of the same term, the trial court made the following entry: "This cause now comes on to be heard on motion of defendant to dissolve writ of habeas corpus and to dismiss petition and is argued to the Court. Briefs to be presented by parties before submission."

On September 13, 1947, of the same term, the trial court entered the following order: "Motion of defendant to dissolve writ of habeas corpus heretofore issued herein and to dismiss petition having been heretofore argued, now on this day it appearing to the Court no briefs have been presented, by agreement of parties motion is submitted to the Court, on due consideration whereof, the Court doth sustain said motion and dismiss petition.

"It is therefore considered, ordered and adjudged by the Court that the writ of habeas corpus heretofore issued herein be and hereby is dissolved, and that petition filed herein be and hereby is dismissed."

Relator made no request for permission to plead further but appealed to this court, assigning as error in substance that: (1) The proceedings of his commitment to the state penitentiary were illegal because section 29-2221, R. S. 1943, governing the Habitual Criminal Act, is not found in the statutes under crimes and punishments but rather is found under the statutes governing criminal procedure, and (2) that his commitment to the penitentiary for a term of ten years was illegal and unlawful because the maximum sentence for the offense charged, as found in count one of the information, was two years' imprisonment, which was the maximum sen-

tence which could have been imposed upon him even under the Habitual Criminal Act. We conclude that those contentions cannot be sustained.

At the outset it should be stated that the statutes involved are section 28-1212, R. S. 1943, defining the offense charged for which, upon conviction, a maximum sentence of two years' imprisonment is ordinarily authorized, and section 29-2221, R. S. 1943, of the Habitual Criminal Act, which under circumstances such as were presented to the trial court upon relator's conviction, authorized a minimum sentence of ten years' imprisonment for the offense charged, which the court lawfully imposed.

In that connection, this court held in Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, that: "The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.

"The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties.

"It is proper to set out the aggravation of a criminal offense justifying the heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information."

Relator relies upon Kuwitzky v. O'Grady, 135 Neb. 466, 282 N. W. 396, and Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. However, both of those cases are clearly distinguishable from the case at bar, and cannot control disposition thereof favorable to relator. In those cases, the offender was sentenced to serve one term for the crime or offense charged and another term for being an habitual criminal, as if it were a separate crime or offense, instead of imposing but one valid sentence for the crime charged. The sentence imposed upon relator was strictly within the latter category

and as authorized by the habitual criminal statute.

This court has held that: "Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose." Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124. That decision controls relator's primary contention in the case at bar.

With regard to the question of relator's alleged mental condition at the time of a previous sentence, this court has held that: "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error.

"The right of a person to the writ of habeas corpus depends on the legality or illegality of his detention, and this in turn depends on whether the fundamental requirements of law have been complied with, and not at all on the guilt or innocence of the prisoner." In re Application of Tail, Tail v. Olson, 145 Neb. 268, 16 N. W. 2d 161.

It was held in Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82, that: "The judgment or sentence of a court of record in a criminal case, when challenged by habeas corpus, is supported by the usual presumptions of validity and regularity. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void."

That opinion also sustained the constitutionality of the Habitual Criminal Act, and affirmed that it did not set out a distinct criminal offense, but provided that the repetition of criminal conduct aggravated the guilt and justified heavier penalties.

The case of Cochran v. Simpson, 143 Kan. 273, 53 P. 2d 502, presented a situation similar to the one at bar. The court in effect held therein that a relator could not by habeas corpus collaterally attack increased punish-

ment under the habitual criminal statute upon the ground that he was allegedly of unsound mind at the time of a former conviction and sentence, since in such event the conviction might have been voidable but was not void.

In that opinion the court also quoted with approval from Weihofen on Insanity as a Defense in Criminal Law, p. 257, as follows: "Where the defense of irresponsibility by reason of insanity was not raised at the trial the reviewing court will not consider the question on appeal or habeas corpus."

In McMahan v. Hunter, 150 F. 2d 498, it was said: "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, and a judgment of sentence by a court of competent jurisdiction may not be collaterally attacked on that issue in a habeas corpus proceedings." See, also, State ex rel. Novak v. Utecht, 203 Minn. 448, 281 N. W. 775.

It follows that if the relator's allegations aforesaid were true, they could not be sufficient to state a cause of action in a habeas corpus proceeding.

In 25 Am. Jur., Habeas Corpus, § 126, p. 236, it was said: "It is a settled rule that a petition for writ of habeas corpus should contain a statement of the facts which constitute the illegal restraint, and that the failure to allege a ground of illegality precludes consideration thereof by the court. The statement should consist of direct averments of ultimate facts, as distinguished from conclusions of law, and the circumstances set forth must be such as to warrant the discharge of the prisoner in case they are established."

As held in In re Application of Tail, Tail v. Olson, *supra*: "The petition must set forth the facts constituting the illegal detention. It is not sufficient to state the reason the detention is illegal in the form of conclusions. It should show in what the illegality consists and this should be done by stating facts as contradistinguished from mere conclusions of law.

"In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be denied."

A motion to dissolve a writ of habeas corpus is the equivalent of a motion to quash. As stated in 29 C. J., Habeas Corpus, § 170, p. 153: "The sufficiency of the petition upon which it was granted to support the writ may generally be questioned before making a return or answer thereto, by motion to quash the writ, but not regularly by a demurrer, although a demurrer in form may be allowed to serve the purpose of a motion to quash or to dismiss."

In 39 C. J. S., Habeas Corpus, § 86, p. 650, it was said: "On a motion to quash the writ, the allegations of the petition are deemed admitted, and the usual presumptions in support of the jurisdiction of a court of general jurisdiction whose proceedings are collaterally attacked will be made."

Also, in Ferris, Extraordinary Legal Remedies, § 42, p. 61, it was said: "Where the petition is not sufficient to warrant discharge, the writ should be quashed."

Although not assigned as error, the statement is made in relator's brief that respondent did not produce relator's body before the court, and that he had no notice that a motion to dissolve had been filed. The record heretofore quoted, which has the import of verity, belies that statement. In any event, as stated in Jackson v. Olson, *supra:* "It would have been a futile act to have produced the petitioner before the court, when it was apparent to the court that even if his charges were sustained, the court would be required to deny the writ." The statement has application here because no writ

should have been allowed, and, having been erroneously allowed, it should have been dissolved.

Clearly, plaintiff's petition contained no allegations which if admitted could by any construction lawfully justify his discharge from custody.

The judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

FAY E. WILLIAMS, APPELLANT, v. MELVIN V. HALLGREN ET AL., APPELLEES.
31 N. W. 2d 737

Filed April 8, 1948. No. 32287.

1. **Injunction: Attorney and Client.** A recovery of counsel fees and costs incurred by the trial of a case will not be allowed as elements of damage in a suit on a bond given for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case.
2. ———: ———. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees and costs incurred by the trial of the case are proper to be allowed as damages caused by an injunction wrongfully issued.
3. ———: ———. A restraining order not being one of the main issues of a case, damages in the way of attorney's fees and costs incurred by its wrongful issuance are limited to those incurred in securing its dissolution, as distinguished from those incurred in the trial of the principal issues involved.

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

Paul Rhodes, Mothersead & Wright, and *R. G. Simmons, Jr.,* for appellant.

F. J. Reed, for appellees.

Heard before PAINE, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and LIGHTNER, District Judge.

WENKE, J.

Appellant Fay E. Williams, plaintiff below, brought this action in the district court for Morrill County to recover attorney's fees and court costs as damages on a bond given for a temporary restraining order. His motion for new trial having been overruled, he appeals from an order sustaining the motion of the appellees, Melvin V. Hallgren, Frank Thomas, and Charles A. Tolle, for a directed verdict. For convenience and clarity the appellant will herein be referred to as Williams; the appellee Melvin V. Hallgren, as Hallgren; and the appellees Frank Thomas and Charles A. Tolle, as sureties.

The record discloses that on October 11, 1932, the Emerson-Brantingham Implement Company, a corporation, obtained a judgment against Hallgren in the district court for Morrill County in the sum of $1,277.04 and costs. On October 29, 1943, this judgment was assigned to Williams. Thereafter, on November 13, 1943, Williams caused an execution to be issued on this judgment and levied upon certain personal property.

Subsequently, and apparently because of the execution being issued and levied, Hallgren brought an action in the district court for Morrill County against Williams, Archibald M. Webb, and Archibald M. Webb as sheriff of Morrill County. This action was filed on November 26, 1943. It sought to have the judgment entered in favor of the Emerson-Brantingham Implement Company and assigned to Williams decreed to be void and prayed that it be vacated, set aside, and canceled. It also sought to have the court declare that Williams was holding the judgment in trust for Hallgren and asked to have the amount determined, if any, to which Williams was entitled and that Hallgren be entitled to settle and satisfy the judgment upon the payment of that amount. It further asked that the defendants be enjoined from taking any action for the collection thereof and that they be restrained from

doing so pending further order of the court.

A temporary restraining order was issued on November 26, 1943, "* * * restraining the defendants, * * * from taking any steps or doing any act toward the inforcing or collection of a certain judgment entered in the District Court of Morrill County, Nebraska in favor of Emerson-Brantingham Implement Company, a corporation, and against Melvin V. Hallgren, and they and each of them are restrained from selling any property levied upon by execution issued upon the aforesaid judgment until further order of the court, * * *."

To put into effect this restraining order Hallgren, as principal, and his sureties executed their bond conditioned: "* * * that the said Melvin V. Hallgren shall pay to the defendants all damages which they or either of them may sustain by reason of said temporary restraining order if it be finally decided that the temporary restraining order ought not to have been granted." Without hearing, this temporary restraining order was kept in force until the case was tried on its merits.

The case was tried on its merits on January 3 and 4, 1944, and the court found that Williams neither held the judgment in trust for Hallgren nor was the judgment open to attack. It thereupon entered its decree holding the judgment to be valid and not subject to attack, dismissed Hallgren's petition, and dissolved the temporary restraining order. No appeal was taken therefrom.

We will neither set out nor discuss the court's findings on the petition of intervention of Theron R. Hallgren, special administrator of the estate of Lillian J. Hallgren, deceased, as it relates to the property levied upon, or the decree entered thereon as they are not material to the issues herein involved because the restraining order was entered on the application of Hallgren and not on the application of the intervener.

On July 29, 1944, Hallgren filed his petition seeking to obtain either a new trial or an order modifying the

decree entered by the court pursuant to the trial had on January 3 and 4, 1944. On March 27, 1945, the court denied Hallgren the relief asked but did enter an order modifying its former decree. This, on appeal, we held it did not have authority to do. See Hallgren v. Williams, 146 Neb. 525, 20 N. W. 2d 499.

If the appellant is entitled to recover we have held: "In an action on a bond to pay all damages resulting from a preliminary restraining order, if wrongfully granted, obligees may recover expenses incurred in procuring the dissolution of the order, including reasonable counsel fees, where liability therefor is properly incurred." Meeske v. Baumann, 122 Neb. 786, 241 N. W. 550. As stated in Gibson v. Reed, 54 Neb. 309, 75 N. W. 1085: "* * * Gibson was entitled to recover all the reasonable and necessary attorney's fees, costs, and expenses which he had sustained, or for which he had become liable, in resisting and attempting to discharge the injunction proceeding."

As to the right to maintain an action for damages in this type of case we have set forth the principles applicable thereto in Trester v. Pike, 60 Neb. 510, 83 N. W. 676, as follows:

"A restraining order not being one of the main issues of a case, damages in the way of attorney's fees for its wrongful issuance are limited to the expenses incurred in securing its dissolution, as distinguished from such expenses incurred in the trial of the principal issues involved.

"It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees for the trial of a case are proper to be allowed as damages caused by an injunction wrongfully issued.

"A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case."

As stated in Jameson v. Bartlett, 63 Neb. 638, 88 N.

W. 860: "The rule established by a multitude of decisions is that expenses necessarily incurred in obtaining a dissolution of the injunction may be recovered in an action on the bond, and that reasonable counsel fees are to be regarded as part of such expenses. But it is equally well settled that expenses paid or incurred for professional services in defending the main action are not ordinarily damages which the obligee of the bond has sustained by reason of the injunction. Bolling v. Tate, 65 Ala., 417; Elder v. Sabin, 66 Ill., 126; Alexander v. Colcord, 85 Ill., 323; Robertson v. Smith, 129 Ind., 422; Bullard v. Harkness, 83 Ia., 373; Aiken v. Leathers, 40 La. Ann., 23; Lamb v. Shaw, 43 Minn., 507; Hovey v. Rubber-Tip Pencil Co., 50 N. Y., 335; Newton v. Russell, 87 N. Y., 527; 16 Am. & Eng. Ency. Law (2d ed.), 469, note 1."

As stated in 43 C. J. S., Injunctions, § 315, p. 1103: "The rule has been laid down without qualification that, if the dissolution of an injunction results merely from the defense and trial on the merits and no effort to obtain such dissolution otherwise is shown to have been made, there can be no allowance for attorney's fees." And at page 1099: "Costs incurred in the main action are recoverable, if the injunction was the sole relief sought therein; but not if the injunction was a mere incident to such action, as least not unless the injunction rendered the trial of the action more difficult and expensive than it would otherwise have been."

Here no effort was made to vacate the restraining order, except as the trial of the main issues affected it. Therefore, we must examine the petition of Hallgren filed November 26, 1943, to ascertain if injunctive relief was its primary purpose or if only auxiliary thereto. In his petition Hallgren sets forth facts by which he claims the judgment is either void, or that Williams is the trustee thereof for Hallgren. He asks that the judgment be either vacated, set aside, and canceled or that the sum, if any, which Williams is entitled to so re-

ceive as trustee be determined and Hallgren be given the right to satisfy the judgment by the payment thereof. The prayer also asks that the defendants be enjoined from taking any action seeking to collect the judgment pending further order of the court.

It was stated in Hallgren v. Williams, *supra*: "The restraining order was issued to protect the property of the plaintiff from sale pending a determination of the validity of the judgment." The principal relief sought by Hallgren was to have the judgment either held to be void or to be held in trust by Williams. The injunctive relief asked was only in aid thereof. Its office was to hold the property in status quo while these issues were being determined.

In Iowa where similar rules are applicable that court stated in Chrisman v. Schmickle, 209 Iowa 1311, 230 N. W. 550: "The test generally applied in this state is to strike the prayer for injunction, and then ascertain from what is left whether a cause of action remains. Thomas v. McDaneld, 77 Iowa, 299."

Applying that test to the case at bar it becomes clear that the injunctive relief asked is only auxiliary to the main cause of action stated, that is, to have the judgment declared void or to have Williams declared trustee thereof for Hallgren.

We quoted in First Nat. Bank of Harvard v. Hockett, 2 Neb. (Unoff.) 512, 89 N. W. 412, the following: "In Leonard v. Capitol Insurance Company, 70 N. W. Rep. (Ia.), 629, it was held that in an action to vacate a judgment and to enjoin an execution thereon the injunction is merely incidental to the main relief sought." See, also, Jameson v. Bartlett, *supra*.

Of course, the proceeding on appeal to this court, reported as Hallgren v. Williams, *supra*, which had the effect of keeping the order of dissolution of January 4, 1944, in effect, stands in the same position. It gave no greater right than the order which it preserved.

We find the trial court's order sustaining the motion

for a directed verdict was proper and is therefore affirmed.

AFFIRMED.

WILLIAM F. GRUBER, APPELLANT, V. ERNEST C. STICKELMAN, DOING BUSINESS AS STICKELMAN LIVESTOCK COMMISSION COMPANY, APPELLEE.
31 N. W. 2d 753

Filed April 8, 1948. No. 32339.

Workmen's Compensation. The intent of section 48-121, R. S. Supp., 1947, of the Workmen's Compensation Act, as it relates to an accidental injury to an eye, is to compensate and indemnify the owner of an eye, capable of industrial use and injured in industry, to the extent therein provided for the loss occasioned thereby.

APPEAL from the district court for Dawson County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

McKillip, Barth & Blevens, for appellant.

W. A. Stewart, Jr., and *William S. Padley,* for appellee.

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

WENKE, J.

Appellant, William F. Gruber, instituted this claim before the Nebraska Workmen's Compensation Court seeking to recover compensation because of injuries allegedly suffered in an accident which he claims happened while he was working for the appellee, Ernest C. Stickelman. Recovery was allowed in the compensation court but upon appeal to the district court for Dawson County it was denied. His motion for new trial having been overruled, appellant brings the cause here for review.

The appeal presents the question of whether or not, based on the evidence produced at the trial, the decision of the district court is correct. This being a workmen's compensation case, under the rule established in the case of Werner v. Nebraska Power Co., *ante* p. 408, 31 N. W. 2d 315, the cause will be considered de novo upon the record.

The record discloses that appellant lives at Gothenburg, Nebraska. For some two or three years prior to October 6, 1945, he had been employed from time to time by the appellee, an auctioneer. Appellee was doing business as the Stickelman Livestock Commission Company of Gothenburg and engaged in the selling of livestock, machinery, et cetera, on a commission basis. For this purpose he held sales about six or seven times a month. Appellee testified that appellant was not a regular employee but that he was hired for a day at a time and if he came back on any sale day and they needed help he would be employed. The record indicates that during these two or three years appellant had been hired and worked at all sales held by the appellee. For working at each sale he received either $6 or $7 per day depending on the length of time that the sale would last. On October 6, 1945, there was a cattle sale and appellant was hired and worked on that day. His work consisted of sorting cattle and writing tickets. His wage for the day was $7.

Under this situation appellant was not a farm or ranch laborer within the provisions of section 48-106, R. S. Supp., 1947, nor a casual employee as limited by section 48-115, R. S. 1943.

Neither was the employment seasonal or dependent upon the weather nor was it continuous as referred to in section 48-126, R. S. 1943.

It was employment within that part of section 48-126, R. S. 1943, which provides: "Wherever in this act the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed

under the contract of hiring in force at the time of the accident, * * *." See, Davis v. Lincoln County, 117 Neb. 148, 219 N. W. 899; Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220; Cole v. M. L. Rawlings Ice Co., 139 Neb. 439, 297 N. W. 652; and Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788.

The accident happened on Saturday, October 6, 1945, while the appellant was engaged with a fellow employee, Homer Trimble, in sorting some 400-pound calves. For this purpose Trimble was using an ordinary rake handle as a prod. While he was so using it one of the animals became excited and kicked. This somehow caused the pole to be swung around and resulted in it hitting the appellant a sharp blow diagonally across his right eye.

The blow bruised the skin where the handle hit and made a slight cut in the eyebrow. It caused some blood to flow which Trimble wiped off with his handkerchief. Appellant testified the blow caused severe pain. He described it as a piercing or tearing pain which resulted in a severe headache. This headache lasted for several days. Appellant continued to work that day and did not report the accident to his employer.

That night, after his work was over, he went to see Dr. Stevenson, who is a general practitioner in Gothenburg. He did not find Dr. Stevenson in his office. However, appellant's wife, who is a practical nurse, was at that time working in the doctor's office. She put merthiolate on the eye and applied cold packs thereto. She continued this same treatment on Sunday. On Monday, October 8, 1945, appellant went to Dr. Stevenson's office and the doctor then examined the eye. He found a bruised condition over the right eye and across the bridge of the nose and on the right cheek just below the eye. There was a slight cut in the eyebrow close to the bridge of the nose. He advised appellant to go home, keep quiet, and continue to apply the cold packs to his eye. He prescribed this treatment to see if the blurred vision and severe pain, of which appellant was

complaining, would clear up. He again examined appellant's eye on Thursday of the same week and, as the vision had not improved, advised continuation of the same treatment, plus vitamin K.

Appellant worked for appellee at sales held on October 13, 18, 20, and 27, 1945. He reported the accident to appellee's son, Ray Stickelman, on either October 13 or 20, 1945. Ray was a foreman at the sales barn and appellant's immediate supervisor. He also reported it to appellee on October 27, 1945. Because of his doctor's advice not to do so, appellant did no work after October 27, 1945, until February 2, 1946. Thereafter he was advised it would be all right to work if he was careful and avoided heavy lifting.

On October 27, 1945, Dr. Stevenson again examined appellant's eye. Because the condition of the eye was getting worse he advised appellant to see a specialist. On October 29, 1945, appellant consulted Dr. Foote of Hastings. Subsequently he also consulted Dr. Harvey of Gothenburg, Drs. Cassity and Judd of Omaha, and Dr. D. D. Sanderson of Lincoln.

Dr. Stevenson testified that when he examined appellant's right eye on October 8, 1945, he found no visible evidence of injury on the exterior of the eyeball but found a hemorrhage in the retina and that the retina did not show up as clear as it should; that there was a blurring or cloudy appearance in the eye; that the vision thereof was disturbed; and that subsequent examinations disclosed this condition to be getting worse. He further testified that from the evidence he found that the blow which struck appellant's right eye was "a good hit" and caused the trouble in his eye.

Dr. D. D. Sanderson, who is an eye specialist, first examined the appellant's right eye in July of 1946. He testified that the loss of sight in this eye was due to an injury to the optic nerve; that the damage was traumatic resulting from pressure on the front of the eyeball rupturing the nerve in the back thereof; and that it

was caused by an accident. Dr. R. H. Rasgorchek, an eye specialist of Omaha, who, in order to testify for appellee, examined appellant's eyes on December 5, 1946, admitted the condition could have been caused by trauma.

The evidence establishes that the appellant is practically blind in his right eye and that he has permanently lost the industrial use thereof. Even Dr. Rasgorchek testified the appellant's vision in his right eye is very poor, being 20/800. He further testified that 20/200 is regarded as industrial blindness. From the evidence in the record we can arrive at no other conclusion than that the appellant has permanently lost the sight in his right eye as a result of the blow received in the accident on October 6, 1945.

In this respect we have not overlooked the testimony of Dr. Rasgorchek that he did not think the visual deficiency was due to trauma but due to corneal astigmatism, which he testified appellant had had since birth. However, the evidence establishes that the appellant, who was 55 years of age at the time of the accident, had never had any trouble with his eyes prior thereto. While it appears that some four or five months before the accident he had purchased glasses at a drug store to enable him to read fine print or writing, however, in all other respects he has always had the full use of his eyes. Both Dr. Stevenson and Dr. Sanderson were of the opinion that the condition of the right eye was not caused by astigmatism. We come to the conclusion that corneal astigmatism was not the cause of the deficiency in the vision of appellant's right eye.

We said in Ames v. Sanitary District, 140 Neb. 879, 2 N. W. 2d 530: "It is to be observed that our statutes nowhere define the characteristics and powers of the normal eye. The obvious intent thereof is to compensate and indemnify the owner of an eye capable of industrial use and injured in industry to the full extent of his industrial loss occasioned thereby." See, also,

Bolen v. Buller, 143 Neb. 237, 9 N. W. 2d 204.

Here the evidence establishes that appellant has lost all practical use of his right eye, having less than one percent of normal visual efficiency, because of the accident and that the condition is permanent and will continue to get worse. Dr. Sanderson testified that he attempted to make a correction but the condition could not be improved, even with powerful lenses, because it would take telescopic lenses and they would not give much benefit. In regard thereto Dr. Rasgorchek testified: "I believe it is possible to correct the vision of *right* right eye, but it is questionable whether or not with such a high refractive error that his right eye has, that it would be possible to correct that vision to match up with the left eye." Thereafter he went on to testify that for all practical purposes the two eyes could not be matched and normal vision established. We do not think the evidence establishes that the appellant's eyes could be restored to their former use.

In any event, in Otoe Food Products Co. v. Cruickshank, 141 Neb. 298, 3 N. W. 2d 452, we said: "In an analysis of section 48-121, Comp. St. 1929 (now section 48-121, R. S. Supp., 1947), we see nothing in the act indicating an intention on the part of the legislature that disability after correction should be the basis for awarding compensation, where there has been an eye injury. If such had been the legislative intent, the act would no doubt have been drafted to so provide. We should not, by construction, put into a law provisions which it does not contain, nor read into it a meaning not intended by the legislature. If the act is faulty, the correction should be made by the legislature and not by the court. We see no more logic in holding that the legislature intended to base disability in an eye case on the condition of the eye after correction than in a leg or arm case where compensation should be awarded on the extent of disability after the attachment of a brace or other appliance. The fact that glasses are

required to restore vision is evidence of the permanency of the injury, and whether artificial means may partially or even wholly restore sight, it nevertheless cannot obliterate the effect of the accident causing the injury."

Section 48-121, R. S. Supp., 1947, effective August 10, 1945, provides, insofar as here material, as follows: "(3) For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; Provided, however, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained, viz: * * * For the loss of an eye, sixty-six and two-thirds per cent of daily wages during one hundred and twenty-five weeks. * * * Compensation under this subdivision shall not be more than eighteen dollars per week, * * *."

From the evidence it appears that appellant was unable to work from October 27, 1945, to February 2, 1946, by reason of his doctor's orders and for that period is entitled to be paid at the rate of $18 per week for temporary total disability. See Poast v. Omaha Merchants Express & Transfer Co., 107 Neb. 516, 186 N. W. 540. The evidence also establishes that appellant lost his right eye within the intent and meaning of section 48-121, R. S. Supp., 1947, and commencing on February 2, 1946, is entitled to be paid $18 per week for 125 weeks because thereof.

Section 48-120, R. S. 1943, provides in part as follows: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, * * * not, however, to exceed the regular charge made for such service in similar cases; * * *." The evidence establishes that appellant had expenses of $247.75 in connection with medical services reasonably necessary in treating the injury to his eye and that these are properly chargeable to the appellee.

The judgment of the lower court is therefore re-

versed with directions for it to enter an award in favor of the appellant and against appellee in accordance herewith, that is, for temporary total disability at the rate of $18 per week from October 27, 1945, to February 2, 1946; for the loss of his right eye the sum of $18 per week for 125 weeks commencing February 2, 1946; for expenses had in obtaining reasonable medical services in connection with treating the eye the sum of $247.75; and costs of this proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

TIMOTHY IRON BEAR, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

32 N. W. 2d 131

Filed April 28, 1948. No. 32474.

Criminal Law: Appeal and Error. Where a defendant in a criminal proceeding negligently fails to file a transcript and petition in error in this court within three calendar months after the rendition of the judgment or the making of the final order complained of, as required by section 25-1931, R. S. 1943, a motion to dismiss the petition in error must be sustained.

ERROR to the district court for Sheridan County: LYLE E. JACKSON, JUDGE. *Error proceedings dismissed.*

Charles A. Fisher, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for defendant in error.

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

CARTER, J.

This case is before the court on the motion of the Attorney General to dismiss the petition in error for the reason that the transcript and petition in error were not filed in this court within three calendar months after

the rendition of the judgment complained of. No other matter is presented by the motion.

The record discloses that the defendant was convicted of first degree murder, the jury fixing the penalty at death. On September 30, 1947, the trial court overruled defendant's motion for a new trial. Defendant was thereupon sentenced to death and the date of execution fixed as of December 30, 1947. On January 6, 1948, the sentence not having been carried out, the trial court fixed May 1, 1948, as the date for execution. The transcript and petition in error were filed in this court on March 30, 1948, six calendar months after the overruling of the motion for a new trial.

The controlling statute provides in part: "No proceedings for reversing, vacating or modifying judgments or final orders shall be commenced unless within three calendar months after the rendition of the judgment or making of the final order complained of; * * *." R. S. 1943, § 25-1931.

Numerous decisions of this court hold that the transcript and petition in error must be filed in this court within three calendar months after the rendition of the judgment or the making of the final order of which complaint is made. Unless such proceeding is taken within the time the Legislature has prescribed, the Supreme Court does not have jurisdiction to entertain it. Goodman v. State, 131 Neb. 662, 269 N. W. 383; Dimmel v. State, 128 Neb. 191, 258 N. W. 271.

The manner of securing a review in a criminal case is fixed by statute, and when the proper steps are not taken within the time prescribed, this court is without jurisdiction and the judgment of the lower court becomes final. The gravity of the crime and the severity of the sentence imposed cannot have the effect of extending the right of appeal beyond the time fixed by the controlling statute.

It is evident that counsel for the defendant assumed that the judgment sentencing the defendant to death was invalid because the date fixed for carrying out the sen-

tence was 90 days after its rendition, rather than the 100 day minimum period required by section 29-2301, R. S. 1943. The date of execution of a death sentence is not an essential part of the judgment. Iron Bear v. Jones, *post* p. 651, 32 N. W. 2d 125, released herewith. This being so, the inclusion of a premature date for the execution of the defendant does not in any manner invalidate the judgment and sentence, or operate to extend the time in which a writ of error must be sued out. Consequently, the filing of the transcript and petition in error in this court on March 30, 1948, was out of time and deprives this court of jurisdiction to review the case on its merits. The motion of the Attorney General to dismiss the petition in error is sustained, and Friday, July 9, 1948, between the hours of six o'clock a. m. and six o'clock p. m. of said day, is fixed as the date for carrying into effect the sentence of the district court.

ERROR PROCEEDINGS DISMISSED.

BEATRICE B. WHITNEY, APPELLANT, v. H. D. PENROD ET AL., APPELLEES.

32 N. W. 2d 131

Filed April 28, 1948. No. 32331.

1. **Actions: Conflict of Laws.** A mere difference between the laws of two states, whether in statutory provisions, or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state.
2. **Courts.** In states where gross negligence of the host is the sole criterion of liability to a guest, courts have taken jurisdiction and have given effect to the law of the state in which the negligent act took place where the highest degree of care is required of a host to avoid liability to a guest. Such differences with respect to the degree or criterion of negligence are no ground for refusal to entertain jurisdiction.
3. **Automobiles: Negligence.** Under the law of Missouri it is the duty of a driver of an automobile to keep a lookout on the

highway in the direction the car is going, in such manner as to see a condition which a person in the exercise of due care for his own safety and that of others would have seen under similar circumstances.

4. ———: ———. Under the law of Missouri the driver of an automobile is required to exercise the greatest degree of care in its operation, and injury to a guest by failure to exercise such care renders the operator liable.
5. ———: ———. Under the law of Missouri ordinary care upon the part of the driver of a motor vehicle requires him at all times and under all circumstances to anticipate and expect the presence of others on the highway, and to keep his machine always under control so as to avoid collision with them.
6. ———: ———. Under the law of Missouri the test of control is the ability to stop quickly and easily, and when this result is not accomplished, an inference is permissible that the car was running too fast, or that a proper effort to control was not made.
7. ———: ———. Under the law of Missouri the test of excessive speed is whether a motorist drove in a careful and prudent manner exercising highest degree of care with regard to situation and surroundings.
8. **Negligence.** 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.
9. ———. To be guilty of contributory negligence as a matter of law, the law requires that if the guest knew, or in the exercise of ordinary care would have known, of the danger threatened and that the driver was remiss in guarding against it, and the guest failed to warn the driver with reference thereto, the guest cannot recover.

APPEAL from the district court for Douglas County: WILLIS G. SEARS, JUDGE. *Reversed and remanded.*

Burbridge & Burbridge and *Clay C. Rogers,* for appellant.

Brown, Crossman, West, Barton & Quinlan, John R. Cockle, and *Rosewater, Mecham, Shackelford & Stoehr,* for appellees.

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

MESSMORE, J.

This is an action at law to recover damages for personal injuries received by the plaintiff while she was riding as a guest in an automobile driven by the defendant Morris E. Whitney when it collided with a truck owned by the defendant H. D. Penrod and driven by an employee. At the conclusion of the plaintiff's evidence, both defendants moved for a directed verdict or, in the alternative, dismissal of the plaintiff's case. The trial court sustained both motions and dismissed plaintiff's case. Upon the overruling of motion for new trial, the plaintiff appealed.

The amended petition of the plaintiff alleged in detail certain acts of negligence on the part of the defendants.

The amended answer of the defendant Penrod alleged certain acts of negligence committed by the defendant Morris E. Whitney which constituted the direct and proximate cause of the accident and the injuries complained of by the plaintiff, and further alleged that the defendant Penrod's driver was confronted with an emergency created solely by the negligence of the defendant Morris E. Whitney.

The defendant Whitney's amended answer denied generally the allegations of the plaintiff's amended petition; admitted the charges of negligence made by the plaintiff against the defendant Penrod, and that the plaintiff was riding as a guest in Whitney's automobile at the time of the collision; and charged the plaintiff was guilty of negligence directly contributing to cause the accident and that said negligence of plaintiff as a matter of law was more than slight.

Plaintiff's reply was a general denial.

We refrain from setting out the acts of negligence charged in the respective pleadings above, deeming it more advisable to discuss the same in the opinion with reference to the facts as shown by the record.

At the outset, it may be well to state that the plaintiff pleaded in her amended petition certain sections of

the statutes of the state of Missouri and decisions of the Supreme Court and the Court of Appeals of that state, pertinent to the factual situation in the instant case.

The defendant Whitney pleaded the guest statute of this state, section 39-740, R. S. 1943, which provides in part and substance that the owner of a motor vehicle shall not be liable for damage to a guest unless such damage is caused by the gross negligence of the owner or operator in the operation of such motor vehicle. The contention is that to enforce the Missouri law, which permits a guest in an automobile case to recover against the host for failure of the host to exercise the highest degree of care, would be in violation of the law of Nebraska and contrary to the public policy of this state. It is noted, such defendant does not brief this phase of the case. We are not prepared to say he has definitely abandoned the contention, so we determine it.

In Skillman v. Conner, 38 Del. 402, 193 A. 563, it is said: "This rule is aptly and concisely stated by Professor Beale in his Work on Conflict of Laws, (3 Beale's Conflict of Laws, 600). He says: 'It has now become axiomatic that substantive matters are governed by the foreign law and that procedural, or, as it is more usually expressed, matters relating to the remedy, are governed by the law of the forum.' * * * It, therefore, seems to be well settled that a mere difference between the laws of the two States, whether in its statutory provisions, or otherwise, will not necessarily render the enforcement of a cause of action arising in one State, contrary to the public policy of another State. Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198; Reynolds v. Day, 79 Wash. 499, 140 P. 681, L. R. A. 1916A, 432; Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314, 868; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; 3 Beale's Con. of Laws, 1651; Conflict of Laws, Restatement, 732; Goodrich on Con. of Laws, § 96."

"In several cases where, under the law of the forum,

gross negligence of the host is the sole criterion of liability to a guest, the courts have taken jurisdiction and have given effect to the law of the state in which the negligent act took place where ordinary negligence is sufficient for a host's liability to a guest, inferentially leading to the conclusion that such differences with respect to the degree or criterion of negligence are no ground for refusal to entertain jurisdiction." 11 Am. Jur., Conflict of Laws, § 183, p. 496. See Collins v. McClure, (Ohio App.) 49 N. E. 2d 181. See, also, Loranger v. Nadeau, 215 Cal. 362, 10 P. 2d 63, 84 A. L. R. 1264; Caine v. St. Louis & S. F. R. R. Co., 209 Ala. 181, 95 So. 876, 32 A. L. R. 793.

We conclude the defendant Whitney's contention in such respect is without merit.

The trial court having dismissed the plaintiff's cause of action in behalf of both defendants, we are required to analyze the evidence to determine whether or not it is sufficient under the law to have warranted submission of the plaintiff's case to the jury. We set forth a résumé of the pertinent and material evidence as disclosed by the record.

The record discloses that the plaintiff is a sister-in-law of the defendant Morris E. Whitney, and the wife of his brother Elmer Whitney. Morris E. Whitney is the owner of a maroon-colored Chevrolet. The defendant Penrod is the owner of a Chevrolet, ton and a half tractor-trailer truck, at the time of the accident driven by James Stephens, an employee. On September 26, 1945, the plaintiff, her husband, two of their children, and Morris E. Whitney started on a trip to Waynesboro, Mississippi. They left Omaha shortly after 11 a. m. Morris E. Whitney drove the car and exercised exclusive control over it. The plaintiff was seated to his right, her husband to her right in the front seat, and the two children occupied the back seat. The party passed through Oregon, Missouri, shortly after 2 p. m., to a point approximately four miles east thereof where a

filling station is located. They proceeded east on highway U S 275. This highway is 18 feet in width, paved, with a black line running through the center of it, dividing it into traffic lanes for east and west travel. The evidence and exhibits show the highway to be approximately level east of the filling station with a clear view for a quarter of a mile east and west; also show a grade, and at the top thereof the highway slopes to the east, then there appears a slight incline and a drop towards an incline a little steeper.

The owner of the filling station testified that he saw the Whitney car pass the filling station proceeding east at an estimated speed of 50 miles an hour. A few minutes prior thereto, Mr. Guy, driving a Model A Ford car, stopped at the station and before the Whitney car passed had left the station driving east on highway U S 275. After the Whitney car passed the filling station, the driver honked his horn for the right-of-way over the Ford car which was ahead of him at the hill. The Whitney car at that time was approximately 200 yards from the crest of the hill, or 200 to 300 yards distant from the filling station. After the honking of the horn he heard the setting of brakes which attracted his attention. He observed the Whitney car in the south lane of the highway, proceeding east over the crest of the hill until it got out of view. A truck was coming over the hill proceeding west. He figured that something might happen, and immediately drove east of the filling station and parked his car near the scene of the accident. The truck was headed west on the south shoulder of the highway and the right rear wheels of the trailer were on the pavement. A woman was lying unconscious about two feet north of the center line of the pavement. The Whitney car was standing at an angle on the pavement, with the front part a little to the north of where she was lying. There was glass, dirt, and water covering a radius of five or six feet in the center of the highway, with a small portion

of the debris to the south of the center thereof.

On cross-examination, this witness testified the accident took place one-eighth of a mile east of the filling station, 60 or 70 feet east of the brow of the hill. The Whitney car was facing southwest with part of it on the north shoulder of the highway. The truck was sitting parallel with the pavement.

The plaintiff testified, in substance, that she recalled passing through Oregon, Missouri, and seeing an old model car 150 to 175 feet ahead of the Whitney car on the same side of the highway going in the same direction. The Whitney car was proceeding at a speed of between 50 and 60 miles an hour. Morris pulled over to the north lane of the highway with two wheels of his car in that lane, far enough to see around the Ford, for the purpose of passing it. She saw a truck proceeding west, coming toward the Whitney car. She screamed to Morris and told him not to pass the Ford. He then immediately pulled his car back into the south lane behind the Ford car, applying his brakes and decreasing his speed. She next observed the truck on the north bank. She thought it was going to turn over. It jackknifed across the highway on the pavement directly in front of the Whitney car when the Whitney car was on its own side of the highway. It was at the time the Whitney car was getting close to the truck that she yelled. It appeared to her that they were going through the cab of the truck. When Morris pulled the car sharply to the left, that is the last she remembered.

On cross-examination she testified that she saw the truck leave the highway and pull out on the north side thereof onto the dirt shoulder. The back right fender of the truck hit the Whitney car when Morris turned it to the left. The truck tilted after it got on the embankment, jackknifed and came across the pavement like a streak, with the cab of the truck pulled across in front of the Whitney car.

The plaintiff's husband testified that on May 10, 1947,

he went to the scene of the accident for the purpose of taking measurements from different points and diagraming the accident. The road conditions at the time were identical with the conditions that existed at the time of the accident, that is, it was a clear day and the pavement was dry. At the point of impact the shoulder on the north side of the highway is seven feet wide. The banks on the same side are 10 to 11 feet in height, varying slightly.

He further testified that proceeding from the filling station east to the point of impact, they were driving 50 to 55 miles an hour. When they arrived at a point where the highway slopes to the east, and proceeded over the point of the hill, a Ford car was about 200 feet ahead of the Whitney car, proceeding slowly in the same direction. Morris partially pulled to the left side of the highway, with two wheels across the center line, with the thought of passing the Ford. He raised his speed to approximately 60 miles an hour, and proceeded in such manner for a distance of probably 50 feet when the plaintiff yelled at him and he pulled back behind the Ford, started to apply his brakes and reduced his speed to 30 or 40 miles an hour. This witness saw the truck at the time Morris pulled his car to the left, immediately after coming to the crest of the hill. The truck was almost to the culvert, or slightly east of it, which is at the bottom of the hill. The highway runs east and west and curves slightly toward the north at the bottom of the hill, as shown in the exhibits. The distance from the culvert to the point of impact is 441 feet. The distance from where he first saw the truck to the point of impact is 315 feet. Evidence of this witness as to the rate of speed the truck was traveling was stricken for lack of proper foundation. The measurements made by him, and the position of the cars and distances prior to the time of the impact, indicate the truck was traveling at a fast rate of speed. He further testified that the truck continued on the

highway for a short distance on the paving and then pulled off onto the north shoulder of the road, without cutting its speed. The Whitney car pulled back in behind the Ford and endeavored to stop. The truck hit the embankment and climbed up a distance on it. The witness thought the truck would turn over, and in the next instant it came across the highway between the Ford and the Whitney car. The right front fender of the Whitney car hit the right front fender of the truck. The trailer of the truck was wider than the cab, and the next bad impact was when the Whitney car hit the trailer, going along the side of it almost to the end of it. The impact took place approximately in the center of the highway. He did not know whether it was two feet north of the center line or not, but the Whitney car swung sharply to the left in an endeavor to avoid hitting the truck when it came almost directly across the highway. When the truck came off the embankment it headed almost directly south on the highway, a distance of 16 feet, completely blocking it. After the accident his wife was unconscious and lying slightly to the north of the center line of the highway, about four feet from the Whitney car. Exhibits appearing in evidence show demolishment to the right side of the Whitney car and damage to the interior. He observed debris in the center of the highway, some of which was on both sides thereof, covering a distance of 15 to 18 feet, scattered in an east and west direction. The truck and trailer were approximately 38 to 40 feet in length, and the Whitney car was 16 feet in length. The Whitney car had not caught up with the Ford car. He observed skid marks approximately 38 to 40 feet in length on the south side of the highway, obviously made by the Whitney car when the brakes were applied.

On cross-examination this witness testified that the filling station is 378 feet distant from the brow of the hill, and 680 feet distant from the point of impact. When Morris turned out to pass the Ford, he traveled for a

distance of approximately 50 feet over the center line on the north side of the pavement. Taking the total distance the Whitney car traveled from the time this witness first saw the truck as 315 feet, Morris used up perhaps 100 feet of this space in pulling out to the left to pass the Ford car and pulling back in behind the Ford car, leaving 215 feet, with the Ford car approximately 40 to 50 feet ahead of the Whitney car at the time of the accident. This would leave a distance of 150 feet he traveled after applying the brakes. When the truck pulled off the highway it was about the same distance east of the Ford as the Whitney car was west of the Ford. The truck traveled 441 feet while the Whitney car traveled 315 feet. The driver of the truck did not slow down. The truck completely blocked the highway; there was no opening, and Morris turned to the left in an endeavor to miss the truck. At no time prior to the collision between the truck and the Whitney car when Morris turned sharply to the left to avoid a collision, was his car on the north side of the center line of the highway.

There is a controversy in the cross-examination of this witness as to the distance between the Whitney car and the truck when the truck pulled off onto the north shoulder of the road, and as to whether or not the Whitney car was proceeding north across the center of the highway at the time the truck turned to the north onto the shoulder of the highway. The distance between the Whitney car and the truck, from the time that this witness observed the truck, is in conflict, as is the testimony with reference to how far behind the Ford the Whitney car was, and how close it got to the Ford.

The appellant contends that the evidence justifies a submission of the case to the jury on the question of the negligence of the defendant Penrod.

In this connection, sections 8383 and 8385, Revised Statutes of Missouri, 1939, insofar as applicable to this case, are as follows:

"Sec. 8383. Every person operating a motor vehicle

on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, * * *."

"Sec. 8385. Every person operating or driving a vehicle upon the highways of this state shall observe and comply with the following rules of the road: * * * (c) An operator or driver meeting another vehicle coming from the opposite direction on the same highway shall turn to the right of the center of the highway so as to pass without interference. * * * (e) An operator or driver of a vehicle overtaking another vehicle going in the same direction and desiring to pass the same shall pass to the left of the vehicle so overtaken: *Provided,* that the way ahead is clear of approaching traffic, but if the way is not clear he shall not pass unless the width of the roadway is sufficient to allow his vehicle to pass to the right of the center thereof in the direction in which his vehicle is moving; * * *."

The negligence charged against the driver of the Penrod truck may be summarized as follows: Failing to keep a proper lookout and to keep the truck under proper control; operating at a high and dangerous rate of speed; and causing and permitting the truck to turn sharply and suddenly across the center of the highway onto the south side thereof, directly in the path of the automobile in which the plaintiff was riding, although he saw, or in the exercise of the highest degree of care could have seen, the automobile in which the plaintiff was riding in a position of peril and danger of being struck by the truck, in time thereafter by the exercise of the highest degree of care on his part, to have stopped the truck or slackened the speed thereof, which he failed to do to avoid the collision.

The following cited decisions reflect the duty of a motorist under the sections of the statutes above cited.

"It is the duty of a driver of an automobile to keep a

lookout on the highway in the direction the car is going, in such manner as to see a condition which a person in the exercise of due care for his own safety and that of others would have seen under similar circumstances. * * *

"The operation of an automobile, under Section 7795, Revised Statutes 1929, requires the driver to exercise the highest degree of care, and injury to a guest by failure to exercise such care renders the operator liable." Kaley v. Huntley, 333 Mo. 771, 63 S. W. 2d 21.

In the above-cited case it is said on page 780: "The language is perfectly plain, and sweeping. The scope of the statute was well expressed in Gude v. Weick Undertaking Co., * * * 322 Mo. 778, 783, 16 S. W. (2d) 59, thus:

" 'It is manifest that the statute itself does not prescribe any different degree of care on the part of the operator for different occasions and places or under different circumstances. It is made the duty of every person operating a motor vehicle to exercise the highest degree of care. Where? Everywhere on the highways. When? At all times, because no exceptions are authorized. The words (are) "so as not to endanger the property of another or life or limb of any person," ' etc.

"It is reasonable to assume that had it been the legislative purpose to except from the general rule of highest degree of care operators as hosts operating automobiles in gratuitous transportation of guests a provision in the laws would have been framed to accomplish that end."

The case of Cox v. Reynolds, (Mo. App.) 18 S. W. 2d 575, holds: "Ordinary care upon the part of the driver of an automobile, however, requires him at all times and under all circumstances to anticipate and expect the presence of others on the highway, and to keep his machine always under control so as to avoid collision with them." Cases cited.

In the same opinion it is said: "We are in accord with the ruling that the test of control is the ability to stop quickly and easily, and that, when this result is not accomplished, an inference is permissible that the car

was running too fast, or that a proper effort to control was not made." See, also, LaBanca v. Pundmann, (Mo. Sup. Ct.) 147 S. W. 2d 466; State ex rel. Hauck Bakery Co. v. Haid, 333 Mo. 76, 62 S. W. 2d 400.

Contra to the plaintiff's contention, the defendant Penrod contends that his driver, as shown by the evidence, was confronted with a sudden emergency, and argues that the Ford car was approaching him at a slow rate of speed and the Whitney car was across the center line of the highway north, proceeding at a high rate of speed. The truck driver would not be able to anticipate whether the driver of the Whitney car would proceed to pass the Ford or pull back in behind it. The Whitney car had, at the most, only 200 feet in which to reduce his speed to that of the Ford. The truck driver therefore abandoned the north side of the highway, moving the truck completely off of it to the north shoulder which was seven feet wide and the truck eight feet wide, for the purpose of allowing the Whitney car to pass in safety on the north side of the highway. This defendant contends the law is clear that, where a driver is faced with a sudden and dangerous emergency, his actions thereafter are not to be judged with reference to the high standard of care to which he would be held if no emergency existed, citing Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689, as follows: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." See, also, Oakes v. Gregory, 133 Neb. 407, 275 N. W. 607; Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338.

Under the law of Missouri, heretofore set out, the driver of the Penrod truck was required to use and exercise the highest degree of care, and to drive the truck at such a rate of speed so as not to endanger the life or limb of any person. The evidence is sufficient to show that the defendant Penrod's truck was proceeding at a

high rate of speed. The measurements, as previously set out in the résumé of the evidence, so indicate.

In Booth v. Gilbert, 79 F. 2d 790, it is said: "Under Missouri statute test of excessive speed is whether motorist drove in careful and prudent manner exercising highest degree of care with regard to situation and surroundings."

Defendant Whitney makes reference to the following facts: He was driving his automobile over the brow of the hill and saw the Ford ahead of him, on the same side of the highway, moving at a slow rate of speed. He speeded his car up to about 60 miles per hour intending to pass the Ford, pulled to the left of the center of the highway and was confronted by an approaching truck. The plaintiff screamed as she saw the truck. Whitney then pulled back to his right side of the pavement at a distance of approximately 215 feet from the point of the collision. He did not apply his brakes until he came back onto the south side of the pavement back of the Ford. He then applied them, going at a rate of speed of 60 miles an hour. He traveled 100 to 150 feet after applying his brakes and was going at a speed of 40 miles an hour at the time of the impact. The only time he encroached upon the north lane of the highway was when his car was at least 700 feet from the approaching truck, as shown by the measurements in evidence. Both vehicles were on their own side of the road, and Whitney asserts he had the right to presume that they would remain there. In addition, the truck was projected across the highway south, completely blocking it. Defendant Whitney contends that under such evidence he was confronted with a sudden emergency, citing and relying on the same cases on this point as defendant Penrod.

"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." McClelland v. Interstate Transit Lines, 142

Neb. 439, 6 N. W. 2d 384. See, also, Rogers v. Brown, 129 Neb. 9, 260 N. W. 794; Andrews v. Clapper, 133 Neb. 110, 274 N. W. 209.

We conclude that the evidence presents a factual situation for a jury to determine as to the degree of negligence of the respective defendants, if any, and as to whether or not a sudden emergency was created, either as to one or the other of the defendants.

The defendant Whitney, in his amended answer, charges the plaintiff with contributory negligence, contending that it is the duty of a guest to warn the host of known approaching danger if there is time and opportunity, citing Kaley v. Huntley, *supra:* "When dangers, which are reasonably manifest are known to an invited guest, confront the driver of a vehicle and the guest has an adequate opportunity to influence the situation for safety, if he sits without warning and permits himself to be driven carelessly to his injury, his negligence will bar recovery."

There is evidence that the plaintiff called the attention of Morris Whitney to the oncoming truck at the time.

In Setzer v. Ulrich (Mo. App.) 90 S. W. 2d 154, it was said that to be guilty of contributory negligence as a matter of law, if the guest knew, or in the exercise of ordinary care would have known, that danger threatened and that the driver was remiss in guarding against it, the guest cannot recover. This is so not because the driver's negligence is imputed to the guest, but because of the guest's own contributory negligence. Burton v. Pryor (Mo. App.) 198 S. W. 1117; Shutz v. Wells (Mo. App.) 264 S. W. 479. But while the law requires the guest to exercise ordinary care and prudence for his own safety, and would not permit him to entrust his safety absolutely to the driver regardless of impending danger or apparent lack of caution on his part, it would not require the guest to use the same vigilance as was required by the driver, and the guest was not under the same obligation to look for danger. The guest necessari-

ly had to rely largely on the driver, having exclusive control of the truck, to exercise the required degree of care in its operation. See cases cited in Setzer v. Ulrich, *supra*. See, also, Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82.

In the light of the evidence and above-cited authorities, we cannot say as a matter of law that the plaintiff was guilty of contributory negligence.

For the reasons given in this opinion, the judgment of the trial court in taking the case from the jury is erroneous, and the judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

TIMOTHY IRON BEAR, APPELLANT, v. JAMES M. JONES, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.

32 N. W. 2d 125

Filed April 28, 1948. No. 32433.

1. **Habeas Corpus.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
2. **Criminal Law.** The time for the beginning of a sentence of imprisonment in a criminal action is not an essential part of the judgment. The essential element in such a judgment is the kind and amount of punishment, without reference to when it is to be inflicted.
3. **Habeas Corpus.** Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged from custody on habeas corpus, but a new date for the execution may be fixed by the proper court.
4. ———. Habeas corpus will not lie to discharge a person from a sentence of death by electrocution imposed by a verdict of a jury where the court pronouncing the sentence of execution had the power to do so and had jurisdiction over the person of the defendant and the subject matter of the action.
5. **Judges.** A district judge has the power to hold court in a

district other than the one for which he was elected, and it will be presumed in case he does so, it was at the instance of the judge of the proper district.

6. ———. The power of a district judge to hold court in a district other than that for which he was elected does not depend upon the absence or disability of the proper judge.

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

Charles A. Fisher, for appellant.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for appellee.

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

MESSMORE, J.

The relator filed a petition in the district court for Lancaster County, Nebraska, for a writ of habeas corpus, naming the warden of the Nebraska State Penitentiary respondent. The relator was convicted of first degree murder by a jury in the district court for Sheridan County, Nebraska. The jury fixed death as the penalty. See § 28-401, R. S. 1943. Motion for new trial and motion in arrest of judgment filed by the relator were overruled September 30, 1947. The relator was sentenced, and judgment pronounced against him the same day, in substance, that he be taken by the sheriff of Sheridan County, Nebraska, to the Nebraska State Penitentiary to be confined until the 30th day of December, 1947, on which date he would be executed, as provided for by law. The relator was thereafter taken to the state penitentiary and held by the warden pursuant to a warrant of death and commitment issued by the clerk of the district court of Sheridan County, on the same date, setting out the judgment and sentence as pronounced by the district court.

On December 3, 1947, the relator filed his petition for writ of habeas corpus in the district court for Lancaster

County, which alleged in substance that he was unlawfully imprisoned and restrained of his liberty by the warden of the Nebraska State Penitentiary and that he would be executed by the warden and deprived of his life without due process of law and in violation of the Constitution of the State of Nebraska and of the Constitution of the United States of America, on December 30, 1947, unless writ as prayed for was granted and relator discharged from his unlawful and void restraint and confinement. The relator further alleged all of the proceedings in the district court for Sheridan County with reference to the trial in the case of State of Nebraska v. Timothy Iron Bear, concluding with the statement that the judgment and sentence of death pronounced by the district court exceeded the jurisdiction of the court and was void for want of authority and of jurisdiction, as was the death warrant and commitment. Relator prayed that he be discharged from imprisonment and restored to his liberty. Writ was issued directing the respondent to produce the relator in the district court for Lancaster County December 5, 1947. At that time respondent filed his return showing that he had custody of the relator under the warrant of death and commitment issued by the clerk of the district court for Sheridan County. Upon hearing, the district court made findings of fact that the judgment and sentence of September 30, 1947, were valid and effective, except such part thereof as directed the execution of the applicant on the 30th day of December, 1947, and remanded the relator to custody of the warden of the Nebraska State Penitentiary to be held there pursuant to the warrant of commitment of September 30, 1947. This order was entered December 6, 1947. Motion for new trial was filed, and overruled on January 12, 1948. Appeal from the foregoing judgment was perfected to this court by the relator.

The appellant, for convenience and clarity, will hereinafter be referred to as the relator.

The relator was not executed on December 30, 1947.

On January 6, 1948, he was taken before the district court for Sheridan County, Nebraska, on motion of the State. The district court fixed May 1, 1948, as the date for execution, and recalled the warrant dated September 30, 1947. A new warrant, dated January 6, 1948, was issued, and the relator was returned to the Nebraska State Penitentiary and is now held therein, pursuant to the warrant dated January 6, 1948.

The relator assigns as error (1) the judgment and sentence pronounced by the Hon. Lyle E. Jackson, judge of the district court, Ninth Judicial District, on September 30, 1947, sentencing and adjudging relator should die on December 30, 1947, was void; (2) the judgment and sentence of September 30, 1947, was without the jurisdiction, power or authority of said judge to pronounce; and (3) the judgment and sentence was unauthorized by law, and in excess of the jurisdiction of the court in original action and the trial judge seeking to impose it.

In this jurisdiction, to obtain a release from imprisonment pursuant to the sentence and judgment in a criminal case it must appear that the sentence and judgment is absolutely void.

In Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, after review of many cases, this court said: "These cases have determined the rules governing the use of the writ of habeas corpus in this state. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Such a judgment is not void. Habeas corpus cannot be used as a substitute for a writ of error. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. The regularity of the proceedings leading up to a sentence in a criminal

case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity."

The relator contends that the Legislature, in a capital case, has made the day on which the execution is to be inflicted and the punishment exacted, an integral, necessary, and controlling part of the judgment and sentence, which provision is mandatory and must be complied with or the sentence and judgment, if not so complied with, will be void. Higlin v. Kaiser, 352 Mo. 796, 179 S. W. 2d 471, is cited.

The cited case involved a predated sentence for the crime of burglary. The sentence, entered on July 14, 1942, contained the words: "Time to begin March 10, 1942." The words were treated as surplusage and the sentence construed as commencing when judgment was entered. The court said: "The time when the sentence commences is controlled by statute and the court does not have power to change it." The court made reference to section 4108, R. S. Mo. 1939, which reads: "When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution." The court then said: "Thus we see that only in capital cases did the legislature see fit to make the day on which the

punishment is to be inflicted a necessary part of the judgment in criminal cases."

It will be observed that the afore-cited section provides that the warrant must appoint a day for execution. We believe the following cases contain a proper construction of such a statute.

People v. Bonilla, 38 Cal. 699: "The practice of designating in a judgment of death a day for carrying it into effect is not in keeping with the provisions of the Criminal Practice Act. The day should be designated in the warrant, and not in the judgment. Section 466 provides that: 'When judgment of death is rendered, a warrant signed by the Judge and attested by the Clerk, under the seal of the Court, shall be drawn and delivered to the Sheriff; it shall state the *conviction* and *judgment,* and *appoint a day* on which the judgment shall be executed, * * *.'"

This case is cited with approval in People v. Murphy, 45 Cal. 137.

And as stated in State v. Summers, 9 Nev. 269: "A judgment of conviction of murder in the first degree, which fixes a time for the execution of the sentence more than sixty days from its date, contrary to the statute, is not therefore void; for the reason that such fixing of time is not properly a part of the judgment and may be rejected as surplusage.

"Under the criminal law (Stats. 1861, 484, Sec. 454) it is the warrant and not the judgment, which fixes the time for executing the death sentence; and the court may at any time issue the warrant in due form of law."

"The time for executing a sentence of imprisonment, or for commencement of its execution, is not an essential element of the sentence. The essential part of the sentence is the punishment, including the kind and amount thereof, without reference to the time that it is to be inflicted." Riggs v. Sutton, 113 Neb. 556, 203 N. W. 999. See, also, Mercer v. Fenton, 120 Neb. 191, 231 N. W. 807; Ulrich v. O'Grady, 136 Neb. 684, 287 N. W. 81;

People v. Bonilla, *supra*; People v. Murphy, *supra*; State v. Summers, *supra;* Holden v. Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. Ed. 734; 8 R. C. L., Criminal Law, § 229, p. 231; 69 A. L. R., 1177, 1178; 15 Am. Jur., Criminal Law, § 448, p. 108.

"The time designated by the court for executing a sentence of death is not a part of the sentence. It is simply an order prescribing the time when the sentence shall take effect." Ex parte Howard, 17 N. H. 545.

In McGinn v. State, 46 Neb. 427, 65 N. W. 46, this court said: "Although the confinement of the prisoner from the time of sentence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute."

There is no statute in this state to make the date of execution an essential part of the judgment and sentence. The date of execution is not a part of the judgment and sentence in a criminal proceeding. The afore-cited authorities are controlling in such respect.

The relator contends that when the trial court set a premature date for execution in violation of section 29-2301, R. S. 1943, the court had no jurisdiction to pronounce a sentence, even though it might have had jurisdiction over the person and subject matter, citing In re McVey, 50 Neb. 481, 70 N. W. 51: "Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void."

In the above case application was made for writ of habeas corpus wherein the petitioner contended that he was charged with the crime of burglary and the jury convicted him of the crime of breaking and entering in the daytime with intent to steal property of value. He was sentenced to two years in the penitentiary. He claimed that the crime of burglary and that of breaking

and entering in the daytime were distinct offenses, and that conviction of the latter could not be had under charge of the former. This court held that the jury, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime. The trial court had no jurisdiction to sentence him, and its attempt in that respect was declared illegal and void.

The relator cites Wilson v. State, 117 Neb. 692, 222 N. W. 47. In this case the defendant was charged with first degree murder, entered a plea of guilty in the district court without the aid or intervention of a jury, and was sentenced to 30 years in the state penitentiary. The matter of sentencing for first degree murder is within the discretion of a jury, to inflict life imprisonment or the death penalty. See § 28-401, R. S. 1943. Therefore, in the cited case, the trial court usurped the function of the jury, had no power or authority to fix the penalty, could not legally pronounce it upon the defendant, and its attempt to do so was a nullity and without legal force and effect.

In the instant case, the jury fixed the penalty at death, which it was authorized to do. § 28-401, R. S. 1943. The trial court did fix the day of execution, which it had jurisdiction to do. It is apparent that the cited cases of the relator are not in point. The judgment and sentence, being otherwise valid, did not become void because the trial court fixed a premature date for execution. As hereinbefore stated, the date of the execution is not an essential part of the sentence. As disclosed by the record in the instant case, the relator was in no manner prejudiced by the setting of a premature date for the execution.

"Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged from custody on habeas corpus, but a new date for the execution may be fixed by the proper court." Simmons v. Fenton, 113 Neb. 768, 205 N. W. 296.

"A warrant of execution of a death sentence generally has no force after the lapse of the time within which it directs the accused to be executed; but the accused is not entitled to his discharge and a new date for the execution may be fixed. * * * The fact that the day of execution has passed without the sentence of death being executed * * * does not entitle the accused to his discharge, and the court may, * * * designate another day for the execution of the sentence. This is a mere fixing or resetting of the day of execution under the original judgment, and is not the pronouncement or rendition of a new judgment." 24 C. J. S., Criminal Law, § 1614, p. 166. See, also, Simmons v. Fenton, *supra;* 15 Am. Jur., Criminal Law, § 513, p. 162.

It is well-settled that permitting the day fixed for execution to pass without carrying out the sentence has the effect of furnishing only temporary immunity from execution. The sentence of death still remains and a new day may be appointed to carry out the sentence. See Mallory v. Chapman, 158 Ga. 228, 122 S. E. 884, 34 A. L. R. 310, and annotation p. 314. See, also, 2 Hawk. P. C., c. 51, § 1, p. 656; Ex parte Cross, 20 D. C. 573; 16 C. J., Criminal Law, § 3133, p. 1331.

The relator contends that the Hon. Lyle E. Jackson, one of the judges of the Ninth Judicial District of the State of Nebraska, had no jurisdiction or authority to preside at the trial of the case, State v. Timothy Iron Bear, in Sheridan County, or to pronounce judgment and sentence against him.

Section 12 of Article V of the Constitution of the State of Nebraska provides: "The judges of the district court may hold court for each other and shall do so when required by law or when ordered by the supreme court." See, also, § 24-303, R. S. 1943; § 24-312, R. S. 1943.

"A district judge has the power to hold court in a district other than the one for which he was elected, and it will be presumed, in case he does so, that it was at the instance of the judge of the proper district." Cox

& Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N. W. 933.

Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, holds that section 27-303, Comp. St. Supp., 1941, now section 24-303, R. S. 1943, does not require a request to be in writing to enable a district judge of one district to hold court in any other district.

"The power of a district judge to hold court in a district other than that for which he was elected does not depend upon the absence or disability of the proper judge." Candy v. State, 8 Neb. 482. See, also, Drake v. State, 14 Neb. 535, 17 N. W. 117.

The relator's contention in such respect is without merit.

For the reasons given herein, the judgment of the district court is affirmed.

AFFIRMED.

ALMA ANDERSON ET AL., APPELLANTS, v. HALLIE STEWART, APPELLEE.

32 N. W. 2d 140

Filed April 28, 1948. No. 32329.

1. **Contracts.** An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offeror, unless the offer otherwise provides.
2. ———. The request or authorization to communicate the acceptance by mail is implied where a person makes an offer to another by mail and says nothing as to how the answer shall be sent.
3. ———. Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.
4. **Vendor and Purchaser.** The acceptance of an offer to buy or

sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition.

5. ———. An acceptance specifying a different place for the delivery of the conveyance or payment of the price from that stated in the offer or implied as a matter of law is not a sufficient unconditional acceptance.

6. ———. If no place for payment is specified in the offer, where the negotiations are carried on by correspondence, it is implied that payment is to be made to the vendor in the city where he resides.

7. ———. If no place for delivery is specified the vendor is entitled to have the transaction closed where he lives.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Dwyer & Dwyer and *Van Pelt, Marti & O'Gara,* for appellants.

George B. Hastings, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

WENKE, J.

Appellants Alma Anderson and Clyde Anderson, who are wife and husband and who were plaintiffs below, brought this action in the district court for Cass County. The action was brought for the purpose of having the court require the appellee, Hallie Stewart, to specifically perform the terms of the contract which they allege she entered into with them. From a decree dismissing their petition, motion for new trial having been overruled, appellants appeal.

For convenience the parties will be referred to as appellants and appellee, except when it is necessary to refer to the Andersons separately when they will be referred to as either Mr. or Mrs. Anderson.

It is either admitted or the record establishes that the appellee, who is a widow and who was the defendant below, was and is the owner of the north half of Lot 15 and all of Lots 16, 17, and 18, Block 23 of Railroad Addition to the town of Imperial, Chase County, Nebraska; that on February 23, 1946, appellee entered into a lease with appellants renting to them this property for the period from March 25, 1946, to March 25, 1947; that this lease contained the following provision: "Lease subject to sale with the option to parties of the second part to purchase same;" and that this provision was understood and construed by the parties to the lease to give appellants the first opportunity to buy this property if the appellee should decide to sell during the term of the lease.

Having decided to sell, appellee, in accordance with this understanding did, on July 6, 1946, send a letter from her home at Eagle, Nebraska, to Mrs. Anderson, at Imperial, Nebraska, where the Andersons live. In this letter, insofar as it is here material, she advised Mrs. Anderson as follows: "I have had an offer of $6500 for the property where you are now living and have decided to sell. In the contract we have, is a statement that I am to give you folkes the first opportunity to buy, so what do you wish to do?"

Although there was additional correspondence between the parties in relation to this offer, however, it was not in any manner modified thereby and remained in effect until the appellee, on July 30, 1946, wrote to Mrs. Anderson advising as follows: *"I hereby withdraw my offer and the place is not for sale at any price."* This letter Mrs. Anderson received on July 31, 1946.

However, the evidence shows that on July 30, 1946, Mrs. Anderson wrote to appellee as follows: "Jess Nothnagle was over Sunday and we did not make satisfactory arrangements so we have decided to exercise our option and are enclosing deed which, when you have signed it before a Notary will you please send it to the

Farmers & Merchants bank where the $6500.00 is on deposit. Will you instruct Edgar to put on your revenue. Which will be $7.15. Do you have an abstract. So many of these older places do not and if you do not we will make one for ourselves at our own expense." This letter was mailed by Mrs. Anderson on July 31, 1946, at Imperial, Nebraska, before she received the letter of appellee dated July 30, 1946.

" 'An acceptance may be transmitted by any means which the offerer has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offerer, unless the offer otherwise provides.' Restatement, Contracts, sec. 64." Corcoran v. Leon's, Inc., 126 Neb. 149, 252 N. W. 819.

" 'The request or authorization to communicate the acceptance by mail is implied * * * where a person makes an offer to another by mail and says nothing as to how the answer shall be sent.' 13 C. J. 300." Corcoran v. Leon's, Inc., *supra.*

"Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer." Restatement, Contracts, § 41, p. 49.

We find the acceptance was mailed before the letter withdrawing the offer was received and, under these principles, a contract was entered into if the acceptance was unconditional, for, as set forth in 55 Am. Jur., Vendor and Purchaser, § 16, p. 483: "The acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a

counterproposition. Thus, it is held that an acceptance specifying a different place for the delivery of the conveyance or payment of the price from that stated in the offer or implied as a matter of law is not a sufficient unconditional acceptance." As stated in 66 C. J., Vendor and Purchaser, § 61, p. 523: "* * * an acceptance of an offer to sell or purchase real estate must be identical with the offer and unconditional, and so if the offeree accepts conditionally or introduces a new term or condition into the acceptance, or in any other manner makes a counteroffer, the acceptance is not effectual." See, also, Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; Ross v. Craven, 84 Neb. 520, 121 N. W. 451; Sennett v. Melville, 85 Neb. 209, 122 N. W. 851; Smith v. Bertrand, 107 Neb. 301, 186 N. W. 83.

It will be observed that while the offer made no reference thereto, the acceptance directed the appellee to send the deed to the Farmers & Merchants Bank at Imperial, Nebraska, and that payment of the purchase price would be made there. While it might be argued that the language used in the letter of July 30, 1946, merely requested that the deed be sent to the bank at Imperial and did not require that it be done as a condition of their acceptance, however, the letter of Mrs. Anderson to appellee dated July 31, 1946, mailed immediately following receipt of appellee's letter withdrawing the offer, and her subsequent letter of August 6, 1946, clearly show that appellants did intend appellee should be required to send the deed to the bank as a requirement of their acceptance and did intend that the money should be paid there where they said it was on deposit.

We said in Lopeman v. Colburn, 82 Neb. 641, 118 N. W. 116: "In order to convert an offer into a contract to sell real estate, the vendee must accept the offer as made. Acceptance of an offer to sell land, but fixing a place other than the residence of the vendor, or the place named in the offer, for the payment of the consideration and delivery of the deed, is not an unconditional accept-

ance so as to bind the vendor." The vendor not living in Central City the court went on to say: "It is also clear that it was not the province of the vendee to compel the vendor to deliver the deed and receive the consideration in Central City."

"If no place for payment is specified in the offer, where the negotiations are carried on by correspondence, it is implied that payment is to be made to the vendor in the city where he resides." 66 C. J., Vendor and Purchaser, § 61, p. 525, note 23b.

"If no place for delivery is specified (1) the vendor is entitled to have the transaction closed where he lives." 66 C. J., Vendor and Purchaser, § 61, p. 525, note 24a.

We think what was said in Beiseker v. Amberson, 17 N. D. 215, 116 N. W. 94, is applicable and controlling here. It was therein stated:

"In this case there was an unqualified acceptance of the offer so far as the price is concerned. After that the acceptance advances terms by the writer as to the carrying out and execution of the contract that were in no manner contained in the offer. Among the new terms imposed by the plaintiff was the one asking the defendant to send the deed to one of two banks named in the letter. The defendant was entitled as a matter of law to have the cash price paid to him at Snohomish, Wash., where the offer was made; and without his consent he was not compelled to send the deed to any place or bank until the price was paid. If plaintiff had accepted the offer unconditionally, his right to a deed could have been made effectual only by a tender of the price to the defendant personally; and, by requiring defendant to send the deed elsewhere, a condition was attached to the acceptance which the defendant was not under any legal obligation to comply with.

"The appellant contends that there is an unqualified acceptance contained in defendant's letter, and that what is thereafter contained in the letter is offered as a suggestion merely for the most convenient way of completing

the transaction. We think that the letter is not susceptible of that construction. At what place the price was to be paid was a part of the offer. The defendant was entitled to have the price paid to him simultaneously with the delivery of the deed, and he was not obligated to go to any bank for payment nor to communicate a deal with the bank before the price was paid. The following authorities fully sustain these principles: Harris Bros. v. Reynolds (N. D.) 114 N. W. 369; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; N. W. Iron Co. v. Meade, 21 Wis. 480, 94 Am. Dec. 557; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Wilkin Mfg. Co. v. H. M. Loud & Sons L. Co., 94 Mich. 158, 53 N. W. 1045; Nat. Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; Russell v. Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134; Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690."

To the same effect is the holding in Rahm v. Cummings, 131 Minn. 141, 155 N. W. 201. Therein it was held: "Where an offer of sale of real estate specifies no place where papers shall be passed and consideration paid, it is implied that this shall take place at the residence of the vendor. Where the acceptance of the offer is coupled with a condition that the deed be sent to a designated bank at a place other than the vendor's residence, and that collection of the consideration be made through the agency of such bank, it imposes conditions not contained in the offer, and is in effect not an acceptance of the offer but a rejection of it." The court, in the opinion, goes on to state that: "The telegram and letter to defendant purporting to accept her offer directed her to 'send deed in blank to Merchants National Bank for collection.' We cannot regard this as a mere suggestion. It was a direction and it imposed new conditions not found in the terms of the offer. It required the transaction to be closed at Detroit, Minnesota, and it named the agent whom defendant should entrust with

the collection of the purchase price. Both of these were conditions which could not be imposed on defendant without her consent, and she did not consent. Unless otherwise agreed, defendant was entitled to have the transaction closed where she lived. Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Couch v. McCoy, 138 Fed. 696, 702; Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. 876, 56 Am. St. 371; Knox v. McMurray, 159 Iowa, 171, 140 N. W. 652; De Jonge v. Hunt, 103 Mich. 94, 61 N. W. 341; Egger v. Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. 596; Beiseker v. Amberson, 17 N. D. 215, 218, 116 N. W. 94; Baker v. Holt, 56 Wis. 100, 103, 14 N. W. 8. She did not live in Detroit. If she saw fit to entrust the collection of her money to an agent she had the right to herself designate the agent. The other party to the contract could not require her to take an agent of his choosing, no matter how responsible that agent might be. The acceptance of an offer, in order to constitute the completion of a contract, must be unqualified. The answer to defendant's offer was not unqualified, but conditional. It was not, therefore, an acceptance of the offer, but was in effect a rejection of it. Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127, L. R. A. 1915 D, 150, and cases cited."

For additional cases involving the same questions and holding to the same effect see Cram v. Long, 154 Wis. 13, 142 N. W. 267; Arnett v. Tuller, 134 Ga. 609, 68 S. E. 330; Hinish v. Oliver, 66 Kan. 282, 71 P. 520; Sharp v. West, 150 F. 458; Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Greenawalt v. Este, 40 Kan. 418, 19 P. 803; Hall v. Jones, 164 N. C. 199, 80 S. E. 228; Whitaker-Glessner Co. v. Clark, 98 W. Va. 19, 126 S. E. 340.

Appellants cite cases of this and other jurisdictions wherein courts granted relief, either in the form of damages or specific performance, under comparable provisions when the owners of the property had sold and conveyed it to others without giving the owners of the option privilege the opportunity to exercise their

right to purchase thereunder. See Harper v. Runner, 85 Neb. 343, 123 N. W. 313; Cummings v. Nielson, 42 Utah 157, 129 P. 619; Pearson v. Horne, 139 Ga. 453, 77 S. E. 387; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73; Driebe v. Fort Penn Realty Co., 331 Pa. 314, 200 A. 62, 117 A. L. R. 1091. Those cases are correct under the situation as therein set forth. Therein the owners had breached the provisions giving the option by selling their property to others without giving the optionees the opportunity to buy if they so desired and, by such sale, established the owners' willingness to sell together with the terms and conditions of the sale. Such cases are not applicable here for the reason that the owner has neither sold nor conveyed the property to another but is still the owner thereof.

Here the appellants had no right to purchase under their agreement unless, during the term of their lease, the owner should decide to sell. Having decided to do so appellee was under legal obligation to offer the property to the appellants and give them a reasonable time to either accept or reject her offer before selling to another on the same terms. Appellee gave the appellants the benefit of this provision by offering the property to them. This offer she was under no obligation to keep open for any definite length of time but could withdraw at any time she desired provided it had not been unconditionally accepted. This she did. Under these circumstances she would be required to give the appellants the same opportunity to buy should she again decide to sell the property during the term of the lease. Nevertheless, she was not obligated to keep the offer made open for the term thereof. The appellants not having unconditionally accepted the offer before it was withdrawn cannot, in the absence thereof, have it enforced and, in the absence of any evidence to show that the appellee has sold or conveyed the property to another during the term of the lease, are not in position to complain. See, 58 C. J., Specific Performance,

§ 159, p. 974; 66 C. J., Vendor and Purchaser, § 22, p. 497; Whitaker-Glessner Co. v. Clark, *supra*; Cummings v. Nielson, *supra*; Pearson v. Horne, *supra*; Hayes v. O'Brien, *supra*; Driebe v. Fort Penn Realty Co., *supra*.

While cases are cited which hold contrary to the principles herein announced they are few in number and do not, in our judgment, represent a sound rule for the reason that owners of property have the absolute right to make the terms and conditions upon which they are willing to sell their property and any offer to do so must be unconditionally accepted if the owner is to be bound thereby. Courts should not qualify this right. See, Whelchel v. Waters, 152 Ga. 614, 111 S. E. 25; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 N. W. 853.

We have come to the conclusion that the decree of the trial court is correct and it is therefore affirmed.

AFFIRMED.

BOONE COUNTY OLD AGE ASSISTANCE BOARD, BOONE COUNTY, NEBRASKA, APPELLEE, v. I. H. MYHRE, ADMINISTRATOR OF THE ESTATE OF MARY DOTY, DECEASED, APPELLANT.

32 N. W. 2d 262

Filed May 7, 1948. No. 32413.

1. **Parties.** When an action is brought by the party designated by the statute for that purpose, it complies with the law which requires all actions to be brought by the real party in interest.
2. **Public Assistance.** The fact that, in recoveries from the estates of recipients of old age assistance by the county old age assistance board, as the local administrator of said funds, a part of such funds may be paid to, or credited to, the assistance funds of the United States, does not require that the United States should be made a party to such actions.
3. ———. The provisions of law relating to old age assistance, and found in sections 68-215, 68-216, and 68-219, R. S. 1943, are not in violation of the state or federal Constitutions.

4. ———. The recipient of old age assistance filed an application therefor, listed the real estate she owned, and accepted the monthly payments as made, and this constituted a contract on her part to be bound by the law making her real estate after her death subject to a claim in favor of the county old age assistance board for the payments she had received as provided by statute.

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

William Keeshan and *Alvin L. Berthelsen,* for appellant.

Walter R. Johnson, Attorney General, *Clarence S. Beck, Homer L. Kyle,* and *Stanley J. Oliverius, Jr.,* for appellee.

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

PAINE, J.

This is an appeal from the allowance of a claim filed by the county treasurer against the estate of Mary Doty, deceased, who had been paid in her lifetime, by the Boone County Old Age Assistance Board, monthly payments for some eight years. The total face amount of said monthly warrants was $2,402.18, for which sum the claim was filed. The appeal from the allowance of this claim is made by the administrator of her estate.

The action is based on a claim filed in the county court on November 15, 1946, by Boone County Old Age Assistance Board against the estate of Mary Doty, deceased, for old age assistance furnished her from July 1938 to June 1946 in accordance with section 68-215, R. S. 1943. This itemized claim set out the date issued, the warrant number, and the amount of each of the 96 monthly payments, amounting to the total sum of $2,402.18. The claim was sworn to by the county treasurer of Boone County.

Some ten objections were filed to this claim and presented. On March 18, 1947, the county judge overruled

the objections and allowed the claim in the full amount of $2,402.18, as a claim of the fourth class against said estate. § 30-615, R. S. 1943. In said order it was stated that the administrator had intimated his intention to appeal from this order and that no appeal bond would be required. § 30-808, R. S. 1943.

Upon appeal and hearing before the district court, it was stipulated generally that the action should be heard upon the original pleadings as filed in the county court, which included the objections there filed by the administrator. It was further stipulated that there was no dispute that the amount of old age assistance furnished to Mary Doty between July 1938 and June 1946 amounted to $2,402.18; that Mary Doty at the time of her death was the owner of Lots 5 and 6, Block 77, in the town of St. Edward, Boone County; and that there were real estate taxes due thereon of $233.45, said taxes being a first and prior lien on said real estate and having been paid by the administrator of the estate.

It was further stipulated that her application for old age assistance was in the form effective at the date of application; that Mary Doty died on July 14, 1946, and I. H. Myhre was the duly appointed, qualified and acting administrator; that she described her property in her application for state assistance; and that an old age assistance lien was filed of record July 22, 1939, in the office of the county clerk, against her real estate therein described.

It was further stipulated that the register of deeds had entered a record that he had received said certificate of award for application No. 28-490, old age assistance, and same was filed in Book 97, p. 192, of the Mortgage Records of Boone County, and that opposite the record of said lien there appears a release thereof by the county clerk on June 23, 1941, reciting that "The within notice of lien is hereby released and discharged."

Exhibit No. 1, introduced at the trial in the district court, was an order, signed by the three members of

the board of county commissioners, instructing the county treasurer to file claim against the estate of Mary Doty, deceased, for $2,402.18, being old age assistance granted her, in accordance with section 68-215, R. S. 1943.

The county treasurer testified that the burden of filing claims against estates was placed upon him under the law, and that when a claim of that type was paid it was sent in with his regular remittance of other state money to the State Auditor.

The administrator in his brief set out 14 assignments of error. However, in this opinion we will combine those which relate to the same legal proposition.

In order to show the close connection between the state and federal funds, we find that Title 42, U. S. C. A., is entitled "Public Health and Welfare." It covers a wide variety of services, of which the Social Security Act is but one, and is found in chapter 7. In general, it is for the purpose of enabling each state to furnish financial assistance to aged needy individuals. Funds available under this act are only paid to those states where the Legislature has provided a state plan for old age assistance. This was designed to operate in a dual fashion and bring states into the cooperative venture. The act was held constitutional. See Allen v. Shelton, 96 F. 2d 102, certiorari denied in 305 U. S. 630, 59 S. Ct. 94, 83 L. Ed. 404; Matcovich v. Anglim, 134 F. 2d 834; Department of Social Welfare v. Wingo, 77 Cal. App. 316, 175 P. 2d 262.

In the 1946 reorganization plan, Congress provided that a Federal Security Administrator be substituted for the Federal Security Board, which was thereupon abolished.

The federal government does not grant any aid to the recipient directly, but the federal government makes a grant to the state government quarterly of approximately one-half the total amount paid for old age assistance. The state distributes all of the United States

funds and the other half is raised by state appropriation. The requirements of the law involve very large sums of money. For instance, in Laws 1947, c. 321, § 27, at pp. 1001-2, there was appropriated from the general fund, from the property tax levy for old age assistance and aid to dependent children and blind assistance, the sum of $14,017,019; from fees and cash funds, including 20 percent of the gasoline tax credited to the assistance fund, and said appropriations include care of crippled children, regulating boarding homes, and boarding children under 16 years of age, an estimate of $4,350,000. There was then appropriated from federal funds for state assistance and child welfare the sum of $17,686,469.

The administrator assigned as an error that the claimant is not the real party in interest, and claimed that section 25-301, R. S. 1943, required that every action must be prosecuted in the name of the person who is the real party in interest. He asked, Is the State of Nebraska, or the United States Government, or the Board of Control, or the State Assistance Department, or its director, the real party in interest? The only answer this court can give is that this action is brought in the exact form provided in section 68-215, R. S. 1943, which reads: "Any claim provided for in this section may be presented to the proper court by the county treasurer, if so directed by the board." It is provided under an amendment, section 68-215.03, R. S. Supp., 1947, effective June 3, 1947, that "In the event that any amount is recovered by a county or the state with respect to old age assistance furnished under sections 68-201 to 68-230, such amount shall be paid into the State Assistance Fund, and the state department is authorized to promptly pay to the United States and to the county the proportionate amount of any such recovery to which each may be entitled."

A similar objection was discussed by the Supreme Court of North Dakota: "The objection to parties plaintiff is based on the assertion that part of the money used

in paying old age assistance is derived from the Federal government and therefore the United States ought to be made one of the parties plaintiff. It is true the Federal government gives a grant to the State; but there is no merit in the contention. The claim against the estate exists in favor of the State. Session Laws 1937, § 21, chap. 211. This section provides: 'On the death of any recipient, the total amount of assistance paid under this Act shall be allowed as a preferred claim against the estate of such person in favor of the State, after funeral expenses, not to exceed One Hundred and Twenty-five ($125.00) Dollars have been paid and after the expense of administering the estate has been paid.' " State v. Wehe, 72 N. D. 186, 5 N. W. 2d 311.

The foregoing provisions of our Nebraska law bring up the further objection of the administrator that part of the recovery, if any, shall be paid to the United States government, which is not a party to the case, and he charges that there is no provision in the federal laws for filing such a claim. In answer to this contention, we find that Title 42, U. S. C. A., section 303, p. 213, as amended, reads in part as follows: "The Administrator shall then certify to the Secretary of the Treasury the amount so estimated by the Administrator, * * * reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Administrator, of the net amount recovered during any prior quarter by the State or any political subdivision thereof with respect to old-age assistance furnished under the State plan; * * *."

So, perhaps, no specific sum is required to be paid back to the federal government, yet the next quarterly amount paid to our state by the government is proportionately reduced by any sums recovered by claims like this against the estates of deceased recipients.

The federal government at all times has exercised close control over the actions of the state in the matter of payments of old age assistance benefits, and, if there

was any failure on the part of a state to comply substantially with the plan and provisions of the act of Congress, no further certification to the Secretary of the Treasury for payments to such state would be made. Title 42, U. S. C. A., § 304, p. 563.

The administrator of the estate assigns as error that sections 68-215, 68-216, and 68-219, R. S. 1943, violate article I, section 3, of the Constitution of Nebraska, and that the first two of these sections are in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States, and also with the Fifth Amendment to said Constitution, because they abridge the privilege of citizens of the United States and deprive the heirs and creditors of the estate of Mary Doty of their legal rights and property without due process of law. It is also contended by the administrator that these two sections last mentioned also violate article I, sections 16 and 25, of the Constitution of Nebraska.

The arguments of the administrator in support of these objections may be summed up by saying that he charges that the claim against the estate of Mary Doty does not arise until after her death; that immediately upon her death the title to her real estate vested by law in her heirs. In support thereof, he cited the case of Security Investment Co. v. Lottridge, 2 Neb. (Unoff.) 489, 89 N. W. 298, in which the court held: "Real estate other than the homestead of an intestate decedent, descends to his heirs and the title vests immediately in them subject to the administrator's right of possession and to its application in payment of decedent's debts."

It is said in the brief: "This creates a somewhat ridiculous situation, and it is apparent that we cannot have a lien or claim attaching itself to real and personal property, immediately upon the death of a person when it is definitely settled law that the heirs of the estate have a vested right upon the death of a person who dies intestate."

We do not agree that the provisions of the law are un-

constitutional. May we clarify this situation by a review of the facts.

Mary Doty filed an application for old age assistance in strict compliance with the law. She set out therein a description of the real estate she owned. The application was checked by the county assistance director and forwarded to the state office for approval. The certificate of award was then filed against her property as a lien. Later the record of that lien was released. This was not a lien which could be enforced against her property while she lived. After the death of Mary Doty, when the homestead right had terminated, then the liability for the payments made to her in her lifetime attached to this property as a claim of the fourth class as allowed by the probate court.

"The recipient of old-age assistance applied for and accepted the old-age assistance granted her under the terms of the statute. That application, the grant of assistance, and the acceptance of that assistance constituted a contract beween the plaintiff and the official boards having to do with the matter of the old-age assistance granted to her. Plaintiff entered into that contractual relation with defendants on the only terms they were authorized to deal with her—the terms of the statute,— so she must be held to have consented to the lien which the statute enacted as a condition of the granting of the old-age assistance she thus obtained." Hawkins v. Social Welfare Board, 148 Kan. 760, 84 P. 2d 930.

In an Oklahoma case it was said: "In the second proposition it is argued that the principle that a lien created by the operation of law is dissolved by the death of the person against whose property it is asserted should be applied in the case at bar." Brashears v. State, 194 Okla. 663, 154 P. 2d 101. The court said that this was contrary to its prior holding.

"The State of Ohio, in administering, through the division of Aid for the Aged in the Department of Pub-

lic Welfare, the aid for the aged provision of the Code, acts in a governmental rather than a proprietary capacity. * * * Although the state or an agency thereof may be shorn of its sovereign character by filing an action, this principle should not be given application in a proceeding by the Department of Public Welfare to enforce a claim against a decedent's estate for old age assistance payments made to the deceased so as to defeat the well known principle of law that a statute of limitations does not run against the state's maintaining a legal action in courts." Division of Aid for the Aged v. Marshall, 42 O. L. Abst. 131, 59 N. E. 2d 942.

"* * * that the lien created by sec. 49.26 (4), Stats., was intended to be as enforceable and effective following the death of the joint tenant, who obtained the assistance, as his transfer as security would have been, is evident * * *." Goff v. Yauman, 237 Wis. 643, 298 N. W. 179.

" 'On the death of a person receiving or who has received assistance under this chapter * * *, the total amount paid as assistance, shall be allowed as a lien against the real estate in the estate of the decedent and as a claim of the second class against the personal estate of such decedent, in the event the estate is admitted to probate. Neither the homestead nor the proceeds therefrom of such decedent or his survivor, shall be exempt from the payment of said lien or claim, any act or statute to the contrary notwithstanding.' * * * Under the statute the liens could be enforced only after her death." In re Estate of Ragan, 237 Iowa 619, 23 N. W. 2d 521.

The administrator argues that the statute of limitations has run against this claim, and he cites in support thereof that section 25-206, R. S. 1943, says that an action upon a contract not in writing, expressed or implied, or on an action upon a liability created by statute, can only be brought within four years. He then cites section 25-219, R. S. 1943, which provides that all actions under a liability created by a federal

statute, for which no period of limitations is provided, shall be commenced within three years next after the cause of action shall have accrued. He contends that the old age assistance law has been amended a number of times between 1938 and 1946; that one of these changes provided for the release and satisfaction of all liens or claims against the real estate of any old age recipient (Laws 1941, c. 169, § 2, p. 670), and he insists it cannot be a continuing account when it had been satisfied and released as required by law. He cites also a number of authorities to the effect that the statute of limitations begins to run upon the accrual of the cause of action and that it applies to actions on implied and quasi contracts. 34 Am. Jur., Limitation of Actions, § 145, p. 117.

When the old age assistance law was first enacted (Laws 1935, Sp. Sess., c. 28, § 12, p. 172), it provided as follows: "On the death of a person receiving or who has received assistance under this Act * * * the total amount paid as assistance may be allowed as a claim in favor of the county against the estate of such decedent." And the law is still to the same effect. See § 68-215, R. S. 1943.

The stipulation of the parties in this case shows that Mary Doty began drawing old age assistance payments in July 1938, but regardless of all the amendments and changes in the law it has provided during all of this time that there should be a liability of the estate of the recipient for the amount received.

The statute of limitations does not begin to run until the cause of action has accrued, and in this connection it should be observed that section 68-216, R. S. 1943, provides: "No statute of limitations shall apply to any claim or cause of action, belonging to the state or county and arising under the provisions of section 68-215, while the recipient, former recipient, spouse or such dependent children survive."

We therefore hold that the claim of the administrator

that this action is barred by the statute of limitations is without merit.

The administrator insists that Mary Doty owed nothing while she lived; that it was therefore not a debt, and after her death the assistance officials attempted to make a claim of it against her estate. He contends that Mary Doty could have transferred this property during her lifetime, clear of any claim for her support, and that because she did not do so it is unjust that her heirs and creditors are now deprived of what is rightfully due them.

The reply is that she received a large sum for her comfortable support in her declining days. The law requires estates of deceased recipients to pay back, as far as possible, the assistance received.

We have examined each of the assignments of error and believe this opinion has disposed of all of them, and that the judgment should be affirmed.

AFFIRMED.

KIRK MILLER ET AL., APPELLANTS, V. JOSEPH STOLINSKI, COUNTY ASSESSOR OF DOUGLAS COUNTY, ET AL., APPELLEES.

32 N. W. 2d 199

Filed May 7, 1948. No. 32437.

1. **Actions: Pleading.** A demurrer was properly sustained to a petition for a declaratory judgment, seeking a decree holding unconstitutional the Nebraska Community Property Act, when the only defendants were two county officers who had no interest in upholding said law or having it declared invalid.
2. ———. In an action for a declaratory judgment, the opposition to the plaintiff's demand must come from a source competent legally to jeopardize his rights.
3. ———. The Declaratory Judgments Act is applicable only where there is a present actual controversy, all interested persons are made parties, and justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent, or uncertain.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

Thomas P. Leary, for appellants.

James J. Fitzgerald and *Ephraim L. Marks,* for appellees.

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

PAINE, J.

This is a suit for a declaratory judgment to test the constitutionality of the Nebraska Community Property Act. The trial court sustained a demurrer to the amended petition and the plaintiffs appeal.

The Nebraska Community Property Act is found as Laws 1947, c. 156, p. 426, and as sections 42-601 to 42-616, R. S. Supp., 1947. It became effective September 7, 1947.

The amended petition was filed December 9, 1947, by a husband and wife against the county assessor and the county treasurer of Douglas County. The plaintiffs alleged that the husband had on deposit in an Omaha bank the sum of $100 in his own name; that $93.75 of this sum was earned by him after September 7, 1947, and the remaining $6.25 of said deposit was received by him after September 7 as interest on bonds which are his separate property. Plaintiffs alleged that they must list this $100 of personal property for taxation as Class A intangible personal property before April 20, 1948; that by virtue of the Nebraska Community Property Act the plaintiff wife is vested with a one-half interest in this property acquired by her husband, and the plaintiff wife alleged that said Community Property Act is unconstitutional, void, and of no force and effect.

The plaintiff husband admitted his liability to taxation as to one-half of said $100 of said bank deposit, but was in great doubt and uncertainty as to his liability to pay the tax on the remaining half of said deposit. He al-

leged that if the community property law is constitutional he must pay the tax on his wife's share and retain a lien for such payment on the half of the $100 deposit in which he is deprived of a vested interest, in which case the wife's property will be subjected to a lien in favor of the husband; that if the community property law is unconstitutional the husband must pay the tax on the whole $100, it being his separate property, according to the laws of the State of Nebraska prior to September 7, 1947; that false listing of property for taxation is a misdemeanor and would subject him to a maximum fine of $2,000 and a possible prosecution for perjury in case he makes a false oath.

It was also alleged that all married persons in Nebraska owning property occupied a similar position and should not be required to list their property for taxation while there is a doubt remaining as to who is the owner of said property; that this action was brought under the Uniform Declaratory Judgments Act; that plaintiff had no remedy, at law or in equity, so adequate, speedy, complete, or serviceable as that afforded by a judgment which would remove all doubt and uncertainty, and prevent a multiplicity of suits; that said community property law was unconstitutional and void and violated the Constitution of the United States and the Constitution of the State of Nebraska, as it impaired the obligations of contracts, violated the due process clause, abridged the privileges and immunities of plaintiffs in their private separate property, amended the present laws of Nebraska without containing the section or sections as amended and repealing them, constituted an unlawful exercise of power by the Legislature in transferring a vested interest in property from one individual to another without a judicial hearing, and that its provisions were so indefinite, ambiguous, uncertain, incomplete, and inconsistent as to be incapable of rational interpretation or judicial enforcement. The plaintiffs prayed for a declaratory judgment as to the rights

of the parties and a declaratory judgment declaring the community property law unconstitutional and void.

To this amended petition the defendants demurred on the ground that there was an improper joinder of parties plaintiff and an improper joinder of parties defendant, and that the amended petition did not state facts sufficient to constitute a cause of action against defendants and in favor of plaintiffs.

These pleadings having been submitted to the court, an order was entered January 24, 1948, sustaining said demurrer. The plaintiffs electing to stand on their amended petition, the court dismissed the cause of action at costs of plaintiffs.

Plaintiffs appealed from said order. Their one assignment of error alleged that the court erred in sustaining the defendants' demurrer and dismissing the action.

As this record presents to the court an attempt to test the constitutionality of the Community Property Act by a declaratory judgment of this court, we must examine whether or not allegations of the amended petition meet the requirements necessary to bring such an action before this court for determination.

The plaintiffs first rely on an opinion of this court in a case brought as an original action, leave being granted to bring the same against the State Tax Commissioner. We held that, if any taxpayer had an actual justiciable controversy, with justiciable issues between proper parties affecting his legal right under any Nebraska law, the Declaratory Judgments Act was applicable. See Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551. In that opinion, an act was held invalid as it attempted to classify as tangible property which was intangible in fact and in truth.

In the case just cited, there was a justiciable issue presented between taxpayers, on the one hand, and the State Tax Commissioner, who was charged by law with the duty of enforcing the provisions of a new tax law.

The plaintiffs call our attention also to the opinion

in Acme Finance Co. v. Huse, 192 Wash. 96, 73 P. 2d 341, 114 A. L. R. 1345, in which a demurrer was overruled to a petition for a declaratory judgment. In this case, involving a new law for licensing the small-loan business, the director of licenses and the Attorney General were made defendants, so there was no question but that the defendants were the proper parties.

Now let us examine the case at bar. The defendants are the county assessor and county treasurer. One is charged with the duty of assessing both tangible and intangible property in his county, with the assistance of the register of deeds, county clerk, county judge, and all other county officers (section 77-1313, R. S. 1943), while the county treasurer collects all taxes as per tax lists he receives from the county clerk for the property in his county. The defendants contend that they have no duties to perform or responsibilities to discharge in connection with the Community Property Act; that whether said act is held constitutional or unconstitutional will not affect by one penny the value of the taxable property or the amount of tax revenue in their county. Therefore, the defendants claim they have no interest whatever in either upholding the act or having it declared invalid.

Under such a situation, can it be said that the defendants' acts are so definite and final as to constitute a genuine threat to the pecuniary interests of the plaintiffs? We cannot so find.

"Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail on this ground, either because the plaintiff is deemed not to have an adequate personal interest in the issue, or because the public officer or other person selected as a defendant has no special interest to oppose the complaint or no special duties in relation to the matter which would be affected by any eventual judgment. The absence of adversary or the correct

adversary parties is in principle fatal." Borchard, Declaratory Judgments (2d ed.), p. 76.

"When the defendant has no power to affect the plaintiff's rights, the suit, as already observed, is likely to be dismissed as presenting 'no controversy.' The opposition to the plaintiff's demand must come from a source competent legally to jeopardize his right." Borchard, Declaratory Judgments (2d ed.), p. 50.

In Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664, an act was assailed by an original action for a declaratory judgment, and it was held that an act imposing a tax of 15 cents per pound on oleomargarine was unconstitutional, but it will be noted that the defendant was the Director of the Department of Agriculture and Inspection in the State of Nebraska, whose duty it would be to enforce such law over the entire state. See Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N. W. 583.

In the case at bar, the husband had a bank deposit of $100 on the date the amended petition was filed, but the personal property schedule is required to be filed, giving a list of all his property as of March 10. § 77-1201, R. S. Supp., 1947. Admitting for the sake of the demurrer that all allegations are true when filed, the question remains, Will the deposit still be $100 on March 10?

The Declaratory Judgments Act is applicable only where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent, or uncertain. See Dobson v. Ocean Accident & Guarantee Corporation, 124 Neb. 652, 247 N. W. 789; Moeller, McPherrin & Judd v. Smith, *supra;* Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192; Annotation, 132 A. L. R. 1108; Annotation, 135 A. L. R. 934; Annotation, 142 A. L. R. 8; 16 Am. Jur., Declaratory Judgments, § 17, p. 291, § 18, p. 292, § 26, p. 298.

In conclusion, we find that there was no actual justiciable controversy between the plaintiffs and the two county officials whom they elected to make defendants. Therefore, the trial court was right in sustaining the demurrer.

AFFIRMED.

W. H. BILL DORRANCE, SHERIFF OF THE COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLANT, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES, STATE OF NEBRASKA, INTERVENER, APPELLEE.

32 N. W. 2d 202

Filed May 7, 1948. No. 32373.

1. **Constitutional Law: Statutes.** If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, it is not subject to objection as local or special legislation.
2. ———: ———. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification.
3. **Prisons: Sheriffs and Constables.** The statutory allowance for boarding occupants of county jails is not salary within the meaning of section 23-1101, R. S. 1943. A statutory requirement, therefore, that such service be provided at actual cost does not tend to fix sheriffs' salaries higher in counties of lesser population than in those with a greater population falling within the purview of the act.
4. **Constitutional Law: Statutes.** Chapter 86, Laws 1943, is not a local or special law within the prohibition of article III, section 18, Constitution of Nebraska.
5. ———: ———. Chapter 86, Laws 1943, does not abridge the privileges and immunities of county sheriffs affected by the act, or deny them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.
6. ———: ———. Chapter 86, Laws 1943, relating to county jails and the fees of sheriffs with reference to the care of prisoners therein, contains but one subject and is not within the prohibition of article III, section 14, Constitution of Nebraska.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Fitzgerald & Smith, Seymour L. Smith, and *Robert L. Smith,* for appellant.

Walter R. Johnson, Attorney General, *Homer L. Kyle, James J. Fitzgerald,* and *Ephraim L. Marks,* for appellees.

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

CARTER, J.

This is an action for a declaratory judgment to have chapter 86, Laws 1943, declared unconstitutional. The act now appears as sections 33-117, 33-117.01, 47-112.01, 47-113, and 47-113.01, R. S. 1943. The trial court held the act to be valid and plaintiff appeals.

On January 9, 1947, the plaintiff as sheriff of Douglas County commenced this action in which he alleged that the Douglas County jail houses federal, state, county, and city prisoners. The evidence shows that in the boarding of such prisoners the sheriff has made an average annual profit of approximately $11,000, the difference between the amounts allotted for the purpose by statute and the actual cost of so doing. The act in question became effective on January 9, 1947, by its terms, and provides that after said date counties having a population of 200,000 or more inhabitants shall provide quarters and equipment for preparing and serving meals to prisoners confined in the county jail, and that all statutory allowances for boarding prisoners shall be paid to the county. It further provides that the sheriff shall have full charge and control of the quarters and service, and shall furnish all meals, washing, fuel, lights, and clothing for prisoners at actual cost to the county. Other provisions are set forth which are not important here. Plaintiff contends that the act is unconstitutional because it is special legislation prohibited by article III, section 18, Constitution of Nebraska; that it violates the Fourteenth Amend-

ment to the Constitution of the United States; and that it is violative of article III, section 14, Constitution of Nebraska.

It is conceded that Douglas County is the only county in Nebraska having a population in excess of 200,000 inhabitants. The plaintiff does not challenge the right of the Legislature to enact such legislation if made applicable to all counties. The objection is that it applies to one county alone and is therefore special legislation and not a general law.

All reasonable doubts must be resolved in favor of constitutionality in construing a legislative act. Sommerville v. Johnson, *ante* p. 167, 30 N. W. 2d 577. For purposes of legislation the Legislature may classify counties when the classification rests upon reasonable differences of situation or circumstances which call for distinctive legislation for the class. State ex rel. Cone v. Bauman, 120 Neb. 77, 231 N. W. 693. Where a class of counties is established on the basis of population in such a manner that other counties may in the future enter the class without additional legislation, the law is considered to be general in its nature. State v. Frank, 61 Neb. 679, 85 N. W. 956. The present act is not unconstitutional because of the fact that it is presently applicable to Douglas County alone. Where reasons exist for a legislative classification, which are not superficial or baseless, the courts may not properly interfere. Such classifications do not violate constitutional provisions against local and special legislation. Allan v. Kennard, 81 Neb. 289, 116 N. W. 63. While such classifications are necessarily somewhat arbitrary, they have been uniformly upheld by the courts. The care and feeding of prisoners in the various counties of the state is a matter which is affected by the population of the county. The evidence shows different conditions existing in the various counties of the state. The number of prisoners to be fed varies, generally in proportion to the population of the county. The facilities provided are not uni-

form and the labor contributed by the sheriffs and their families is a variable factor. The record shows that the classification of counties on a population basis is reasonable under the existing situation and that the Legislature was warranted in making such a classification for the purposes of the act. Under these circumstances it is not the province of the court to re-examine the evidence upon which the Legislature acted. If the legislative classification is upon a rational basis, and consequently not unreasonable or arbitrary, it meets the requirements of the Constitution.

It has been a common legislative practice to classify counties and cities on a population basis in prescribing the manner of conducting their functions. In sustaining such classifications it has been recognized that problems of administration have a direct relation to population. It is possible that an occasional exception might exist or that one might by speculation create a possible exception, but this cannot operate to change the rule. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

It is argued that the classification of counties for the purpose of fixing salaries carries with it the fact that the larger the population the greater is the responsibility of county officers and that the salaries of public officials cannot properly be made greater in the less populous counties than in the more populous ones. This is generally true and the Legislature has complied with the rule in fixing such salaries. §§ 23-1101 to 23-1110, R. S. 1943. It is then contended that the statute before us makes it possible for a sheriff in a county of lesser population to receive greater emoluments from his office than does the sheriff of Douglas County. The difficulty with this contention is that the allowances made for the boarding of prisoners is not salary within the meaning of the statute fixing the salaries of sheriffs, and no complaint can properly be made, based on a salary differential. This being so, the act is not unconstitutional for that

reason. It does not tend to fix sheriffs' salaries higher in counties of lesser population than Douglas County.

It is next argued that the act abridges the privileges and immunities of plaintiff and denies him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. This contention is based on the claim that the act denies one within a class the privileges and immunities of others in the same class, a question we have discussed in relation to the Nebraska Constitution. The Supreme Court of the United States has reached no different conclusion in cases similar in principle. In Budd v. People of State of New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247, it was held that a statute which applies to elevator owners in places having a population of 130,000 or more does not deprive the owners of the equal protection of the laws within the meaning of the Fourteenth Amendment. In Mason v. Missouri, 179 U. S. 328, 21 S. Ct. 125, 45 L. Ed. 214, it was held that a registration law based on population, when there is in fact but one city in the class, does not deny to the citizens of such city the equal protection of the laws within the meaning of the Fourteenth Amendment. See, also, Ft. Smith Light & Traction Co. v. Board of Improvement of Paving District No. 16, 274 U. S. 387, 47 S. Ct. 595, 71 L. Ed. 1112; Phelps v. Board of Education, 300 U. S. 319, 57 S. Ct. 483, 81 L. Ed. 674. We hold that chapter 86, Laws 1943, is not violative of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff next urges that the act contravenes article III, section 14, of the Nebraska Constitution in that it contains more than one subject. We think this objection is controlled by the case of Endres v. McDonald, 115 Neb. 827, 215 N. W. 114. There we were dealing with chapter 86, Laws 1925. The act was intended as an amendment to section 3006, Comp. St. 1922. This section as amended became section 47-111, Comp. St. Supp., 1941, which in turn is one of the sections amended by chapter

86, Laws 1943, presently before us. It was plaintiff's contention in the Endres case that chapter 86, Laws 1925, did not operate to amend or repeal section 2381, Comp. St. 1922, which later became section 33-120, Comp. St. Supp., 1941, and in turn one of the sections amended by the act now before us. We held in that case that chapter 86, Laws 1925, by attempting to amend section 2381, Comp. St. 1922, without referring to it by title or otherwise, had the effect of nullifying the whole act. Clearly, we there recognized that the two sections dealt with a single subject matter — the allowances to sheriffs for boarding prisoners in county jails. The Legislature in the present act did that which it failed to do in the 1925 act which resulted in our holding of invalidity. There is but one subject contained in the act before us, although it involves more than one section of the statute. The sections amended and repealed are properly set forth. There is no merit in the claim that chapter 86, Laws 1943, was enacted in violation of article III, section 14, of the Nebraska Constitution.

The act meets all requirements of the state and federal Constitutions which have been presented. The judgment of the district court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., concurring.

I am in accord with the judgment of affirmance of the majority.

The cause presents constitutional issues. Beneath those issues and motivating this litigation and the result which plaintiff seeks is a financial issue. That issue is clearly stated by plaintiff in his assignments of error and argued by written brief and oral presentation at the bar of the court.

Plaintiff contends the courts should take judicial notice of the fact that the larger the population, the greater the responsibility of county officers; that the emoluments of office cannot be made greater for public officials in the less populous counties than in the more populous

counties; that what may be done under an act is material in determining its constitutionality; and that if the act in question may cause sheriffs in the less populous counties to receive more compensation than those in the more populous counties, it is invalid.

For the majority to hold, as it does, that the statutory allowance for boarding occupants of county jails is not salary within the meaning of section 23-1101, R. S. 1943, is to state the obvious, but not to answer the contention. Plaintiff does not contend that the allowance for the boarding of prisoners is a part of his statutory salary. It is his contention that the profits which he makes from the boarding of prisoners is an emolument of his office, over, above, and in addition to his salary, which he has a right to keep and which the Legislature cannot take from him constitutionally, save and unless it also is taken from all sheriffs. Plaintiff's contention is based on that premise. The premise is not sound.

The record clearly discloses the basis of this financial issue. Plaintiff was sheriff of Douglas County from 1939 to 1947. The Douglas County jail houses federal, state, county, and city prisoners. During the above period plaintiff made a profit averaging approximately $11,000 a year from the feeding of prisoners. It appears from the record that the plaintiff received 15¢ a meal for feeding county and city prisoners; 75¢ a day for feeding state prisoners, with the exception of two years when the Legislature cut his allowance to 45¢ a day; and one dollar a day for feeding federal prisoners. For the three years shown plaintiff received approximately $5,000 a year for feeding federal prisoners. Plaintiff's costs for the feeding of prisoners over the eight-year period averaged about 42.5 percent of the gross amounts received for that purpose. His profits averaged about 57.5 percent of the amount received for that purpose. It is these profits which the plaintiff seeks to retain.

The first question to be determined is whether or not the plaintiff had the right to keep and retain these

profits under the law as it existed prior to the enactment of the legislation here assailed. The question of the constitutionality of the act in question, insofar as this contention is concerned, does not arise unless and until it is determined that plaintiff had the right to these profits as a part of the emoluments and perquisites of his office as sheriff and in addition to his salary. I would answer that first question. Plaintiff presents it. The majority neither considers nor decides it.

For the purpose of fixing salaries, counties of this state are classified using the base of population. § 23-1101, R. S. 1943. Plaintiff does not question the validity of this classification, but argues that such a classification is held reasonable because it is assumed "that no situation can possibly arise whereby the officers in the less populous counties can receive more compensation than those in the more populous counties."

A public officer in this state must perform all the duties of his office for the compensation allowed by law. Johnson v. Johnson, 141 Neb. 239, 3 N. W. 2d 414. The salary of a sheriff is fixed by statute, on an annual basis, to be paid monthly. §§ 23-1102 to 23-1110, R. S. 1943. The sheriff has been on a salary basis since 1907. The sheriff has charge of the county jail and of the prisoners in the same. §§ 23-1703 and 47-105, R. S. 1943. If he elects to do so he may act as jailer, and if not, the jailer must be a deputy appointed by the sheriff. § 47-115, R. S. 1943. It is clearly the intention of the Legislature that the duty of caring for prisoners shall be that of the sheriff or his deputy. That duty is expressed in section 47-111, C. S. Supp., 1941, and as amended by chapter 86, Laws 1943, as appearing in sections 47-113 and 47-113.01, R. S. 1943.

Section 33-120, C. S. Supp., 1941, fixing the fees of a sheriff, provided for an allowance of 75¢ a day for boarding all prisoners in all counties where there is an average of less than 50 prisoners per day, and 45¢ per day where there is an average of more than 50 prisoners

per day. It is also provided that the sheriff should make a quarterly report to the county board of fees collected and earned, "except mileage collected or earned," and shall "pay all fees earned to the county treasurer." These provisions were retained in section 33-117, R. S. 1943. These provisions negative any legislative intent that the sheriff should make a personal profit out of the feeding of prisoners. This conclusion is strengthened by the provisions of sections 29-1002 and 29-1004, R. S. 1943, that, subject to certain conditions, it is the "cost of keeping and maintaining any prisoner" which shall be paid by the county or state.

We held pursuant to these provisions in the original 1907 act: "A sheriff is required to report all fees earned by him by virtue of his office, which are not especially excepted from his report by statute. His salary is in lieu of fees" (State ex rel. Antelope County v. Miller, 98 Neb. 179, 152 N. W. 326), mileage being excepted (Red Willow County v. Peterson, 91 Neb. 750, 137 N. W. 987).

In Dunkel v. Hall County, 89 Neb. 585, 131 N. W. 973, a case dealing with jailer's fees, we said arguendo: "It is contended by defendant that under these provisions of the statute it was the intention of the legislature that the amount fixed as a salary 'for their services' was intended to cover any and all services performed by such sheriff, and that all fees earned by him should belong to the county; and that if plaintiff were allowed the $1.50 a day as jailer's fees he would be required, under the terms of section 5, *supra,* to pay it over to the county treasurer. If that be a correct construction of section 5, then the sheriff would have to turn over all money collected by him for the 50 cents a day for boarding each prisoner, notwithstanding the fact that he had been obliged to previously advance his private funds in the payment for the provisions necessary for the furnishing of such board—expenditures which might eat up a very considerable portion of the salary allowed

the sheriff for his services. We are unable to so construe this statute."

That statement goes no further than to say that the sheriff is not required to bear the cost of food for prisoners out of his own salary without receiving restitution. The statement does not say that the sheriff is entitled to retain profits made from the feeding of prisoners. Again, the exception contained in the act as to mileage alone negatives that conclusion.

This review clearly demonstrates that the sheriff has no statutory right to keep and retain these profits and that they are to be accounted for and paid to the county.

The question here presented has been considered and determined in a number of states where the sheriff is on a salary, as he is in Nebraska, and not on a fee basis. Their decisions sustain these conclusions. The county jail is not furnished to the sheriff as a place in which to conduct a private business. The sheriff receives and cares for prisoners in his official capacity and not in his individual capacity. He receives the fees for boarding prisoners because he is an official of the county. The theory of an allowance for the board of prisoners is that such payment shall be sufficient to reimburse him for actual expenses; it is intended to prevent both an extravagant overfeeding and a niggardly underfeeding of the prisoners. It was not enacted for the purpose of adding a perquisite to the sheriff's office, nor was it intended that the sheriff should receive a private personal profit out of the feeding of prisoners and at the expense of the prisoners, the county or the state. It is against public policy for a public official to be so placed that in the performance of a public duty a conflict may arise between his personal financial interest and his public duty, or so that he may be required to choose between personal interest and public duty. So long as he retains public office, private interest must yield to public duty. That conflict arises when a personal private profit is made from the performance of

a public duty. To hold otherwise would be to say that the sheriff has, not a fixed and definite salary, but a very indefinite salary. The money received by a sheriff for the care and feeding of prisoners in excess of what was actually expended by him for those purposes belongs not to the sheriff but to the county. Freeholders of Hudson v. Kaiser, 75 N. J. L. 9, 69 A. 25; Bowman v. Harford County, 166 Md. 296, 171 A. 48; Kommers v. Palagi, 111 Mont. 293, 108 P. 2d 208; Howell v. City of Ashland, 239 Ky. 349, 39 S. W. 2d 468; Holland, Jailer, v. Fayette County, 240 Ky. 37, 41 S. W. 2d 651, and cases there cited; Adams v. Maricopa County, 16 Ariz. 418, 145 P. 884; Kohler v. Powell, 115 Ohio St. 418, 154 N. E. 340.

I would so answer plaintiff by basing the decision as to this contention upon the first question, and not upon the second question which it presents.

I am authorized to state that Paine and Wenke, JJ., concur in this opinion.

FRED J. LEFFERDINK, APPELLEE, V. HENRY H. SCHMUTTE, APPELLANT.

32 N. W. 2d 194

Filed May 7, 1948. No. 32344.

1. **Evidence.** Parol evidence is not admissible which seeks to modify, nullify, or change the character of a promissory note which has been delivered and has become an obligation by showing that it is to cease to be effective in whole or in part or is to have an effect different from that stated therein.
2. ———. Parol evidence is admissible under section 62-116, R. S. 1943, to show that the delivery of a promissory note was given conditionally or for a special purpose only and not for the purpose of transferring the property in it, but is not admissible if there has been delivery for the purpose of transferring the property in the instrument.
3. ———. Where a promissory note in usual form calls for the payment of money, evidence that it was to be paid in work and labor cannot be received against the objection of the holder.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded.*

Lloyd E. Chapman, for appellant.

Baylor, Bloss & Evnen, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

YEAGER, J.

This is a suit by plaintiff and appellee against defendant and appellant on a promissory note wherein plaintiff obtained judgment against defendant.

The cause was tried to a jury. At the conclusion of the evidence, on motion of plaintiff, a verdict was directed in his favor and against the defendant for $1,450. Judgment was entered on the verdict. Motion for new trial was duly filed by defendant which motion was overruled.

From the verdict and judgment and the order overruling the motion for new trial the defendant has appealed.

As grounds for reversal the defendant asserts (1) that the court erred in excluding evidence offered by appellant to prove affirmative defenses set forth in his answer, (2) that the court erred in directing a verdict in favor of plaintiff and against the defendant, (3) that the judgment is not sustained by the evidence and is contrary to law, and (4) that the court erred in overruling the motion for a new trial.

The petition of plaintiff was in the usual form used in actions for recovery on promissory notes. Plaintiff set out the note, which is as follows:

"Hickman, Nebraska, Aug 1 1937
Two years days after date, for value received, we or either of us, promise to pay to the order of F. J. Lefferdink Eight hundred & fifty DOLLARS, $850.00 with interest at the rate of 4 per cent per annum from date

to maturity and ten per cent from maturity until paid. The makers and endorsers of this note hereby severally waive presentment for payment, notice of non-payment, protest, and consent that time of payment may be extended without notice thereof.
I sign this note intending hereby to charge my separate estate with its payment.

H. H. Schmutte"

Plaintiff then pleaded that the note with the interest provided by the terms of the note was due and unpaid except for payments of $34, December 31, 1938, $34, May 15, 1940, and $50, August 25, 1943, leaving a balance due in the amount of $1,397.02.

To the petition the defendant filed an answer. The answer contains a general denial of the allegations of the petition. As an affirmative defense the defendant claimed a credit of $150 under an alleged oral contemporaneous agreement whereby plaintiff agreed to give defendant credit on the note for material furnished and work performed by defendant in repairing a house, well, and fences upon a farm owned by plaintiff on which defendant had formerly been a tenant. Defendant alleged that the reasonable value of the work and material was $150. Defendant further alleged affirmatively a contemporaneous oral agreement that he would not be called upon to pay the note in money but that payment was to be made by credit for the afore-mentioned work and material and that the balance was to be paid by work to be performed thereafter for plaintiff by defendant; that work was performed of the value of $184.50 for which he was entitled to credit which has not been given. He also filed a counterclaim but it was dismissed on his own motion, therefore it requires no consideration here.

The allegations of the answer which are inconsistent with the allegations of the petition were denied by a reply.

The judgment rendered, according to the bill of ex-

ceptions, appears to have been for the face of the note with interest according to its tenor less the endorsed credits, less a credit for payment of $126.50 which includes four of the items for work claimed by defendant in his answer, and less $41.35 allowed at the suggestion of the attorney for plaintiff, the reason wherefor is not disclosed.

On the trial of the case the court rejected evidence whereby the defendant sought to prove the alleged oral agreement that credit was to be allowed on the note for material furnished and work performed prior to the time of the execution and delivery of the note and some evidence the effect of which was to prove the alleged oral agreement that the note was not to be paid in money but in work to be performed for plaintiff.

The evidence offered to prove the alleged agreement for credit for past furnished material and past performed labor was clearly inadmissible.

The effect of the evidence rejected was to prove by parol and to attach to the note a condition subsequent. There is no doubt on the record that the note was based on a valid consideration and was for an amount of money due and owing and that it was intended to be a valid and binding obligation. It was a renewal note for rent long owing. The purpose of the evidence was to effect a modification or change by parol of the note the validity of which as a binding obligation from the date of execution was not brought by evidence into question. This being true, under well-settled legal principles of law the trial court rightly rejected the evidence.

The applicable rule is that parol evidence is not admissible which seeks to modify, nullify, or change the character of a promissory note which has been delivered and has become an obligation by showing that it is to cease to be effective in whole or in part or is to have an effect different from that stated therein. Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412; Gund v. Roulier, 108 Neb. 589, 188 N. W.

185; Security National Co. v. Sanders, 60 N. D. 597, 235 N. W. 714; Phelps v. Abbott, 114 Mich. 88, 72 N. W. 3.

The defendant however contends that under the terms of section 62-116, R. S. 1943, which is a provision of the Negotiable Instruments Act, he was entitled to have this evidence admitted. The section is the following: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or endorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved."

Neither the terms of the statute nor the decisions cited sustain defendant's contention. The note was neither incomplete nor revocable within the meaning of the statute since there was a delivery. The delivery was made by the defendant, the party making it. There was no evidence within the meaning of the statute indicating that the note was conditional or for a special purpose only and not for the purpose of transferring the property in it. To the contrary the evidence without dispute shows an intention that on delivery the transfer of the property in the note should be complete.

The decisions of this court on this proposition arrive at the conclusion that parol evidence is admissible under section 62-116, R. S. 1943, to show that the delivery of

a promissory note was given conditionally or for a special purpose only and not for the purpose of transferring the property in it, but is not admissible if there has been delivery for the purpose of transferring the property in the instrument. Witte v. Broz, 111 Neb. 76, 197 N. W. 121; People's State Bank v. Smith, 120 Neb. 29, 231 N. W. 141; Monroe v. Parker, 122 Neb. 499, 240 N. W. 548; Luikart v. Braasch, 130 Neb. 361, 265 N. W. 13; Security Savings Bank v. Rhodes, *supra.*

Parol evidence of the alleged agreement that payment of the note was to be made by work and labor to be furnished by the defendant was objectionable for the same reasons as was the evidence of the agreement for credit for earlier work and material. The authorities applicable there are equally applicable here.

To allow proof by parol that there was an agreement to pay the note in question other than in money would be to allow the terms of the note to be varied by parol. It was said in Vradenburg v. Johnson, 3 Neb. (Unoff.) 326, 91 N. W. 496: "Where a promissory note in the usual form calls for the payment of money, evidence that it was to be paid in work and labor can not be received against the objection of the holder."

The evidence in these two respects which was rejected was properly so rejected.

The evidence relating to payments on the note during the years 1940 and 1941 appears to have been erroneously rejected. This evidence was offered in support of allegations of payment of $27.50 by work in 1940 and $48 by work in 1941. This evidence was apparently rejected on either the ground that such evidence would tend to vary the terms of a written instrument or that the statute of limitation had run on the right to assert payment. These two grounds appear in the objections which were sustained.

No authority is cited to sustain the validity of the objections on either ground and we think none may be found. Certainly proof that a promissory note was paid

in whole or in part other than by cash is not to be rejected on the ground that a written instrument is varied by such proof. Equally certainly the maker of a promissory note is not barred by any statute of limitation from making proof of payment of the note in whole or in part.

The court erred in the rejection of the evidence of payment which was proffered.

The defendant defends against interest on the note on the ground that it is usurious. This defense, however, is not available. It is true that section 45-102, R. S. 1943, fixes the maximum legal rate of interest at nine percent. It is also true that section 45-105, R. S. 1943, provides that if proof is made that an illegal rate of interest has been taken, contracted for, or reserved there shall be no recovery of interest at all but that the principal may be recovered. These two sections of the statutes as now appearing were in full force and effect at the time of the execution of the note herein but we must conclude that section 45-105 did not at that time apply alone to section 45-102. It also applied to section 45-101. At that time section 45-101 permitted a contract for interest not exceeding ten percent. Section 45-101 was not amended to conform with section 45-102 until 1941.

It therefore appears that the court erred in rejecting the defense of payment as to the items discussed. Whether the evidence in support of the defense would have been sufficient upon which to submit that issue to a jury is not ascertainable from the record. It further appears for the reasons set out that the directed verdict and judgment thereon were erroneous and contrary to law.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CHAPPELL, J., concurs in the result.

CHARLES M. LEEMAN, MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF OMAHA, PLAINTIFF IN ERROR, V. JAMES VOCELKA, DEFENDANT IN ERROR.

32 N. W. 2d 274

Filed May 7, 1948. No. 32332.

1. **Contempt.** Contempts are either direct, those committed in the presence of the court while in session, or constructive, those committed out of the presence of the court.
2. ———. Constructive contempts are classified as criminal or civil in character.
3. ———. Constructive contempts instituted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders, are criminal contempts which must be prosecuted by a separate action in the name of the State and by information.
4. ———. Contempts instituted to preserve and enforce the rights of private parties to a suit and compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them entitled, are civil contempts which may be prosecuted in the original action by the affidavit of any party therein who is injuriously affected.
5. **Equity.** A court of equity cannot exercise jurisdiction over a matter which has been by statute expressly entrusted to another tribunal of adequate power to deal with it.
6. **Intoxicating Liquors.** The acts of local governing bodies of cities and villages in passing upon original applications for the renewal or revocation of licenses to sell alcoholic liquors at retail, being quasi-judicial in character and by statute expressly entrusted to that tribunal, are not subject to collateral attack or reviewable by resort to an injunction suit.
7. **Injunction: Contempt.** If the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisidiction, its injunction will be treated as void and defendants in such case cannot be punished for contempt because of its alleged violation.

ERROR to the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and dismissed.*

Edward F. Fogarty, Edward Sklenicka, Einar Viren, James M. Paxson, and *Herbert M. Fitle,* for plaintiff in error.

Eugene D. O'Sullivan, B. J. Boyle, and *White & Lipp,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, hereinafter called defendant, was found guilty of contempt by the district court for Douglas County, and "not as punishment, but as a token and demonstration that all people are amenable to the orders of the Court" defendant was sentenced to pay a fine of one dollar and costs, and to be confined momentarily in the custody of the sheriff and then be released, but upon failure to pay the fine and costs, he was ordered committed in lieu thereof. At the conclusion of the hearing, the trial court also castigated and reprimanded Edward F. Fogarty, the city attorney, for alleged misconduct in advising defendant as hereinafter set forth. Stay of execution was granted defendant, however, and his motion for new trial was overruled, whereupon he prosecuted error to this court. We exonerate the city attorney and reverse and dismiss the proceedings.

On March 3 or 4, 1947, defendant in error, hereinafter called plaintiff, filed with the city clerk of Omaha an application, together with a certified check and bond, as required by law, to obtain renewal of a Class "C" or retail liquor license for the year May 1, 1947, to April 30, 1948. The application showed on its face that in August 1946, plaintiff had been cited before the Nebraska Liquor Control Commission and that his license had been suspended for sale of liquor on Sunday.

On April 1, 1947, the city council by resolution voted to renew some 195 Class "C" licenses to named applicants therefor, who, as represented, had no violations charged against them. By oversight of the clerk, plaintiff's application was among that group, and his suspen-

sion was overlooked and not called to the city council's attention until after his application for a license had been improvidently approved and signed by defendant as mayor, countersigned by the chairman of the Liquor Control Commission "as a matter of course" as provided by section 53-132, R. S. 1943, and delivered to plaintiff. However, the license was, as prescribed on its face as well as under the law, not effective or to be effective as such until on and after May 1, 1947, and it was at all times as provided therein subject to the provisions of the Liquor Control Act and such rules and regulations as may have been or might thereafter be lawfully promulgated or adopted.

On April 23, 1947, after plaintiff's suspension had been called to its attention, the council, by motion, unanimously reconsidered its action approving the renewal of plaintiff's license, and set the matter down for hearing on April 29, 1947. Thereupon, plaintiff was duly notified personally and by mail of such action and proposed hearing. He was also personally requested by the clerk to surrender the license then in his possession, but as yet ineffective, which he refused to do.

On the morning of April 29, 1947, plaintiff filed an original action in the district court, seeking substantially among other things to enjoin the members of the city council as such from reconsidering or undertaking any action or holding any hearing, meeting, or proceeding initiated or designed to render ineffectual plaintiff's alleged license. The basis of plaintiff's action was that the council had no authority in law to take such action.

Ex parte, without any notice or hearing, the trial court granted a supersedable temporary injunction as distinguished from a temporary restraining order, among other things thereby enjoining defendants as members of the city council from reconsidering and from holding, carrying on, or conducting any proceeding, hearing, or meeting to withdraw or otherwise attempt to cancel, rescind, or nullify plaintiff's license.

Although the sheriff was present in the council chamber on the morning of April 29, 1947, and had ample time and opportunity earlier to have served the process and order of injunction upon defendants, he made no effort to do so until the members of the council were in the midst of a regular session, and were holding a hearing upon the application of another for a liquor license. At that time, upon the advice of the city attorney that an injunction enjoining the city council from having a hearing in a matter involving a liquor license was void, and that the council was immune from service thereof while in regular session, defendant refused to give the sheriff permission to make service thereof as requested, and ordered him barred from the council chamber while in regular session. Thereafter, while the council was still in regular session, plaintiff's application was called up for hearing. Although plaintiff was present in the council chamber at that time, he made no response, and the council, after hearing, unanimously adopted a resolution denying him any license. Following adjournment of the council meeting, the process and order of injunction were duly served upon defendant members of the city council.

On April 30, 1947, an application, supported by affidavits, was filed by plaintiff in the original injunction suit, charging defendant and the other members of the city council with contempt of court. Whereupon the trial court issued an order to show cause. The defendants jointly and severally answered, denying generally and, insofar as important here, contending that they were immune from service at the time it was attempted and that the temporary injunction was void. Upon trial of the issues, defendant herein, the mayor, was found guilty, but all other defendants were dismissed or acquitted.

The charge of contempt is in two parts, and will be so treated in this opinion. The first charged in substance that defendants and each of them, with full knowledge

of the import, contents, and restraints of the temporary injunction, willfully, deliberately, and contumaciously, and in wanton disregard of law, prevented delivery to the defendants of the process and order of injunction, and did hinder, delay, and unlawfully interfere with service thereof, and thereby did unlawfully and illegally attempt to and did obstruct the due administration of justice, all in contempt of court and its order and process.

The second charged that defendants and each of them, with full knowledge of the import, contents, and restraints of the temporary injunction, willfully, deliberately, and contumaciously disobeyed, flaunted, and violated the same, by reconsidering and having a hearing, withdrawing its approval and denying plaintiff's application for renewal of his license. It prayed that defendants be cited for contempt and punished; that they be directed to rescind their reconsideration and denial of plaintiff's license; and that they be required to give further security to obey the injunction.

It was said by this court in Maryott v. State, 124 Neb. 274, 246 N. W. 343: "Generally speaking, contempts are either direct, those committed in the presence of the court while in session, or constructive, consisting of those not committed in the presence of the court. Properly speaking, constructive contempts should be divided into two classes - criminal and civil. Those contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts. * * * In criminal contempts the prosecution should be in the name of the state and by information." See, also, 17 C. J. S., Contempt, § 63, p. 79; 13 C. J., Contempt, § 82, p. 59.

Section 25-2121, R. S. 1943, provides: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of * * * (3) willful disobedience of or resistance willfully offered to any lawful process or order of said court; (4) any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; * * *."

Without question the first part of the charge came clearly within the classification of a constructive criminal contempt, which could only be prosecuted in the name of the State and by information. Private litigants in such a situation have no right or authority to prosecute such actions, and thus intimidate and harass litigants and public officials under the pretext of preserving the power and vindicating the dignity of the court. We are not unmindful that the power of courts should be preserved and that the dignity of courts should be vindicated for the benefit of the public, but competent public officials and adequate proceedings are otherwise available for that purpose, which will also protect and preserve the fundamental rights and liberties of litigants which courts were created to protect. Viewed in that light, the first part of the charge of contempt falls of its own weight for want of any power or authority to prosecute the same.

On the other hand, the second part of the charge, while of a dual nature, may be said to come within the classification of constructive civil contempt, in which case it need not be prosecuted in the name of the State and by information in a separate action, but may be prosecuted in the original action by the affidavit of a party to the action who is injuriously affected. In re Application of Niklaus, Niklaus v. Holloway, 144 Neb. 503, 13 N. W. 2d 655; Maryott v. State, *supra*.

It will be noted from the facts heretofore stated that plaintiff's application had already been reconsidered by

the city council on April 23, 1947, before the temporary injunction was granted, and that there was then naught left for determination save the question of whether or not plaintiff's application, after hearing thereon, should be approved or denied.

The remedy by injunction is wholly preventative, prohibitory, or protective, and it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost, and wrongs, if such, already perpetrated, cannot be restrained or remedied by injunction. Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687.

We have presented then only the question whether or not the trial court had any authority or jurisdiction to enjoin the hearing, upon plaintiff's application. We hold that it did not.

The comprehensive Liquor Control Act of this state, as applicable here, is chapter 53, R. S. 1943. As provided in section 53-149: "A license shall be purely a personal privilege, * * * and shall not constitute property, * * *." Section 53-150 provides: "Any licensee may renew his license at the expiration thereof; Provided, he is then qualified to receive a license * * *; and provided, further, that the renewal privilege herein provided for shall not be construed as a vested right * * *."

In Griffin v. Gass, 133 Neb. 56, 274 N. W. 193, this court approved the statement that: "'The right to engage in the sale of intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden to abridge, nor can such restrictive statutes be said to deprive persons of liberty or property without due process of law, nor, if not entirely arbitrary in their discrimination between persons, do they deprive any one of the equal protection of the laws.' 33 C. J. 508.

"So, also, 'A license for the sale of liquor is not a contract between the state or municipality granting it and the person to whom it is issued, in any such sense

as to be within the protection of constitutional guaranties. It gives no vested rights, such as cannot be abridged or abrogated by the legislative authority in the interests of the public, nor is it in itself property or a right of property, in the ordinary meaning of those terms.' 33 C. J. 532."

It is well established as a general principle of equity jurisprudence that an equity court has no jurisdiction in any controversy except to protect some property right or some civil right granted by the Constitution, statutes, or law of the land. See Rogers v. Tangier Temple, 112 Neb. 166, 198 N. W. 873; 21 C. J., Equity, § 135, p. 154; 28 Am. Jur., Injunctions, § 162, p. 352.

As stated in Sheridan v. Colvin, 78 Ill. 237, and approved in In re Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402, cited and relied upon in Wolski v. Lippincott, 147 Neb. 944, 25 N. W. 2d 754: "It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property." See, also, 30 C. J. S., Equity, § 66, p. 413; 21 C. J., Equity, § 137, p. 156.

As heretofore demonstrated, no property right, and as will be hereinafter observed, no civil right cognizable by courts, was involved in plaintiff's injunction suit.

We turn again to chapter 53, R. S. 1943. An examination of its various sections, which, as required therein, must be liberally construed, demonstrates that they

provide a complete, comprehensive, and adequate authority and procedure for the hearing and disposition of every phase relating to the granting, renewing, or revoking of liquor licenses without any recourse to courts. They place the express power and authority with relation thereto entirely in the hands of the Nebraska Liquor Control Commission and local governing bodies for the protection of the health, safety, and welfare of the people of this state. Both of such bodies, when acting upon matters such as here involved, exercise a discretion and function in a quasi-judicial capacity. Any final order or action of the local governing body is appealable to the commission with trial de novo and rehearing thereof, but no appeal is allowed from any decision of the commission to the courts.

It is elementary that equity follows the law, and has no jurisdiction or authority to violate it or enjoin its valid proceedings or processes. This case is a classic example of the reason for the rule, since it appears that as a result of the trial court's action, plaintiff was extrajudicially permitted to sell intoxicating liquors at retail without the required approval of the city council and in violation of the Liquor Control Act.

In The Law of Injunctions, Lewis & Spelling, § 5, p. 7, it is said: "A court of equity cannot, however, exercise jurisdiction of a matter which has been by statute expressly entrusted to another tribunal of adequate power to deal with it." See, also, Massman Construction Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N. W. 2d 639.

Also, as stated in MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013: "There is no reason, therefore, why the statute remedy should not be pursued, and a court of equity is never at liberty to draw to its general jurisdiction a question remitted to a competent and sufficient authority by express command of a statute, unless under some very exceptional circumstances, which do not exist

here." See, also, State ex rel. Ellingsworth v. Carlson, 72 Neb. 837, 101 N. W. 1004.

In 43 Am. Jur., Public Officers, § 255, p. 72, it is said: "Where a statute gives a discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is the sole and exclusive judge of the existence of those facts; the courts will not attempt to interfere with or control the exercise of his discretionary powers, in the absence of any controlling provisions in the law conferring the power. The fact that the exercise of a power may be abused is not a sufficient reason for denying its existence. Thus, it is a firmly established rule, as stated in other articles in this work, that the judiciary will not interfere with executive officers in the performance of duties which are discretionary in their nature or involve the exercise of judgment. Although courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of the acts of public officers, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts." See, also, Chicago, R. I. & P. Ry. Co. v. City of Lincoln, 85 Neb. 733, 124 N. W. 142; Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955.

In the light of the foregoing and by an analogy we hold that the acts of local governing bodies of cities and villages in passing upon original applications for, or the renewal or revocation of licenses to sell alcoholic liquors at retail, being quasi-judicial in character, and by statute expressly entrusted to that tribunal, are not subject to collateral attack or reviewable by resort to an injunction suit. See Everts v. Young, 125 Neb. 562, 251 N. W. 109; Dawson County Irrigation Co. v. McMullen, 120 Neb. 245, 231 N. W. 840.

We are cognizant of the fact that an equity court has the power generally to issue a temporary restraining order to preserve existing conditions while it is determining its own authority to grant injunctive relief in cases where the question of jurisdiction has any substantial foundation in law or fact, and in that situation such restraining orders must be obeyed, but the rule is otherwise where the question of jurisdiction is clearly frivolous and not substantial in any sense, as in the case at bar. See United States v. United Mine Workers of America, 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884.

In State ex rel. Ellingsworth v. Carlson, *supra,* this court approved a statement appearing in High on Injunctions, volume II, (4th ed.), § 1425, p. 1434, to the effect that: "And if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants can not, in such case, be punished for contempt for its alleged violation." See, also, Wolski v. Lippincott, *supra.* The second part of the charge against defendant comes squarely within that category, and thus disposes of it, as well as the unwarranted castigation and reprimand of the city attorney by the trial court.

As we view the case, other questions presented in the briefs need not be discussed, and for the reasons heretofore stated, the judgment is reversed and the contempt proceeding is dismissed.

REVERSED AND DISMISSED.

JOHN E. BURKHARDT ET AL., APPELLEES, V. ALICE M. CIHLAR ET AL., APPELLANTS.

32 N. W. 2d 197

Filed May 7, 1948. No. 32345.

1. **Equity.** A suit in equity will not lie when the plaintiff has a plain, adequate, and speedy remedy at law.

2. **Highways.** Where a highway has been legally established, mandamus will lie to compel the proper authorities to open it.

APPEAL from the district court for Knox County: LYLE E. JACKSON, JUDGE. *Reversed and dismissed.*

Roscoe L. Rice and *W. Keith Peterson,* for appellants.

W. A. Meserve, for appellees.

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

WENKE, J.

Appellees John E. Burkhardt and Lydia B. Burkhardt, plaintiffs below, brought this action in the district court for Knox County. The purpose of the action is to permanently enjoin the appellants Alice M. Cihlar and Vinc Cihlar, defendants below, from maintaining or permitting to be maintained any fences on and across road No. 225 as it traverses the northwest quarter of Section 2, Township 29 North, Range 7 West, of the 6th P. M., in Knox County, Nebraska, and for the recovery of damages. From a judgment in favor of the appellees granting the injunctive relief, their motion for new trial having been overruled, the appellants have perfected this appeal.

Since the various quarter sections of land herein involved are all in the same township and range in Knox County, Nebraska, that is, Township 29 North, Range 7 West, of the 6th P. M., they will be herein cited by referring only to the section wherein located.

The record establishes that the appellees are the owners of the northeast quarter of Section 5 which they have owned for many years and farm as their home place; that by deed dated August 7, 1944, appellees became the owners of the southwest quarter of Section 2 of which they went into possession on March 1, 1945, and have been in possession thereof ever since, and are now farming it; that appellants own, are in possession of, and farm the northwest quarter of Section 2 which they

acquired by deed dated October 21, 1943; that this deed provided that they take the title thereto "subject, * * * to all rights in roads and highways;" that on August 15, 1890, the County Board of Knox County established road No. 225 pursuant to a petition which had been filed on May 10, 1888; that road No. 225, as established, crossed the northwest quarter of Section 2; that the line of said road No. 225 across the northwest quarter of Section 2, as shown by the survey, is as follows: "Commencing at a point 12 chains 10 links east of the North Quarter Post of Sec. 2, Twp. 29, Rg. 7, W., thence South variation 47 degrees West, 10 chains 26 links, thence South variation 31 degrees 65 minutes West, 18 chains 57 links, thence South variation 16 degrees West, 23 chains 78 links, thence South variation 8 degrees 10 minutes West, 5 chains 96 links, to the East Bank of Verdigris Creek;" and that the distance which the appellees must travel in going from their home place to the southwest quarter of Section 2, by public roads, would be about four miles shorter provided they could use road No. 225 across the northwest quarter of Section 2.

It is on this road, as it traverses the northwest quarter of Section 2, that the appellees are seeking to permanently enjoin the appellants from maintaining or permitting to be maintained any fences.

Two of appellants' contentions are as follows: That appellees have not established any special injuries peculiar to themselves, aside and independent of injury to the general public, to entitle them to injunctive relief; and that appellees have an adequate remedy at law.

If road No. 225 across the northwest quarter of Section 2 had actually been opened, that is, worked or traveled, after it was established and thereafter the appellants had, by means of fences, obstructed the use thereof then, under our holdings in Letherman v. Hauser, 77 Neb. 731, 110 N. W. 745, and Donovan v. Union P. R. R. Co., 104 Neb. 364, 177 N. W. 159, it would appear

that appellees could maintain this action although George v. Peckham, 73 Neb. 794, 103 N. W. 664, should be considered in relation thereto.

However, none of these cases are applicable here for the reason that the facts established that road No. 225, as it was established across the northwest quarter of Section 2, has never actually been opened. No work was ever performed thereon nor did anyone ever travel it. It is true, as the evidence shows, that the public has, during the period of time covered by the evidence, used a trail or road across this land at different places and has at times improved the same but such trails or roads were never on the route of road No. 225. This was apparently due to the difficulty of passing over or near the route of road No. 225 because of the nature of the terrain which it crossed. In June 1945 the appellants closed, by means of a fence, the road then being used across this land. Whether the trails or roads so traveled were ever dedicated to the public, or the public acquired a right therein by prescription, or if only a permissive use was granted, the record does not disclose nor do we decide as it is not in issue here. The appellees' action is based on road No. 225 and they seek to restrain the appellants solely with reference thereto.

"It is elementary that a suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law. Hahn System v. Stroud, 109 Neb. 181; Western Union Telegraph Co. v. Douglas County, 76 Neb. 666; Brown v. Reed, 72 Neb. 167." Vance v. Sumner, 119 Neb. 630, 230 N. W. 490. See, also, Omaha Grain Exchange v. Spillman, 118 Neb. 729, 226 N. W. 452, and our authorities therein cited; and Golden v. Bartholomew, 140 Neb. 65, 299 N. W. 356.

If road No. 225 across the northwest quarter of Section 2 is still an established road, which question we do not here decide, then appellees have an adequate remedy at law for we approved in State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556, the following

from 38 C. J., Mandamus, § 371, p. 751: "Where a highway has been legally established, mandamus will lie to compel the proper authorities to open it."

Since the appellees have available an adequate remedy at law to secure their rights, a suit in equity to obtain injunctive relief for the same purpose will not lie. As stated in 93 A. L. R. 1495: "Upon the broad general principle of equity jurisprudence that where there is a remedy at law which is full and adequate courts of equity will not exercise jurisdiction, it is settled by practically all cases, with few exceptions, that where there is a remedy by mandamus a suit for injunction (preventive) may not be maintained."

The judgment of the lower court is therefore reversed and all injunctive relief granted appellees is hereby dissolved and the action dismissed.

REVERSED AND DISMISSED.

HONOR ANSON ET AL., APPELLEES, V. THERESA MURPHY, APPELLANT, IMPLEADED WITH GEORGE E. CARRUTHERS ET AL., APPELLEES.

32 N. W. 2d 271

Filed May 12, 1948. No. 32397.

1. **Joint Tenancy.** Where in the attempted creation of a joint tenancy prior to the enactment of section 76-118, R. S. 1943, in which one or more of the unities of time, title, interest, and possession are absent, a tenancy in common results if no contrary intent is expressed.
2. **Tenancy in Common.** Where language creating a tenancy in common is accompanied by appropriate words reciting a purpose to create a right of survivorship, the intention to create a survivorship is effectual.

APPEAL from the district court for Burt County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

Ralph M. Anderson and *Moodie & Burke,* for appellant.

Cranny & Moore and *Charles Nanfito,* for appellees.

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

CARTER, J.

This case presents the question of whether or not the two deeds involved in the second and third causes of action effectively create a right of survivorship in the grantees therein named. The trial court held that they did not. The holding being adverse to the claims of the defendant Theresa Murphy, she brings the case here on appeal.

Each of the two deeds presents the identical question. As to each deed, the defendant Theresa Murphy is the sole survivor among the grantees. We shall determine the rights of Theresa Murphy by virtue of the first deed, and the determination made will apply equally to the second.

On April 10, 1933, Mary Murphy, single, George Murphy, single, and Bernard Murphy, single, conveyed certain real estate to Mary Murphy, George Murphy, Bryan Murphy, Margaret Murphy, and Theresa Murphy "as joint tenants and not as tenants in common, their assigns, the survivor of said parties, and the heirs or assigns of the survivor, forever." The habendum clause stated in part: "To have and to hold the above described premises unto the said parties of the second part, their assigns, the survivor of said parties, and the heirs and assigns of the survivor heirs and assigns." The heirs of deceased grantees claim an interest in the property conveyed by the deeds presently before the court, while the defendant Theresa Murphy claims the ownership thereof as the sole surviving grantee.

The grantors were tenants in common who conveyed the property to themselves and others directly in the manner hereinbefore shown. In order to create a joint tenancy prior to the adoption of section 76-118, R. S. 1943, there must have been a unity of interest,

arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327. The deeds presently before us do not create a joint tenancy under the foregoing holding for the reason that they lacked the unity of time and title necessary to create such an estate. The estate actually conveyed was that of a tenancy in common. It may be that the grantors intended to create a joint tenancy and not a tenancy in common, as is evidenced by the use of the words, "as joint tenants and not as tenants in common," contained in the conveying clause, but for failure to comply with controlling rules of law, their expressed intention could not be given effect, and they in fact conveyed a tenancy in common only. Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327, 62 A. L. R. 511. It is a fundamental rule in the construction of a deed that the courts, unless prohibited by applicable rules of law, will give effect to the intent of the parties and not so construe it as to render it a nullity.

The real contention is whether the survivorship provision contained in the conveying clause of the deed can be given effect. A joint tenancy is endowed with certain attributes which attach as incidents to the estate. The right of the survivor to take the entire fee title is one of those incidents, whether or not survivorship is specifically mentioned in the deed. In view of the fact that a survivorship clause was not necessary if a joint tenancy had been properly created, excluding the possibility that the addition of a survivorship clause to a joint tenancy by appropriate language might eliminate the destructibility to which it was subject as an incident to a properly created joint tenancy, a matter which we do not here decide, the grantors must have intended that survivorship exist whatever the estate actually conveyed might be. The sole question remaining, therefore, is whether a survivorship pro-

vision can properly be attached to a tenancy in common. We think that it can.

The English common law recognized that a right of survivorship could be attached to a tenancy in common. In the case of Doe, on the Demise of Sarah Borwell v. Abey, 1 Maule & Selwyn's Rep. 428, it was said: "The fair construction is to treat it as a devise to the sisters as tenants in common with benefit of survivorship, and thereby give effect to all the words. A tenancy in common with benefit of survivorship is a case which may exist, without being a jointenancy; because survivorship is not the only characteristic of a jointenancy."

In Burns v. Nolette, 83 N. H. 489, 144 A. 848, 67 A. L. R. 1051, in a case involving the same principle, the court said: "If the intent to create a right of survivorship is expressed, it is to be given effect. * * * That it recites a purpose to create a joint tenancy, as well as a right of survivorship, does not render the latter object invalid if the provision as to joint tenancy is ineffective because the four unities are not present. Survivorship without joint tenancy being permissible, and survivorship being the real object evidently in view, it is not to be defeated because the depositor, or the bank officials who advised her, mistook the technical meaning of the term joint tenancy and used it to describe a transaction to which it was inapplicable." The reasoning of this case has particular application to the confronting problem.

In Mitchell v. Frederick, 166 Md. 42, 170 A. 733, 92 A. L. R. 1412, it was said: "Whatever may be the proper description of the estates conveyed in those deeds, the intention to attach the right of survivorship is made clear, and is effectual. Even a tenancy in common may have a right of survivorship attached to it if the grantor expresses an intention that it shall be so." See, also, Hass v. Hass, 248 Wis. 212, 21 N. W. 2d 398. The majority rule in this country appears to follow the common law rule announced. We hold, therefore, where

language creating a tenancy in common is accompanied by appropriate words reciting a purpose to create a right of survivorship, the intention to create survivorship is effectual.

It must be borne in mind that the creation of a joint tenancy includes the right of the survivor to take the whole estate as an incident thereto. In this respect it will be noted that an estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and that such an act has the effect of destroying the right of survivorship incidental to it. After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains. A survivorship attached to a tenancy in common is indestructible except by the voluntary action of all the tenants in common to so do. It will be noted, also, that survivorship as it relates to a tenancy in common is subject to certain restrictions, such as liability of the surviving estate for the debts of the deceased tenant in common, a liability which does not exist in the case of a survivorship incident to a properly created joint tenancy that is in existence upon the death of a joint tenant. In other words, survivorship attached to a tenancy in common does not have the same legal effect, under all circumstances, as that which is incidental to a joint tenancy. Taaffe v. Conmee, 10 H. L. Cases, 64. But to the extent that it can be made effective in connection with the nature of the estate to which it is attached, appropriate words of survivorship will be carried out in accordance with the intent of the grantors. The trial court was in error in not so holding. The judgment of the district court is reversed with instructions to deny the prayer of plaintiffs' petition and to quiet the title to the property involved in Theresa Murphy as the sole surviving grantee.

REVERSED AND REMANDED.

SIMMONS, C. J., concurring.

I concur in the result. I have not changed my views

expressed in the dissenting opinion in Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 131 A. L. R. 327. To the cases there cited I add Therrien v. Therrien, 94 N. H. 66, 46 A. 2d 538, 166 A. L. R. 1023; Switzer v. Pratt, 237 Iowa 788, 23 N. W. 2d 837; Jones v. Jones (Tenn.), 206 S. W. 2d 801.

MILTON L. BONNER ET AL., APPELLANTS, v. CITY OF IMPERIAL, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
32 N. W. 2d 267

Filed May 12, 1948. No. 32379.

1. **Municipal Corporations: Husband and Wife.** When a street improvement district is created agreeable to the provisions of section 17-511, R. S. 1943, and abutting real estate is held in joint tenancy by a husband and wife who are residents, each has the right to act separately and independently of each other with regard to the objection to such improvement provided for in said section.
2. ———. In the case of objection by one such joint tenant in which the other has not joined the question of whether the one objecting represents the entire property and his joint tenant, or if such one is to be considered as objecting and the other not doing so, is one of fact.
3. ———. In the case of objection by one such joint tenant in which the other has not joined a presumption arises that the one objecting represents the entire property and his joint tenant and this presumption obtains unless and until the contrary is made to appear.

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

Beatty, Clarke & Murphy, Colfer, Russell & Colfer, and *Earl E. Morgan,* for appellants.

Henry W. Curtis, for appellees.

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

YEAGER, J.

This is an action by plaintiffs, appellants here, against the defendants, City of Imperial, a municipal corporation, its mayor, and the members of its city council, appellees here, to enjoin the said defendants from letting a contract for construction work in a certain improvement district in the City of Imperial and from levying an assessment on lots or parcels of land abutting or adjacent to the streets and alleys to aid in defraying the costs of such proposed improvements.

The action was tried to the district court and injunction was denied by the decree of that court. From the decree the plaintiffs have appealed.

Pertinent facts constituting the background of the action are that on April 14, 1947, the city council duly passed, in conformity with law (section 17-511, R. S. 1943) an ordinance creating a street improvement district providing for the grading, draining, curbing, and guttering of certain streets in the district. The ordinance was duly published. The district was denominated Street Improvement District No. 2. After the passage and publication of the ordinance the city on April 19, 1947, in accordance with section 17-511, R. S. 1943, published notice of the creation of the district. The pertinent part of this section of the statute is the following:

"Whenever the governing body shall deem it necessary to make any of the improvements named in section 17-509, said governing body shall by ordinance create paving, graveling or other improvement district or districts, and after the passage, approval and publication of such ordinance, shall publish notice of the creation of any such district * * *. If a majority of the resident owners of the property directly abutting on the street, * * * to be improved, shall file with the city clerk * * * within twenty days after the first publication of said notice, written objections to the creation of such district * * *, said improvement shall not be made as provided in said ordinance; but said ordinance shall be repealed. If

said objections are not filed against the district in the time and manner aforesaid, the governing body shall forthwith cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, * * * especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement."

It will be observed that this section provides that if a majority of the resident owners of property directly abutting on the street to be improved shall within 20 days after the first publication of notice of the creation of the district file with the city clerk written objections to such creation the improvement shall not be made but that the ordinance shall be repealed.

There is no question in this case as to the regularity of any step in the proceedings. The only question is that of whether or not within the meaning of law a majority of the resident abutting owners filed objection to the creation of the district.

The facts in this respect are that 83 resident owners filed written objection. The city council concluded that this was not a majority. It concluded that there were 101 resident owners who did not file objections. This number was made up of 71 resident owners whose property stood in their names alone. The remaining 30 were wives of men who had filed objections. In each such instance the wife was a joint tenant with the husband. These wives had not filed objections nor had they joined in the objections filed by their husbands.

The city council took the position, without inquiry to ascertain the facts with regard to the intention of these wives, that they were resident owners as well as their husbands and counted them among those not objecting.

The theory of the plaintiffs is that the husband in each of these instances must be considered as a resident owner and also as representative of his joint tenant wife and

that in his objection he represented the full ownership of the property.

If the viewpoint of plaintiffs is to be accepted then the number objecting was 83 and the number not objecting 71.

The district court found on this controverted question in favor of defendants and entered decree accordingly. It is from this finding and decree that the plaintiffs have appealed.

It will be observed that the right of objection is by statute extended equally to all resident owners without any qualification or limitation as to the quality or extent of ownership.

Attention has been directed to decisions of this and other courts and to statements of texts bearing on the question of the right of a cotenant to represent the other cotenants in objecting to or petitioning for public improvements. They are not in harmony.

This court in Chan v. City of South Omaha, 85 Neb. 434, 123 N. W. 464, 133 Am. S. R. 670, upheld the right of one of two representatives of real estate to object for the two to a public improvement. The improvement was sought to be made pursuant to a statute in some respects similar to the one being considered here. The significant part of that statute which was part of chapter 20, Laws 1905, p. 228, was the following: "No repavement as herein provided, shall be ordered or made if a remonstrance against the making of the same is filed with the city clerk * * * signed by the owners of fifty per cent at least, of the foot frontage on the street, * * *."

The representatives in that case were an executor and an executrix and they were for the purposes of the case treated as owners. With regard to the right to object to an improvement the court said: "Complaint is made that the executrix signs as to certain lots and the executor for the remaining tracts owned by the estate and included in the district, and it is argued that each representative of the estate should have signed the protest as to all of said

lots. While it may be necessary for the representatives to act jointly to convey the real estate, a remonstrance signed by either representative for the purpose of protecting the estate is valid."

The Supreme Court of Missouri adopted an opposite viewpoint. Kitchen v. City of Clinton, 320 Mo. 569, 8 S. W. 2d 602; Blackwell v. City of Lee's Summit, 326 Mo. 491, 32 S. W. 2d 63. The holdings in those cases were that where a protest is to be measured on a per capita basis, both the husband and wife must be counted as owners in determining the number of eligible signers and if one failed to sign one should be counted on one side and one on the other.

We think the fact that here is a statute placing the right to object on a per capita basis whereas in Chan v. City of South Omaha, *supra,* the court was considering a statute which placed the right on a foot frontage basis is of no controlling importance when the thing contemplated by both statutes is properly analyzed.

In the one as in the other the right depended upon ownership. The only point of dissimilarity is found in the effect of the objection after it has been made. In the one case the objection is equally effective with every other objection. In the other it is effective along with all others but its effectiveness has a different measure.

In some jurisdictions other than our own it has been held that a tenant in common is an owner and may sign a protest against an improvement for all owners; in some that on a petition for improvement no owner whose name has not been signed to a petition may be counted. The varying viewpoints are set out in the opinion in Warren v. Borawski, 130 Conn. 676, 37 A. 2d 364. We do not observe a need for their repetition here.

We think therefore that under the authority of Chan v. City of South Omaha, *supra,* the holding must be that these husbands had the right of representation of these entire ownerships subject however to the observations contained in the three succeeding paragraphs hereof.

The defendants contend that there are other reasons why these husbands may not be considered as representatives of these tenancies. The first one is that there is a joint tenancy and for that reason the rule announced in Chan v. City of South Omaha, *supra,* is not applicable, and a second is, as has already been indicated, that this would destroy the right of a wife as a joint tenant of real estate with her husband of the incidents of her ownership.

Our attention has been directed to no authority the effect of which is to say that a different rule shall apply with regard to representation of abutting property which is held in joint tenancy from the one which has been applied to tenancies in common, and we have found none. We observe no good and sufficient reason for a different rule.

As to the other proposition, a contention that these plaintiffs had the right by their objections to deprive their wives of their rights as owners and residents would be clearly erroneous. Their rights could not thus have been taken away and in the view taken herein they were not taken away. Their rights were not different from those of their husbands. Sections 42-201 and 42-202, R. S. 1943, make clear their rights. They could not have been properly denied the right to object and neither could they have been denied the right to have placed themselves on the other side of the proposition.

To effectuate these observations and these conclusions it becomes necessary to point out that agreeable to the statute the question of whether or not a co-owner of real estate who has not joined in an objection to improvements shall be counted as approving is one of fact.

We think it fair to say that where there is no co-ownership and there is a failure of objection that it must be presumed that the owner favored the improvement.

Must a like presumption prevail where there is a joint tenancy and one of the joint tenants objects and noth-

ing appears as to the other one? Without the precedent of Chan v. City of South Omaha, *supra,* the same position could reasonably be taken, but we do not think this could be properly done without overruling that opinion. We are not disposed to do so. The effect of that opinion has long obtained without legislative disturbance, therefore, we feel that it should not receive judicial disturbance at this time.

It appears therefore that to give effect to the statute, to the former decision of this court, and to the rights of joint tenants in a situation such as is presented here it should be held that where one resident joint tenant files objection and another does not that a presumption arises that the tenant objecting did so as the representative of the joint tenancy which presumption shall prevail and obtain until and unless the contrary is made to appear. There is nothing in the records of the city which were made a part of the record here nor is there any other evidence which serves to indicate that the city in its own proceedings in council or on the trial of this case sought to overcome this presumption.

This presumption on the record should have been indulged and on the record made in the district court it should have been allowed to prevail. It will be allowed to prevail here.

For the reasons herein stated the decree is reversed and the cause remanded to the district court with directions to enter decree in conformity with the prayer of the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

ALBERT WITTHAUER, A MINOR, BY ESTHER WITTHAUER, HIS MOTHER, NATURAL GUARDIAN AND NEXT FRIEND, APPELLEE, v. EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, APPELLANT.

32 N. W. 2d 413

Filed May 20, 1948. No. 32367.

1. **Trial.** In a law action where, at the close of the evidence, each party requests a directed verdict in his favor, and the court discharges the jury and decides the case, the losing party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence.
2. **Appeal and Error.** A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong.
3. **Automobiles.** The presumption that an automobile in charge of its owner's employee is in the service of the owner is not evidence. The presumption vanishes when rebutted by evidence that is clear and undisputed. The burden then rests on the party asserting the fact to produce evidence to sustain his case.

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

Joseph H. McGroarty, for appellant.

John A. McKenzie, for appellee.

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

SIMMONS, C. J.

This case arises out of the same accident that was involved in Witthauer v. Paxton-Mitchell Co., 146 Neb. 436, 19 N. W. 2d 865. In that action plaintiff secured a judgment against Paxton-Mitchell Company and one Joe Gryva for personal injuries. Paxton-Mitchell Company appealed. The judgment against it was reversed and the cause as to it dismissed.

Plaintiff then brought this action against the defendant as insurer of Paxton-Mitchell Company (hereinafter called the company), plaintiff's contention being that the defendant's insurance policy covered Gryva as an addi-

tional insured. Issues were made and trial had. At the close of plaintiff's case-in-chief defendant moved for a directed verdict, which was overruled. At the close of all the evidence, both plaintiff and defendant moved for a directed verdict. The trial court discharged the jury, made a general finding in favor of, and entered judgment for, the plaintiff. Motion for a new trial was made and overruled. Defendant appeals. We reverse the judgment of the trial court and dismiss the case.

These facts are admitted by the pleadings. The plaintiff at the time this action was brought was a minor eight years of age. On November 25, 1944, plaintiff obtained a judgment against Gryva in the district court for Douglas County in the amount of $2,500 and costs on account of personal injury inflicted upon the plaintiff by and on account of the negligence of Gryva in driving an automobile against plaintiff. On the day of the accident Gryva was employed by the company as a truck driver. The defendant was the automobile insurance carrier of the company under an insurance policy which provided that "The unqualified word 'Insured' wherever used includes not only the Named Insured but also any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the Named Insured, * * *."

Plaintiff alleged that Gryva at the time of the accident was driving the truck with the knowledge, permission, and consent of the company, owner of the truck, and that Gryva was an additional insured under the above provision. Defendant denied that at the time of the accident the contract of insurance covered Gryva; that at the time Gryva was performing any agency for the company; and that the truck was then being driven with the knowledge or consent of the company; and further denied any liability to pay the judgment.

The first assignment of error is that the court erred in overruling defendant's motion for a directed verdict

made at the end of plaintiff's testimony and again at the end of all testimony. The second assignment is that the court erred in sustaining plaintiff's motion for a directed verdict and judgment. The third assignment is that the judgment is contrary to the evidence.

Plaintiff asserts that only fact questions are involved; that the trial court made only general findings of fact, and hence if there is evidence in the record which, if believed, supports a finding that the actual use of the truck was with the permission of the named insured, then the judgment must be affirmed.

The facts, therefore, will be reviewed subject to the rule that "In a law action, where, at the close of the evidence, each party requested a directed verdict in his favor and the court discharged the jury and decided the case upon the law and the evidence, the losing party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence. Segear v. Westcott, 83 Neb. 515, 120 N. W. 170; Henton v. Sovereign Camp, W. O. W., 87 Neb. 552, 127 N. W. 869; Howell v. Bowman, 89 Neb. 389, 131 N. W. 597; Knies v. Lang, 116 Neb. 387, 217 N. W. 615; Adams v. City of Omaha, 119 Neb. 753, 230 N. W. 680. A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed unless clearly wrong." Slagle v. Securities Investment Corporation, 131 Neb. 319, 268 N. W. 294.

We find no substantial dispute in this record on material fact questions.

The company owned the truck involved in the accident. It had the company's name painted on it. The truck was kept at the company's place of business. During other than working hours the keys to the truck were kept at the company office. The truck was used to make deliveries of and pick up materials for the company.

Joe Gryva had been employed by the company as a truck driver and had been assigned the use of the truck involved in the accident. At the time he was assigned to

duty as a truck driver, he was instructed that the truck was to be used only on company business. That instruction was repeated to him some months after his employment and before the accident in question.

The order of doing business with the truck was as follows. When Gryva reported for work he would get the keys and prepare the truck for the day's operations. Specific orders to Gryva for the use of the truck were in writing and were channeled through a clerk in the office. Gryva would get them from the clerk or from a basket on his desk provided for that purpose. Gryva would carry out the orders so given. He made a written memorandum of his trips, showing where he went, for what purpose, and the day's mileage.

The company prepared hot lunches at one of its plants for those employees desiring them. Orders for meals had to be placed by the employees at about 10 a. m., so as to have them prepared on time. Gryva's schedule of trips was so worked out each day that he was able to be at the other plant and pick up the food at 11:30 and haul it to the plant where he worked and be there before 12 noon. The lunch hour for all employees was 12 noon to 12:30 p. m.

The accident involved occurred March 23, 1944, about 12:15 p. m. Gryva ordinarily brought his own lunch to the plant. On that day he did not. He was not at the plant when the orders for hot lunches were taken up, so a lunch for him was not ordered. Gryva made four trips on the morning in question and returned to the plant about 11:45 or 11:50 a. m. He then took the truck, drove to a cafe some blocks away, ate his lunch, and was returning to the plant when the accident occurred.

His supervisors did not know that he was using the truck. He had not asked permission to take the truck that noon to go to lunch and hence specific permission was neither denied nor granted. He had never asked permission to take the truck to go to lunch. He had never used it for that purpose before. He took the truck

without permission. He was not on any company business when making the trip. He had no specific authority to make the trip and it was contrary to his general orders.

Following the accident he was taken to police headquarters, released, and returned to the plant about 3 p. m. That afternoon he made a statement in writing about the accident to the officials of the company and to a representative of the defendant. He was told he should not have so used the truck. He was not discharged. At the time of the trial he was in the employ of the company, although not as a truck driver.

It appears that plaintiff relies upon the presumption that in the absence of evidence to the contrary it will be presumed that an automobile in charge of its owner's employee is in the service of such owner. However, as we have held, such a presumption is not evidence. The presumption vanishes when rebutted by evidence that is clear and undisputed. When the presumption disappears, the burden then rests upon the plaintiff to produce evidence to sustain his case. Ebers v. Whitmore, 122 Neb. 653, 241 N. W. 126; Wise v. Grainger Bros. Co., 124 Neb. 391, 246 N. W. 733; Rose v. Gisi, 139 Neb. 593, 298 N. W. 333; Witthauer v. Paxton-Mitchell Co., *supra*.

Plaintiff does not point out the evidence which, in the absence of a presumption, sustains his contention that the actual use was with the permission of the named insured, but rather argues that the evidence of Gryva that he was on a "mission of his own" to get his lunch is a pure fabrication and unworthy of belief, and that the trial court had the right to disbelieve him and hence to make a fact finding against defendant. Plaintiff argues this at length and on various bases.

This is not a situation such as we have in Jennings v. Campbell, 142 Neb. 354, 6 N. W. 2d 376, where parol testimony could be weighed against facts and circumstances contrary thereto, and the parol testimony dis-

believed. Here the facts and circumstances all point to the truth of Gryva's testimony. The testimony of other witnesses whose credibility is not questioned supports the testimony Gryva gave.

We have reviewed each of plaintiff's contentions as to the credibility of Gryva, and find no merit in the propositions advanced. We do not deem it necessary to set out the answers. The material question here is not did Gryva drive the truck to the cafe and get his lunch. The material question is, was the "actual use" of the truck at the time of the accident "with the permission of the Named Insured."

Plaintiff's whole case rests on the proposition that Gryva had the truck, was driving it, and injured the plaintiff. There is no substantial dispute in this record that at the time of the accident Gryva was not on a mission for the company; he was not complying with any of its orders; he had not been directed to use the truck on company business; he had no permission to use it except on company business; and he was not on company business.

Plaintiff not only failed to meet the burden of proof that was on him, but defendant, without any substantial basis for dispute, proved that the actual use was not with the permission of the company.

We find no evidence in this record to sustain the finding of fact made by the trial court. It is clearly wrong. The trial court erred in sustaining plaintiff's motion and in not sustaining defendant's motion for a directed verdict. This conclusion makes it unnecessary to determine the contention of the defendant that the decision in Witthauer v. Paxton-Mitchell Co., *supra,* is res adjudicata of this action.

The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

CYRUS C. ROBY, APPELLEE, v. HOBART M. AUKER, APPELLANT.

32 N. W. 2d 491

Filed May 20, 1948. No. 32294.

1. **Trial.** A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. ———: **Negligence.** When plaintiff moves to dismiss, or for a directed verdict, or to withdraw from the jury consideration of defendant's claim upon a cross-petition in a negligence case, such defendant has a right to rely upon and have the benefit of any evidence of plaintiff's negligence which may appear in evidence adduced by plaintiff in his own behalf.
3. ———. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury.
4. ———. It is the duty of the trial court to submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence.
5. **Negligence: Automobiles.** The emergency 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, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM, JUDGE. *Reversed and remanded.*

George W. Leamer and *H. E. Siman,* for appellant.

Mark J. Ryan, for appellee.

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

CHAPPELL, J.

This is an action to recover for damages resulting from an automobile collision. Plaintiff was awarded a jury verdict and judgment thereon. Defendant's motion for new trial was overruled, and he appealed to this court, assigning that the trial court erred: (1) In refusing to sustain defendant's motion for directed verdict; (2) in sustaining plaintiff's motion to withdraw from the jury defendant's counterclaim pleaded in his cross-petition; (3) in giving instructions Nos. 5 and 12 respectively; and (4) that the verdict and judgment thereon were not sustained by the evidence but were contrary to law and the evidence. We sustain the second, third, and fourth assignments.

The evidence adduced for plaintiff was substantially as follows: At a little after 8 a. m. of a foggy morning in February, when visibility was limited from 300 to 500 feet, plaintiff was driving his car west on the right side of a straight, level, icy, 20 or 22 foot-wide pavement. Some cars on the highway had lights on and some, including plaintiff, did not. Plaintiff saw two cars approaching from the west on the south side of the highway. Defendant was seen by plaintiff 400 to 500 feet away, with his lights on, suddenly turning out from behind the other cars in an attempt to pass them, at a high rate of speed, to-wit 40 to 45 miles an hour, "maybe less." Upon seeing defendant, plaintiff did not put on his brakes and attempt to stop, because he was afraid of skidding on the icy pavement, but took his foot off the accelerator, threw out the clutch, and coasted his car on to the west but toward the ditch on the right side of the pavement, at a speed of 28 to 30 miles an hour. A witness for plaintiff testified that the brakes could have been safely, if moderately, applied, and that it was not a measure of safety for plaintiff to disengage the clutch. To plaintiff, defendant appeared to have slammed on his brakes and lost control of his car, which then traveled across the pavement to the north, then

south, thence back north on an angle, where the left front of defendant's car collided with the left side of plaintiff's car, at a point where the right wheels of plaintiff's car were four feet four inches north of the pavement, on the shoulder thereof.

After the impact, plaintiff's car was headed south in the ditch north of the pavement with the rear bumper against the fence north of the ditch 30 or 40 feet from the point of impact. Defendant's car was headed south, with the front end over and off the south side of the pavement on the shoulder and the rear end still on the pavement.

Plaintiff testified that sometime after the accident defendant said "he was to blame, it was all his fault" and the sheriff testified for plaintiff that defendant said he was "in a hurry" and if plaintiff "had gone in the ditch he wouldn't have hit him." However, defendant testified that he never made any such statements.

The evidence adduced for defendant was substantially as follows: That at the time of the accident it was cold but not freezing, and the pavement was wet but not icy. A car ahead of defendant was traveling slowly, 25 to 30 miles an hour, and having followed it for about a quarter of a mile, defendant decided to pass the car. He started to turn out, looked, and seeing no car approaching, speeded up to perhaps 40 miles an hour. He then saw plaintiff's car about 300 feet away. At that time the right side of defendant's car was about in the center of the highway, and being unable to safely turn back into the south lane, he put on the brakes and tried to stop, but his car skidded first to the north, then south, and thence traveled straight east, where plaintiff's car, which came straight on down the pavement without deviation, collided with the left front fender of defendant's car. Thereafter, plaintiff's car traveled northwest for approximately 40 feet from the point of impact and defendant's car traveled southeast for approximately 20 feet from the point of impact. There they

both stopped substantially in the positions heretofore described. Defendant testified that at the time of the accident there was approximately three-quarters of the width of a car between the left side of his car and the north side of the pavement, plus six and one-half feet of readily traversable shoulder north thereof. Photographs of the pavement and shoulder at the point of collision were offered by defendant and received in evidence.

Bearing in mind the foregoing evidence, we turn to the assignments of error. In this jurisdiction, a motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the facts in evidence. Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633; Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

We call attention also to the fact that when a plaintiff moves to dismiss, or for a directed verdict, or to withdraw from the jury a consideration of defendant's claim upon a cross-petition in a negligence case, such defendant has a right to rely upon and have the benefit of any evidence of plaintiff's negligence which may appear in the evidence adduced by plaintiff in his own behalf. Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

What is reasonable care must in each case be determined by its own peculiar facts and circumstances, Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670, and negligence is essentially relative and comparative, depending on the surrounding facts and circumstances, McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

Where different minds may reasonably draw different

conclusions from the evidence adduced, or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury. Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391.

It is only where the evidence is undisputed or but one reasonable conclusion can be drawn from the evidence, that the question is of law for the court. Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178. In other words, if there is any competent evidence before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. Bainter v. Appel, 124 Neb. 40, 245 N. W. 16.

In the light of the foregoing rules and the evidence heretofore set forth, we conclude that the trial court did not err in refusing to sustain defendant's motion for a directed verdict.

On the other hand, upon like premises, we conclude that the trial court did err in sustaining plaintiff's motion to dismiss defendant's cross-petition and in withdrawing his counterclaim from consideration of the jury by giving instruction No. 5. The effect of the instruction was to tell the jury as a matter of law that defendant was guilty of more than slight negligence, which was a question for the jury to decide.

In that connection, defendant's alleged violation of section 39-7,110, R. S. 1943, in overtaking and passing another motor vehicle proceeding in the same direction, was not negligence as a matter of law but only evidence of negligence, and whether or not such alleged violation of a statute constituted negligence under the circumstances was a question for the jury under proper instructions. Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

In any event, defendant in his cross-petition, as if

he were plaintiff and plaintiff were defendant, pleaded facts equivalent to the doctrine of the last clear chance. Plaintiff's answer thereto, together with the evidence adduced, not only by defendant but by plaintiff as well, of which defendant was entitled to have the benefit, made that doctrine an issue for the jury. The applicable rule is that the trial court must submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence, Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597, whether requested to do so or not, Tenborg v. Dillie, 132 Neb. 203, 271 N. W. 689.

This court has held that: "Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results because thereof, he may still recover." Carnes v. DeKlotz, 137 Neb. 787, 291 N. W. 490.

In Kruger v. Omaha & C. B. Street Ry. Co., 80 Neb. 490, 114 N. W. 571, 127 Am. S. R. 786, 17 L. R. A. N. S. 101, it was said: "The doctrine of the 'last clear chance' simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care."

In Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431, it was held: "To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care."

It has also been said that: "Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action." Diehm v. Darg-

aczewski, 135 Neb. 251, 280 N. W. 898; Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338. There is competent evidence in the record before us from which the jury could have found that plaintiff did have time and opportunity to have avoided the collision by the exercise of ordinary care.

It is also the rule that: "The doctrine of the last clear chance is not applicable where the negligence of the party seeking to invoke it is active and continuous as a contributing factor up to the time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct." Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916. We conclude that whether or not defendant was entitled to the benefit of the doctrine was, under the circumstances, a question for the jury, which should have been submitted to it for determination.

Instruction No. 12 gave plaintiff the benefit of the sudden emergency rule. Defendant contends that the instruction was prejudicially erroneous, and we sustain that contention.

Emergency is commonly defined as: "An unforeseen combination of circumstances which calls for immediate action." Webster's New International Dictionary, 2d ed., Unabridged.

In the realm of negligence cases, an emergency has become the basis for a rule of law which is dependent for application upon two factual elements.

This court has held that: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689.

However, 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, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Hughes v. Omaha & C. B. Street Ry. Co., 143 Neb. 47, 8 N. W. 2d 509.

While it appears that plaintiff pleaded facts justifying the admission of evidence upon the issue of sudden emergency, obviously under the evidence adduced as heretofore set forth, plaintiff was not confronted by a sudden emergency requiring instant decision. As a matter of fact, after observing defendant suddenly come from behind the cars 400 to 500 feet away, more than a city block, plaintiff, according to his own evidence, had plenty of time to and did exercise mature reflection and deliberate judgment. However, whether or not he was guilty of negligence in the exercise thereof under the circumstances was a question for the jury to decide.

For the reasons heretofore stated, the judgment should be and is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PAINE, J., dissenting.

I respectfully dissent from the opinion adopted, reversing and remanding the case.

This case is somewhat close and I desire to make clear certain points in the evidence.

This action grew out of a head-on collision of two automobiles, both of which were damaged. The jury returned a verdict for plaintiff for $1,183, and defendant appealed.

The accident occurred about as follows: The plaintiff, Cyrus C. Roby, with his wife, was driving west on Highway No. 20, a paved road, 20 feet wide, in his Dodge coupé, on February 4, 1946, at a little after eight o'clock in the morning. His speed was 28 to 30 miles an hour. At the time it was very foggy, and some cars were using lights, others were not. The road was slippery in places from being wet, and was icy in other places.

The defendant, Hobart M. Auker, a farmer, 50 years

of age, was driving east to Sioux City in his Ford V-8, and testified that there was at that time considerable traffic on the road, both of cars and trucks. Some had their lights on, as he did. He followed Howard Carter's car for about one-fourth of a mile. As it was going only 25 to 30 miles an hour he decided to pass it, and stepped on his accelerator; "I gave it all it would take to pick up my speed to pass him." He had looked to see if the road was clear ahead. The road was level. He could not see anyone coming, and was alongside the Carter car when he first saw the plaintiff about 300 feet ahead of him. Defendant put on his brakes as hard as he dared to, and tried to stop, but his car skidded first to the right, then to the left, and was headed straight east when the cars collided, both being on the north side of the center line of the road. When it was over, the plaintiff's car was over in the fence to the northwest, 40 feet from the place of the accident, with his rear bumper in the fence. Defendant said his car slid over to the south side and stayed, with the rear wheels on the pavement, about 20 feet from the place of the accident.

Defendant said the shoulder, or apron, was about six and a half feet wide, with a very gentle dip to the ditch, which was about three feet deep.

The plaintiff testified that he first saw defendant's car when it whipped out from behind the Carter car at a terrific rate of speed, 400 or 500 feet away. "Now when Auker came out behind this car how was his car performing? A It looked to me like he was headed right straight north and then he came back and when he came back the second time he hit me. Q In other words it indicated to you that his car was out of control or partially out of control, is that it? A That's right. Q And upon seeing this *Carter* (Auker) car in this position, what did you do? A Well, I told the Mrs., I says look at that crazy devil come, hang on, I am taking the ditch, and I took my foot off the accelerator and

threw out the clutch. I didn't want my power to hit his power."

Plaintiff testified that he had gotten so his right wheels were four feet four inches off the pavement at the time of the collision, and his coupé was thrown to the north side, with the back bumper in the wire fence over across the ditch, and defendant's car was off the road on the south side. The plaintiff's car had its left front wheel knocked off, the bumper off, the hood mashed, left front door mashed, the running board on left side entirely off, and the frame and front axle were sprung. Plaintiff's car was worth $1,200 before the accident. It cost $410 to repair it, and took two months to get repairs. After it was repaired it was only worth $600, and he had not yet gotten the new front door or running board. He testified that his business at the time was buying stock with which to go on a farm, and it cost $5 a day to hire a car to make these trips. Dr. Larsen removed eight pieces of glass from plaintiff's eye, and later took out another piece. Plaintiff's back bothered him all summer. He testified that defendant came to see him afterwards and said it was all his fault, that he was to blame for the accident, and "it was lucky we wasn't all killed." The defendant denied making these statements.

Sheriff Goodsell testified that he got out to the place of the accident about 9 o'clock that morning. He saw the fresh tracks where the plaintiff's car had been driven out on the shoulder or just kept skidding. The sheriff testified that defendant Auker answered his questions, and told him this: "He said he was trying to pass a fellow and he was in a hurry and had some stock in the stockyards and wanted to get down at the stockyards by the time it was sold." However, the defendant denied making this statement to the sheriff.

There was a stipulation as to the testimony that Dr. A. A. Larsen would give if he were called and sworn as a witness; that he would testify to removing glass from

plaintiff's eye, that plaintiff's left shoulder and left knee were bruised, "and, further, that Mrs. Roby had bruises on both arms, hematoma of the left arm and of the left shoulder, and large bruises on the right shoulder, and a puncture wound of the right leg one-half inch deep; * * *."

At the close of plaintiff's evidence defendant moved for a directed verdict for the reason that plaintiff failed to prove the allegations of his petition; that by plaintiff's admissions and the testimony of his own witnesses it was shown that he was guilty of more than slight negligence in that he did not exercise care by applying his brakes, in disengaging his clutch, which was negligence, and that the speed of plaintiff's car was not reduced at the time of the accident; and that the contributory negligence of plaintiff bars him from recovery. This motion was overruled by the court.

The defendant testified that he had to pay $172.75 for the repairs on his car, which included the tow-in charge of $10, and it was stipulated that that amount was the fair and reasonable value of the repairs. The defendant called no other witness, and rested after his own testimony had been given, which included introduction of four pictures he had taken some days after the accident.

One section of our statute is in part as follows: "No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction." § 39-7,110, R. S. 1943.

The defendant admitted that he attempted to pass an automobile going in the same direction. The left side of the road was not free of oncoming cars, and when defendant saw that plaintiff's car was dangerously close he put his brakes on hard, causing his car to skid from side to side and go out of control.

In his counterclaim the defendant alleged that plaintiff "carelessly, negligently, recklessly and unlawfully, and wholly without regard to the safety of the public in the use of said highway, ran his said car, with great force and violence, upon and against defendant's car, damaging and wrecking the same, * * *."

These allegations the defendant's evidence entirely failed to support, and therefore, under this state of the record, it was not error for the trial court to give the jury instruction No. 5, in which the jury were told that the defendant's counterclaim was withdrawn from their consideration, "and in arriving at your verdict you shall not take into account any monetary value of repairs to defendant's car or the loss of the use thereof."

The defendant next charged the court with error in the giving of instruction No. 12 on sudden emergency, which read as follows: "Where the operator of a motor vehicle by a sudden emergency not due to his own negligence is placed in a position of imminent danger, and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances; and if he pursues a course of action to avoid an accident, such as a person of ordinary prudence placed in a like position might choose, he is not guilty of negligence even though he did not adopt the wisest choice. So, if you find in this case that plaintiff was suddenly confronted with an emergency not due to his own negligence you will then consider the foregoing rule and determine whether under the conditions plaintiff used ordinary care."

The defendant objects to this instruction on the ground

that it was a statement of an abstract proposition of law, and not within the issues presented by the pleadings. Defendant charges that the giving of this instruction was highly prejudicial to the defendant, and that it suggested to the jury that they could excuse the plaintiff for his contributory negligence.

The opinion of the majority sustains the defendant in his contention and denies that there was a sudden emergency. Let us examine some of the evidence as to whether there was an emergency.

The plaintiff testified as follows: "Q What would be the effect of one applying the brakes suddenly and severely? A He would lose control of his car on the highway. Q From the appearance of the course that Mr. Auker's car took after he came out into your traffic lane, would you say he applied his brakes severely to that automobile? A That is the way it looked, slammed on his brakes. Q After that did he apparently have any control of the automobile? A No, I don't think he had any control at all."

Howard Carter, whose car the defendant attempted to go around, testified: "Q What was the condition of the pavement itself as regards being slippery or dry? A Icy. Q And was this icy condition, was that plainly visible to anyone driving that highway? A Yes. Q Were you driving slower than your usual rate of speed? A Yes. Q And for what reason were you driving slower? A Fog and ice."

Frank Kukuk testified on direct examination that the road was "real slippery" and had "A little ice on it."

The defendant differed with these three men, and testified: "Q You heard the testimony of Mr. Kukuk and Mr. Carter that the pavement was icy, didn't you? A It was later on, yes. Q At the time of the accident they testified to. A No, it wasn't. I wouldn't say it was icy at all, it was wet. Q It was slippery enough so that your car went into a skid when you applied your brakes? A That's right."

Now, the evidence is that the defendant was driving very fast a little over a mile back when he passed Frank Kukuk, who testified: "Q At what rate of speed were you driving that morning? A Well, I was going awful close to fifty. * * * Q After the defendant's car passed you as you have testified, did you continue to drive at about the same rate of speed you had been driving? A Yes, I did. Q Did the defendant's car remain within the range of your vision? A No, he got away from me. * * * Q After you had driven on up the road you came to the scene of the accident? A Yes, sir. Q About how far was it from the point where the defendant had passed you? A I would say it was over a mile. Q A mile or so east of there? A Yes."

The facts indicate that when defendant went around the Carter car he saw plaintiff coming towards him. Defendant testified: "Q And you slammed them on as hard as you dared to, is that what you say? A Yes. Q You had thrown your car into a skid, didn't you? A Yes, sir. Q Which way did you skid? A It skidded to the right first and then to the left and I was going straight east when we collided. Q And you weren't able to control your car after you slammed on the brakes at all? A Not for a minute."

This court has frequently held that a motorist who drives his automobile so fast on a highway at night, (or on a foggy morning when using his lights, as defendant was in the case at bar,) that he cannot stop in time to avoid a collision with an object within an area lighted by his headlights is negligent as a matter of law. See Redwelski v. Omaha & C. B. Street Ry. Co., 137 Neb. 681, 290 N. W. 904; Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572; Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384; Most v. Cedar County, 126 Neb. 54, 252 N. W. 465; Hendren v. Hill, 131 Neb. 163, 267 N. W. 340; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287.

Under this state of facts, it is my opinion that the plaintiff was confronted with a sudden emergency, and

the instruction on that subject was correctly given.

"The emergency rule exculpates one when he acts upon his judgment in an emergency of imminent peril not created by his own fault." Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A. L. R. 546.

The necessity of acting suddenly, without opportunity for deliberation, is a circumstance to be taken into consideration in determining what is ordinary care in that situation. In the case at bar, the court also gave the usual instruction on contributory negligence.

In the majority opinion it is said that the court should have instructed the jury on the last clear chance doctrine, although the defendant did not submit any instructions and did not assign its omission as one of the errors of the court.

Before the doctrine of last clear chance can apply, the party must have had a chance to avoid the collision, for the doctrine presupposes time for action. See 5 Am. Jur., Automobiles, § 490, p. 778; Diehm v. Dargaczewski, 135 Neb. 251, 280 N. W. 898.

After defendant had dashed out to pass the Carter car, and when his car went out of defendant's control, what time for action did the plaintiff have to avoid a collision? I submit that under the evidence he had none. There was no valid reason that I can see for giving an instruction on last clear chance in this case.

"It may be admitted that under the Constitution the right of trial by jury is guaranteed to all citizens. This right cannot be violated by a legislative act, or by judgment of the court, yet not all cases must be submitted to a jury. It is just as erroneous to submit a case to a jury, and permit the jury to speculate with the rights of a litigant, when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has that right. J. C. Penney Co. v. Robison, 128 Ohio St. 626, 193 N. E. 401, 100 A. L. R. 705." Smith v. Epstein Realty Co., 133 Neb. 842, 277 N. W. 427.

The verdict of the jury and the judgment thereon in

this case are now sent back for a new jury trial, with all of the expense and delay that this incurs, and the court in a retrial is to submit the defendant's claim of $172.75 for car repairs to a jury, when one jury has already decided this case for the plaintiff. In my own humble opinion, after holding district court in 31 counties in Nebraska, if a new jury should decide that the defendant's cross-petition claim was valid the trial judge would have to set it aside, as there would be no evidence to support negligence on the part of the plaintiff.

In my opinion, the instructions in this case were much more favorable to the defendant than he was entitled to, the verdict was the only one that could have been reached, and the judgment entered thereon should have been affirmed.

HANNAH COLBERT ET AL., APPELLANTS, V. CHARLES A. MILLER, JR., ET AL., APPELLEES.
32 N. W. 2d 500

Filed May 20, 1948. No. 32391.

1. **Pleading.** More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other.
2. **Appeal and Error.** The assignment of error must point out and specify the particular evidence of which complaint is made before we will consider it.
3. **Evidence.** Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved.
4. **Deeds.** Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.
5. ———. Where the delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery.

6. ———. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
7. ———. However, if a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution.
8. ———. In suit to set aside deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed.
9. ———. A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed.*

C. S. Wortman and *Ralph M. Kryger,* for appellants.

Leo M. Williams and *Frederick M. Deutsch,* for appellees.

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

WENKE, J.

The appellants Hannah Colbert, Etta Elliott, and Kate Curtis, as plaintiffs, brought this action in the district court for Antelope County against the appellee Charles A. Miller, Jr., as defendant. The appellants' purpose in bringing the action is to quiet the title in themselves to 360 acres of land in Antelope County. From a decree in favor of the appellee, their motion for new trial having been overruled, the appellants have perfected this appeal.

The source from which all parties claim to have received their title is Charles A. Miller, Sr. Since he is now deceased he will herein be referred to as the deceased. The appellee, Charles A. Miller, Jr., is a nephew and the appellants are sisters of the deceased and will be herein referred to as appellee and appellants,

except when it is necessary to refer to the appellants individually. In such instances they will be referred to by their Christian names of Hannah, Etta, or Kate.

By their action the appellants seek to cancel a deed from the deceased to the appellee which is dated February 2, 1938, and was recorded August 1, 1944, to the lands that are herein involved and to quiet the title in themselves under and by virtue of either or both of the following: A deed from the deceased to themselves dated June 10, 1946, and recorded June 12, 1946, or the last will and testament of deceased dated June 10, 1946, which has been allowed and admitted to probate by the county court of Antelope County on March 17, 1947.

The first question presented is the validity of the deed from deceased to appellee dated February 2, 1938, for if this deed is valid then any question raised as to the validity of any subsequent deed or will of the deceased in favor of the appellants becomes immaterial as they would be inoperative insofar as the lands herein involved are concerned.

Insofar as appellants contend that the appellee's pleadings should be dismissed because of the defenses therein pleaded being inconsistent, we find the following principle is applicable thereto: "The rule is that more than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other. Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985; People's Nat. Bank v Geisthardt, 55 Neb. 232, 75 N. W. 582; Hilmer v. Western Travelers Accident Ass'n, 86 Neb. 285, 125 N. W. 535; Ford & Isbell Lumber Co. v. Cady Lumber Co., 94 Neb. 87, 142 N. W. 300; Maier v Romatzki, 95 Neb. 76, 144 N. W. 1036; Schellpeper v. Sporn, 112 Neb. 192, 198 N. W. 1012." Tighe v. Interstate Transit Lines, 130 Neb. 5, 263 N. W. 483. We find no such inconsistencies therein.

The appellants contend the trial court erred in admitting incompetent evidence over their objections and in

excluding evidence and declarations of the deceased made by him long after the execution of both deeds involved herein and after he had any interest in the subject matter of this action. This assignment of error, in the form made, is subject to the following rule: "Our uniform holding has been that the assignment must point out and specify the particular evidence of which complaint is made before we will consider it." Tarpenning v. Knapp, 79 Neb. 62, 112 N. W. 290. See, also, Smith v. Western Union Telegraph Co., 80 Neb. 395, 114 N. W. 288.

Nevertheless, in considering the record we will, in determining whether any evidence received or offers of proof rejected, to which objections were made, are competent and to be considered by this court, apply the following principles:

Hearsay testimony is incompetent and, as stated in Shold v. Van Treeck, 88 Neb. 80, 128 N. W. 1134: "Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved."

" 'Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.' (Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.)" McDonald v. Miller, 73 N. D. 474, 16 N. W. 2d 270, 156 A. L. R. 1328. See, also, 31 C. J. S., Evidence, § 325, p. 1103; Pickworth v. Whitford, 228 Iowa 658, 293 N. W. 47; Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93; Johnson v. Petersen, 101 Neb. 504, 163 N. W. 869, 1 A. L. R. 1235; 2 Jones, Commentaries on Evidence (2d ed.), § 909, p. 1672; 20 Am. Jur., Evidence, § 605, p. 518.

As to any testimony of the appellants Kate and Etta and of the appellee relating to conversations or transactions had with the deceased, it was incompetent under

section 25-1202, R. S. 1943, unless the statutory disqualification was waived. See Holladay v. Rich, 93 Neb. 491, 140 N. W. 794; Haecker v. Haecker, 113 Neb. 587, 204 N. W. 72; Broeker v. Day, 124 Neb. 316, 246 N. W. 490; Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350; Owens v. Reed, 141 Neb. 796, 4 N. W. 2d 914; Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183. Of course, this rule does not apply to the testimony of the other witnesses, if their testimony is otherwise admissible. See Dvorak v. Kucera, 130 Neb. 341, 264 N. W. 737.

In considering the record to determine the question of the validity of the deed to appellee, the following principles apply:

" 'Where the delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery, * * *.' 18 C. J. 413." Ehlers v. Seip, 136 Neb. 722, 287 N. W. 202. But, as stated in Brittain v. Work, 13 Neb. 347, 14 N. W. 421: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." See Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. S. R. 532; Flannery v. Flannery, 99 Neb. 557, 156 N. W. 1065; Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188; and Kellner v. Whaley, *supra.*

However, as stated in Kellner v. Whaley, *supra:*

" 'It is well settled, however, that, if a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution. Wolverton v. Collins, 34 Iowa, 239; Craven v. Winter, 38 Iowa, 480. This presumption is not conclusive, but it raises a strong implication, which can only be overcome by clear and satisfactory proof. Tunison v. Chamberlain, 88 Ill. 379. (McGee v. Allison, 94 Iowa 527, 63 N. W. 322.)' "

In Kellner v. Whaley, *supra,* it is also said: " 'In suit

to set aside deed to defendants for want of delivery, plaintiffs had burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendants' possession of deed.' Klatt v. Wolff, (Mo.) 173 S. W. 2d 933." See, also, Brittain v. Work, *supra;* Haecker v. Haecker, *supra;* and Ladman v. Ladman, *supra.*

As stated in Kellner v. Whaley, *supra,* quoting from McGee v. Allison, *supra:* " 'The fact that a grantee kept a deed without recording for a number of years, allowed the grantors to remain in possession, and made no claim to the property until after their deaths, does not alter the presumption of a delivery, when the deed, fully executed, is in his possession.' "

The record establishes that the deceased was born in Indiana; that his parents moved to Plattsmouth in Cass County, Nebraska, when he was four years of age; that he came to Antelope County about 1912 and rented the lands herein involved, which are described as the northwest quarter, the north half of the southwest quarter, the southeast quarter of the southwest quarter, and the south half of the southeast quarter, of Section 22, Township 28 North, Range 6 West, of the 6th P. M., in Antelope County, Nebraska; and that he moved thereon and farmed the same.

Appellee first worked for the deceased shortly after deceased moved to Antelope County. However, appellee married about 1914 and, although he continued to work for deceased for about a year, he thereafter started farming for himself. He farmed for about three years but after his marriage ended in divorce he ceased his farming operations. Thereafter, in about 1918, he returned to work for the deceased and has been living on this farm ever since. For a short time after his return in 1918 he worked for deceased but thereafter farmed the lands on a crop share basis.

Upon his return to the farm in 1918 he and the deceased, who never married, operated the farm together,

the appellee doing the farm work and the deceased the housework. They batched in this manner until April 1944. During all of these years the evidence shows their associations were very friendly and they had no difficulties. About 1921 the deceased became the owner of these lands.

On February 2, 1938, the deceased had a notary public from Brunswick come out to the farm and directed him to prepare a warranty deed to the land. This deed conveyed the lands to the appellee. At the same time there was an understanding entered into between deceased and the appellee whereby appellee was to give deceased a one-third share of all crops raised during the lifetime of the deceased. This deed the deceased executed, leaving it in the possession of the appellee with directions not to record it until after his death.

In the fore part of 1944, deceased, then being approximately 80 years of age, was advised by his doctor that because of the condition of his health he needed better care than their batching arrangements provided and was advised to move to a hotel. Consequently, the deceased, in April 1944, went to live at the hotel in Brunswick, his trading center and which is only about four miles from the farm. Thereafter the appellee frequently visited the deceased at the hotel and deceased occasionally went out to the farm. Their close friendly relations, which had existed since shortly after 1912, continued.

In the latter part of July 1944 two of the deceased's older sisters came to visit him. This came about as the result of a letter written to them by the lady who ran the hotel where deceased was staying. She advised them of his condition. It was while they were visiting the deceased, and apparently due to something that took place between them, that on August 1, 1944, the deceased asked appellee to come to the hotel at Brunswick, where he was then staying. When appellee arrived there deceased directed him to record the deed

to the land, which appellee had in his possession. This direction the appellee complied with and the deed was recorded on the same day.

We find the deceased's transfer of this land to appellee was his free act and voluntary deed and done at a time when he was fully possessed of his mental faculties and not the result of any fraud, undue influence, unfair advantage, or an overreaching of a confidential relation on the part of the appellee. It appears to have resulted from the desire of deceased to give this property to the one closest to him by long and friendly association.

Nor does the fact that deceased was to receive a share of the crops as long as he lived in any way affect the validity of this transfer, for, as stated in Kellner v. Whaley, *supra*: "'A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery. * * *.' Klatt v. Wolff, (Mo.) 173 S. W. 2d 933." The record shows that appellee has always paid this share.

After the deed was recorded the deceased continued to live in the hotel until October 1945. During this time his relations with appellee remained friendly. In October 1945 he visited a sister in Ashland and another in Kansas City. At this time deceased had three older sisters. Hannah lived at Ashland, Nebraska, and Etta and Kate lived in Kansas City, Missouri. After these visits it appears that deceased's attitude toward appellee changed. It is apparent that thereafter the deceased desired to undo what he had done by his deed of February 2, 1938, which gave these lands to the appellee. This is fully evidenced by his deed and will of June 10, 1946, seeking to give these lands to the appellants, and by many other acts. Just what caused this change, after his visits in October 1945, is quite apparent from the record but need not be here discussed for he could not then recall the transfer to the appellee,

which he had voluntarily made.

When he executed the deed on June 10, 1946, to the appellants it was without force and effect for he then had no interest in these lands which he could thereby convey. The same is true of the will, which became effective as of the date of his death on January 26, 1947, when he died in an old people's home in Lincoln, Nebraska, where he had been taken in December 1946 after being taken from the hotel in Brunswick to Ashland, Nebraska, on June 5, 1946.

We find the evidence to show that the deceased desired to and did voluntarily transfer the land herein involved to the appellee by his deed which he executed on February 2, 1938, and therefore the opinion of the trial court is correct and affirmed.

AFFIRMED.

LEONA J. URBAN, APPELLEE, v. WALTER R. URBAN, APPELLANT.

32 N. W. 2d 410

Filed May 20, 1948. No. 32408.

Divorce. In fixing the amount of permanent alimony the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Swarr, May, Royce, Smith & Story, for appellant.

Webb & Kelley, for appellee.

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

WENKE, J.

Appellant Walter R. Urban, defendant below, appeals from a decree of divorce entered by the district court for Douglas County in favor of the appellee Leona J. Urban, plaintiff below.

Appellant complains of those provisions in the decree which provide as follows: That he may, at reasonable times, visit the minor daughter, Diana J., whose custody was awarded to the appellee; that he pay $100 per month, commencing September 1, 1947, for the care and support of said minor child; that appellee have all the furnishings and contents in the home of the parties located at 4315 Chicago Street and all right and title of the appellant in and to said property; that he pay appellee the sum of $3,500 with interest thereon at five percent from date of the decree, which is August 27, 1947.

With reference to the allowance of $3,500 to appellee the decree provides that it is to be paid at the rate of $75 per month, commencing on September 1, 1947, but directs that appellee, upon receipt of each monthly payment, is to remit the same to Fred M. Urban and Rose M. Urban, parents of appellant, to be applied upon a $3,500 indebtedness due said parents from these parties as evidenced by their note.

Shortly after this case was filed the appellee made application for temporary allowances. On June 9, 1947, the court sustained this application and allowed, for the care and support of the minor child and as temporary alimony, the sum of $25 per week. It appears that the appellant has regularly paid this allowance.

The record discloses that prior to her marriage the appellee lived in Kansas City, Missouri. They were married there on March 23, 1936. At that time appellee

was 18 years of age and appellant 27. He is a graduate of the College of Engineering of the University of Kansas with a Bachelor of Science degree in chemical engineering. Immediately following their marriage they came to Omaha to make it their permanent home and have lived there ever since.

At the time of their marriage they had no property other than a second-hand car. Appellant was employed as a cereal chemist with the Miller Cereal Mills and earned about $100 per month. In May 1936 they purchased a home at 3835 Saratoga Street in Omaha for the sum of $2,200. They moved into this home and lived there until after they purchased their present home at 4315 Chicago Street in March 1946. They moved into this home in April 1946, after repairing and improving it.

In October 1936 appellant changed his employment and started working for the Omaha Grain Exchange Laboratory as assistant to the chief chemist at a salary of $125 per month. He has continued in that employment and at the time of trial was chief chemist at a salary of $375 per month.

In March 1940 their only child was born, a daughter, Diana J., who was seven years of age at the time of trial.

There is no question as to the cause of this marriage breaking up. It was due to the appellant's excessive use of intoxicating liquors.

At the time of trial the parties had accumulated, during their 11 years of married life, the following: The residence located at 4315 Chicago Street in Omaha, which they purchased in March 1946 for a consideration of $6,750 and on which they expended about $1,700 for repairs and improvements; the household furnishings therein, it being a five-room house; a 1940 tudor Ford sedan, having a value of approximately $650; a bank balance of $95; and two $1,000 life insurance policies, the cash value of which is not shown. At that time the

only debt which the parties had was to the appellant's parents in the sum of $3,500. This sum they had borrowed at the time they purchased and fixed up the Chicago Street property. It is evidenced by a note signed by both parties. This note draws interest at five percent and is due in ten years.

The effect of the decree is to give appellee the Chicago Street residence together with the furnishings and contents therein and leaves the appellant the Ford car, worth approximately $650, a $95 bank account, and two $1,000 insurance policies, the cash value of which is not shown. While appellant has his position, from which he draws a salary of $375 per month, however, out of this salary he is required to pay $75 per month, until the $3,500 indebtedness to his parents has been paid, and the further sum of $100 per month for the care and maintenance of the minor child.

In view of the rule as stated in Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721, we think the award to appellee is excessive. Therein we said: "In fixing the amount of permanent alimony the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties."

We find a fair award to be as follows: That appellee have the furnishings and contents of the home; that appellee and appellant own the property located at 4315 Chicago Street and described as Lot 4, Block 21, Poppleton Park Addition to the City of Omaha, Douglas County,

Nebraska, as tenants in common subject to the condition that appellee have the use thereof as a home for herself and minor child as long as she shall have the custody of the child and use the property to make a home for her. However, this provision shall not extend beyond the time when said child shall reach the age of 21 years, permanently leave the home, or marry, whichever may occur first in point of time. During the time the appellee occupies the property under the foregoing provision she shall pay the taxes on said premises, keep the same insured for a reasonable amount payable according to the interest of the parties, and keep the premises in reasonable repair. Appellant is to pay appellee the sum of $50 per month, commencing with the date of the lower court's judgment entered pursuant hereto, and continue to do so every month as long as she maintains the home for the minor child pursuant to the foregoing provisions. Appellant is also to pay the sum of $50 per month for the care and support of the minor child. The payment of this latter sum is also to commence on the date the lower court enters judgment pursuant hereto. Both of these $50 monthly payments are made to commence on the date as specified for the reason that the appellant has been paying the sum of $25 per week as a temporary allowance for the same purpose and when these payments go into effect the temporary allowance shall cease.

The balance of the property, consisting of the bank balance, Ford sedan, and life insurance policies are awarded to the appellant.

As to the $3,500 which these parties owe the appellant's parents, and which is not due until 1956, we direct, insofar as any liability which the appellee may have thereon, that, as between these parties, the appellant shall be primarily liable therefor.

As to appellant's desire to have custody of the child for short periods of time during each year we do not think such a provision would be for the best interests

of the child. Under the situation disclosed by the record we think the best interests of the child will be served by the provision in the decree of the lower court which gives appellant the right to visit his daughter at reasonable times.

Appellant also complains because the lower court excluded evidence relating to the financial and physical condition of his parents. While it would have been proper to have admitted this evidence the exclusion was not prejudicial for the record indicates they are not in financial distress and for the further reason that in this action we are primarily concerned with the welfare of the parties immediately involved.

The decree of divorce and custody of the child, as awarded to appellee, are affirmed. Otherwise, the decree entered by the lower court is ordered modified in accordance with this opinion.

Costs, including a fee of $150 awarded appellee for attorney fees in this court, are taxed to appellant. As modified, the decree of the lower court is affirmed.

AFFIRMED AS MODIFIED.

JESS N. TORRES, APPELLANT, V. FRED C. BOLLMAN ET AL., APPELLEES.

32 N. W. 2d 642

Filed June 11, 1948. No. 32400.

Appeal and Error. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed.

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

Crosby & Crosby, for appellant.

C. L. Baskins, for appellees.

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

SIMMONS, C. J.

This case is one for damages arising out of a collision between two automobiles at a street intersection in the city of North Platte. The jury found for the defendants, and upon the verdict the court entered judgment. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff's case is bottomed upon section 39-751, R. S. 1943, and a provision of the ordinances of the city of North Platte to the effect that the driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection.

Plaintiff's first assignment of error is that the verdict and judgment are contrary to and not sustained by the evidence.

Plaintiff's evidence is to the effect that his car was proceeding south on its right side of the road at a speed of 15 miles per hour when he entered the intersection; that his car had proceeded into and almost across the southwest quadrant of the intersection when the defendants' car approached from the west at a speed of 40 to 50 miles per hour, entered the intersection and collided with plaintiff's car. Plaintiff's witnesses were in substantial agreement that the defendants' car stopped in two to four feet following the collision. Plaintiff's car swerved to the right, rolled over from one to three times, and came to rest on its side 60 feet south of the point of collision. Plaintiff was seriously injured and his car materially damaged.

Defendants' evidence is that the driver of their car, which was proceeding east, approached the intersection at a speed of 20 to 25 miles per hour; that at a point 44 feet west of the west line of the intersection the driver observed the plaintiff's car half a block away and coming at a high rate of speed from the north; that

the driver instantly applied the brakes, entered the intersection and came to a complete stop in the southwest quadrant of the intersection; that thereafter plaintiff's car entered the intersection, swerved to avoid hitting defendants' car; and that the right rear side of plaintiff's car struck the left front side of defendants' car. Defendants' evidence further is that their car remained in position after the impact until driven out of the traffic lane; that the condition of defendants' car after the accident disclosed that the force of the blow to it was from left to right; and that defendants' driver was in no way thrown about or injured. Skid marks testified to by defendants' witnesses sustain the defendants' parol testimony, as does also the evidence as to the movement of plaintiff's car after the collision.

This record discloses a conflict in the evidence which the jury resolved in favor of the defendants.

The rule is: "Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed." Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

We see no reason for disturbing the jury's verdict and the judgment of the court based thereon.

Plaintiff suggests that the jury's verdict may have been based on a misunderstanding of the court's instructions as to the amount of damages plaintiff could have been awarded. There is no error assigned as to the instructions and the misleading instruction, if any, is not pointed out. Plaintiff further suggests that there was racial prejudice involved, plaintiff being of Mexican nationality. We find no support in the record for such a contention.

The judgment of the trial court is affirmed.

AFFIRMED.

DONALD M. DEMONT ET AL., APPELLEES, V. GEORGE ABBAS, APPELLANT, JOHN DIETZ ET AL., INTERVENERS, APPELLEES.

32 N. W. 2d 737

Filed June 11, 1948. No. 32348.

1. **Injunctions: Nuisances.** An injunction against an anticipated nuisance will issue if it is shown that the anticipated use of the property will be a nuisance per se, or that under the circumstances of the case a nuisance must necessarily result from the contemplated act.
2. **Nuisances.** The construction and maintenance of a rendering plant in a rural area is not a nuisance per se.
3. **Injunctions: Nuisances.** If the thing sought to be restrained is not a nuisance per se, and if the evidence be doubtful, eventual, or contingent that a nuisance would necessarily result, injunction is not an available remedy. The alleged wrong must be actually threatened and practically certain to result.
4. ———: ———. If the thing which it is sought to restrain is not a nuisance per se, and will not necessarily become a nuisance, but may or may not become such, depending upon the use, manner of operation, or other circumstances, the remedy of injunction is not available.

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

Collins & Collins, for appellant.

Guy E. Tate, for appellees.

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

CARTER, J.

This is a suit for an injunction to enjoin the defendant from building, operating, or maintaining a rendering plant on a tract of land in Sarpy County. The trial court granted the injunction and defendant appeals.

The plaintiffs allege that in the operation of a rendering plant at the place selected, the air will be filled with noxious exhalations and noisome and offensive smells and odors, which will be injurious to the health of plaintiffs and others in the community; that it will result in the pollution of the Papillion Drainage Ditch; that it

will attract flies and vermin to the injury of the health of plaintiffs and others in the vicinity; and that it will decrease the value of plaintiffs' properties as residences. Claiming that it will constitute a continuing nuisance, plaintiffs pray that the construction of the rendering plant be permanently enjoined. The petition of the interveners alleges the same facts and seeks the same remedy as the plaintiffs.

Defendant admits his intention to construct and operate a rendering plant at the place alleged in the petition. He denies that it will be a nuisance and alleges that it will be a modern plant operated in the most scientific manner in compliance with the laws of the State of Nebraska regulating the operation of such plants.

The evidence shows that the place where the rendering plant is to be constructed is in a rural locality and that it has none of the attributes of an industrial area. In addition to the neighboring farms there are several acreages of approximately seven acres each within one-half mile of the proposed site.

The evidence further shows that in the operation of the rendering plant, dead and diseased hogs, horses, cattle, and sheep will be conveyed to said plant for processing, necessarily resulting in accumulations of flies. There is also evidence that in the process of separating the fats from the flesh of the dead animals, at numerous times each day, offensive odors and gases would escape from the building which would affect the comfort and enjoyment of plaintiffs, depending upon wind direction and atmospheric conditions existing at the time. The record shows also that approximately 200 gallons of water per minute would be dumped into Papillion Drainage Ditch during the operation of the plant, which water includes some solid matters and gases which would tend to pollute the stream and neighboring atmosphere.

The evidence shows that the petitioners and interveners reside between one-quarter and one-half mile from the site where the plant is to be located. The acreages

used for residence and gardening purposes are almost one-half mile from the proposed site of the rendering plant. Very few people reside in the immediate vicinity of the place where the plant is to be constructed. Livestock feeding and general farming operations are the chief avocations in the immediate neighborhood of the plant.

The defendant produced evidence to the effect that he proposed to construct and operate a most modern dry processing rendering plant. He says the factory will be screened against flies to the extent possible, and that the water and gases emptied into Papillion Drainage Ditch will be released under water and will not be noticeable to persons in the community. He testifies that the plant will be clean and sanitary, and will not be injurious to plaintiffs or others in the vicinity. He states that he will comply with all laws and regulations imposed upon the business of processing dead animals for hides, fats and tankage. His evidence as to the method of conducting the plant is corroborated by others familiar with the business.

Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property to their damage that an owner's use may be restricted. The burden rests upon the one complaining to establish that the use to be made of the property must necessarily create a nuisance.

In the present case, the rendering plant has not been built. No nuisance could have existed on the premises at the time this action was filed. The prayer of the petition is based on the anticipated use which the defendant intends to make of it. To justify the issuance of an injunctive order against an anticipated nuisance it must be shown that the anticipated use of the property will be a nuisance per se, or that under the circumstances of the case a nuisance must necessarily result from the contemplated use of the property. A render-

ing plant is not a nuisance per se when constructed in a rural area as here shown, and the plaintiffs do not contend to the contrary. The question for determination is whether, under the circumstances shown, the building of the rendering plant would necessarily result in a nuisance. Brown v. Easterday, 110 Neb. 729, 194 N. W. 798; Pennsylvania Co. v. Sun Co., 290 Pa. 404, 138 A. 909, 55 A. L. R. 873. If the thing which it is sought to restrain is not a nuisance per se, and will not necessarily become a nuisance, but may or may not become such, depending upon the use, manner of operation, or other circumstances, the remedy of injunction is not available.

The location for the proposed rendering plant is on a tract of land consisting of 52 acres, bounded on the north by the county line between Douglas and Sarpy counties, and on the east by the Papillion Drainage Ditch. The west side is bounded by Papillion Creek. The proposed plan is to build the plant at the south end of the tract about 200 feet from the Papillion Drainage Ditch. Into the plant will be hauled the "dead animals, offal, or whatever we will get." The dead animals are then skinned, cut up, and put into the cooker for four to six hours. The defendant admits that the overloading of the cooker will result in the escape of odors. The vent from the cooker is to run into the Papillion Drainage Ditch and its contents released under water. The defendant admits also that, during the process of transferring the "cook" to the presses, odor is bound to escape for approximately 15 minutes during each transfer. He admits that some flies will gather at this plant whatever attempt to eliminate them is pursued. Rodents and vermin have a tendency to gather at such a place.

The operation of a rendering plant is a lawful business, although it is licensed under the laws of this state. §§ 54-736 to 54-741, R. S. 1943. The defendant has expended $15,000 in the purchase of the land upon which the plant is to be erected. The rule is well established that an anticipated nuisance cannot be enjoined, unless

it be a nuisance per se, except by evidence that injury is actually threatened and practically certain to result if the improvement is made. If the evidence be doubtful, eventual or contingent, an injunction will not issue. It takes more than mere apprehension or probability to make a case. The proposed site is from one-quarter to one-half mile from the homes of the plaintiffs and interveners. It is in an area which is more rural than urban in character. The evidence that the claimed injuries are certain to occur is very doubtful. Some odors will emanate from this plant at times, but we are unable to say from this record that a nuisance will necessarily result therefrom. Proper equipment and efficient management may eliminate the objectionable features. We are of the opinion that the evidence is insufficient to show that the erection and operation of the rendering plant under the situation and circumstances herein recited will necessarily result in a nuisance. It may or may not become such. Therefore, an injunction cannot properly issue. It follows that the judgment of the district court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

EDNA TUTTLE, APPELLANT, V. BERT A. WYMAN ET AL., APPELLANTS, FRANK M. JOHNSON ET AL., INTERVENERS, APPELLEES.

32 N. W. 2d 742

Filed June 11, 1948. No. 32324.

1. **Evidence.** The admissions and declarations of a party against his own interest upon a material matter and with reference to and pertinent to the issues being tried are admissible in evidence against such party.
2. **Trusts.** Where a constructive trust arises out of and was the result of actual fraud, the constructive trustee should be denied any recovery for personal services rendered by him to the trust estate.
3. **Trial.** A dismissal after final submission of a case to a court,

where trial is by the court, to be effective, must be by leave of court and upon its order, which order is required to be entered on its journal.

4. ———. The right of a plaintiff to dismiss his action is not always absolute, in the sense that the court has no power over or discretion with respect to its exercise, because if justice to the court or its officers or to any of the parties whose rights would be otherwise jeopardized requires imposition of terms or retention of the cause on the docket, the court, in its discretion, may impose such terms or refuse to permit dismissal.

5. **Judgments.** A satisfaction of judgment, even if entered on the judgment record, is but a receipt, and in the absence of intervening equities, may be explained or avoided by satisfactory evidence that payment was never in fact made or that the entry was induced by fraud or other causes not producing an actual satisfaction.

6. **Executors and Administrators.** An executor or administrator is entitled as such to maintain an action to recover funds and property or its value as belonging to the estate of a decedent then being administered, if there are no funds or insufficient funds or property in his possession with which to pay creditors or the costs and expenses of administration.

7. **Attorney and Client.** Section 7-108, R. S. 1943, which should be liberally construed, does not require that the notice of an attorney's lien shall be in any specific form or that it shall be given in any particular manner.

8. ———. The purpose of such notice is to protect innocent parties who have no notice or knowledge that an attorney claims a lien on the judgment, and a petition in intervention duly filed by an attorney to enforce his lien in the original action before effective dismissal or satisfaction thereof is of itself notice to the adverse party.

9. ———. Ordinarily, in the absence of an agreement therefor, a lawyer has no lien as such upon the lands of his client. However, if properly perfected, he does have a charging lien upon the judgment or any process of the court, which lien is enforceable by timely intervention in the original action upon any money or property recovered thereby for the satisfaction of his client's claim.

10. ———. An agreement between an attorney and client that such attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered.

11. ———. Where a collusive settlement has been made by the parties to an action for the purpose of defrauding an attorney

of his just compensation for services rendered, and prevent the enforcement of his lien upon the judgment, the attorney may proceed by intervention in the original action and carry forward the litigation for the purpose of establishing and protecting his own rights and interests, justly determining the amount of his compensation, and enforcing collection thereof.

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

M. O. Bates, *R. E. Bannister*, and *H. W. Baird*, for appellants.

Davis, Stubbs & Healey and *Beatty, Clarke & Murphy*, for appellees.

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

CHAPPELL, J.

After hearing upon and in conformity with issues made by the amended petition of Frank M. Johnson, intervener, and the amended petition of D. D. Ernst, administrator with the will annexed of the estate of Isaac Large, deceased, intervener, together with the respective answers of plaintiff and defendants thereto, the trial court entered a decree finding generally for interveners. Motion for new trial was overruled, whereupon plaintiff and defendants appealed to this court. Some 18 assignments of error are presented in their brief, all of which may be summarized as contending that the decree was not sustained by the evidence and was contrary to the law and the evidence. We conclude that such assignments are without merit and that the judgment should be affirmed.

Hereinafter Edna Tuttle will be generally designated as plaintiff, Bert A. Wyman and Della A. Wyman as defendants, Frank M. Johnson as intervener, and D. D. Ernst as administrator.

The decree found substantially that on August 12, 1943, plaintiff and intervener entered into a written

contract whereby she employed him as her attorney to enforce her legal rights in and to funds and real property allegedly possessed and held by defendants as constructive trustees for the benefit of the legatees and devisees, of which plaintiff was one, under the will of Isaac Large, deceased. At the time of entering into the contract, plaintiff was without funds or property with which to pay intervener any compensation for his legal services, and it was understood and agreed that intervener was to have and receive his compensation solely from any funds or property recovered from defendants, and that if plaintiff recovered nothing, intervener was to receive nothing for legal services performed by him under the contract, but any funds or property recovered was to be held and used for the payment of intervener's compensation and the benefit of plaintiff.

The court found that intervener had fully and faithfully performed the terms of the contract and that by virtue of his legal services eventually procured for plaintiff a decree in the Supreme Court (Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744), and a judgment upon the mandate therefrom in the district court for Dawson County, finding and decreeing that plaintiff was the owner of and entitled to a share in the estate of Isaac Large, deceased, as provided in the will, and that all of the land involved in this action and formerly owned by Isaac Large, together with a right to an accounting from defendants for the rents and profits of said lands from June 13, 1932, to July 13, 1945, was held in trust for the benefit of the devisees and legatees in the will.

The decree found further that between February 14, 1946, and February 25, 1946, after judgment had been entered on the mandate, plaintiff and defendants entered into a fraudulent conspiracy to cheat and defraud intervener of the compensation owing him under his contingent contract of employment with plaintiff. The

court found that at that time defendants had actual notice and knowledge that plaintiff had no property or funds with which to pay intervener the compensation earned by him under the contract, and knew that he looked for recovery thereof solely from the trust funds brought into existence and created by intervener through his services under the contract.

It was further found that on February 25, 1946, plaintiff and defendants, for the purpose of carrying out and consummating their conspiracy to cheat and defraud intervener as aforesaid, filed a collusive and fraudulent dismissal of plaintiff's action in the district court while the final accounting therein was still pending. However, it was found that such dismissal never became effective as a dismissal of the action in any event, for the reason that no order of dismissal was ever entered by the court in said cause and said dismissal was never at any time spread upon the journal of the court. It then found that intervener had a lien on the judgment entered upon the mandate of the Supreme Court, enforceable upon the trust funds created and brought into existence by the legal services of intervener for plaintiff, of which lien defendants had full notice and knowledge prior to entering into their conspiracy with plaintiff and prior to the filing of said dismissal.

The decree found that plaintiff intended to enter into and carry out such fraudulent conspiracy with defendants and that at the time of trial of the issues presented herein still had the fraudulent intent and purpose of carrying out and consummating such conspiracy and fraud against intervener.

The decree found and adjudged that intervener had a lien for his services upon the trust estate recovered for the benefit of plaintiff, which consisted of her one-half interest in the land aforesaid, and the proceeds of an accounting from defendants of the rents and profits thereof from June 13, 1932, to February 25, 1946. The value of the land on the latter date, over and above

encumbrances (which encumbrances did not exist on June 13, 1932), was found to be $40,300. The net rents and profits received by defendants from such lands were found to be $41,420, making a total of $81,720 as the value of the trust estate. The court found that the administrator could maintain his petition in intervention to the extent of recovering a sufficient amount of money to enable him to fully administer the estate of Isaac Large, deceased, pay all claims allowed, including a cash legacy provided in the will of deceased, and the costs and expenses of administration. The decree set aside $1,200 for such purposes and made that sum a lien upon the funds and property, any balance thereof to be distributed by the county court to the persons entitled thereto.

The decree thereafter allowed defendants a credit of $200, previously paid by them, which left a balance of $40,060 as the value of plaintiff's one-half interest in the trust funds and property. From that sum it was found and adjudged that intervener was entitled to recover $19,030 as of February 25, 1946, for services rendered by him as provided in his contract with plaintiff, which sum, together with costs advanced by intervener but remaining unpaid by plaintiff, and interest from February 25, 1946, to date of the decree, amounted to $20,667.27, for which amount judgment was entered and a lien imposed therefor upon the trust funds aforesaid, second only to the lien of the administrator.

The decree then ordered that unless such sums should be paid within thirty days, the real estate involved, or so much thereof as was necessary, should be sold as upon execution, to satisfy such liens, together with all costs, which were taxed to defendants.

The record is voluminous. It would unduly prolong this opinion and serve no good purpose to recite the evidence at length in this opinion. It is sufficient to state that we have examined the record and find that the evidence therein conclusively supports the decree

of the trial court. We find it unnecessary, however, to discuss or decide whether or not plaintiff was herself also defrauded by defendants.

Three matters in the accounting of rents and profits require brief discussion. Complaint was made that the court erred in admitting exhibit No. 70 over the objections of defendants. The exhibit was a purported accounting made by defendants for the rents and profits covering the years involved. There is no merit in the contention, because it is a well-established rule in this jurisdiction that: "The admissions and declarations of a party against his own interest upon a material matter and with reference to and pertinent to the issues being tried, are admissible in evidence against such party." Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744.

Complaint was also made by defendants that defendant Bert A. Wyman's claim for personal services rendered to the trust estate during the years involved was erroneously disallowed. In the first place, defendants at all times claimed all the property as their own. In fact, defendant Della A. Wyman did at all times have a one-half interest in the property after Isaac Large's death on June 17, 1939, which was subject, however, to the claims of creditors and the costs and expenses of administration. Certainly no recovery could be had as compensation for serving defendants' own interests. On the other hand, the original fraud of defendants was not in collateral matters, but the constructive trust itself arose out of and was the result of actual fraud by defendants. See Tuttle v. Wyman, *supra.* In such a situation, a court of equity should deny any recovery for services rendered to the trust estate. To allow compensation to a constructive trustee in such cases would put a premium upon fraud. See Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. S. R. 670.

With reference to the claim of defendants for monthly payments alleged to have been made by them to Isaac Large for his support during his lifetime, it should be

said that the claim was manifestly fictitious and fraudulent, therefore properly disallowed by the court.

We turn then to the question whether plaintiff's purported dismissal and satisfaction of the action were of any legal force and effect. In doing so, we conclude that they were not.

Section 25-601, R. S. 1943, provides: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case * * * to the court where the trial is by the court; * * *." Section 25-1318, R. S. 1943, also provides: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action."

This court has specifically held that: "A 'dismissal' after final submission of a case to a * * * court, where trial is by the court, to be effective, must be by leave of court and upon its order, which order is required to be entered on its journal." Knaak v. Brown, 115 Neb. 260, 212 N. W. 431, 51 A. L. R. 237.

The original controversy between plaintiff and defendants had been finally submitted to the trial court, with a judgment thereon, and a judgment on the mandate from this court had been entered by the trial court, the effect of which was to find that all the land involved therein and herein, together with rents and profits thereof from June 13, 1932, to July 13, 1945, was held in trust by defendants for the benefit of the legatees and devisees under the will of Isaac Large, deceased. Only the net amount of such rents and profits was then left for determination by the trial court in an ancillary proceeding to enforce the judgment already entered, at the time plaintiff and defendants fraudulently attempted to dismiss with full notice and knowledge not only that intervener claimed a lien on the judgment, but also in the face of the fact that the administrator had previously filed a petition in intervention in behalf of the estate of Isaac Large, deceased, to recover for it and

the estate's effective administration, that portion of the rents and profits of the land from June 13, 1932, until June 17, 1939, the date of the death of Isaac Large.

It will be noted that there were no assets in the estate of Isaac Large except the land and the rents and profits therefrom, all of which defendants had theretofore fraudulently appropriated. The will of Isaac Large provided for payment of a small cash legacy and there were expenses and costs of administration then unpaid. That the administrator had not only the right but the duty to proceed as he did in the case at bar there is no question.

In that regard, Tyrrell v. Judson, 112 Neb. 393, 199 N. W. 714, relied upon by plaintiff and defendants, is distinguishable on the facts. In that case there were sufficient funds in the estate to pay the debts of deceased and the costs and expenses of administration. Therefore, the administrator was not permitted to maintain the action. That is not the situation here. Also, in Blochowitz v. Blochowitz, 130 Neb. 789, 266 N. W. 644, relied upon, there were no debts or costs and expenses of administration remaining unpaid in the estate. Also, in neither of the two above cases was there a specific legacy remaining unpaid and unsatisfied as in the case at bar.

Plaintiff's alleged dismissal was after final submission and judgment on the mandate, and without leave, or upon any order of the trial court entered on the journal. It was, therefore, ineffective as a dismissal.

Moreover, the rights of the administrator who intervened before plaintiff's purported dismissal was filed, also precluded any absolute right of plaintiff to dismiss. In such a situation, the right of plaintiff to dismiss the action was not absolute in the sense that the court had no power over or discretion with respect to its exercise. This court has heretofore affirmed that when justice to the court or to its officers or to any of the parties requires imposition of terms or retention of the cause on

the docket, the court in its discretion may impose such terms or refuse to permit dismissal. Further, the court's discretion to so act depends on the existence of rights which would be prejudiced by dismissal, and not in the manner in which the court may become cognizant of them, and is not conditioned on some formal claim or assertion of them in the record. Horton v. State, 63 Neb. 34, 88 N. W. 146.

We turn then to plaintiff's alleged satisfaction of the judgment. Such a satisfaction, even assuming that it was entered on the judgment record, which by stipulation here it was not, was but a receipt, and in the absence of intervening equities, which do not here exist, could be explained or avoided by satisfactory evidence, which does appear herein, that payment was never in fact made, or the entry was induced by fraud or other causes not producing an actual satisfaction. See Knaak v. Brown, *supra*. We conclude then that the alleged satisfaction was executed and filed by plaintiff without payment thereof, and solely for the purpose of perpetrating a palpable fraud upon the intervener and the administrator. It was, therefore, of no force and effect to deprive them of their lawful rights in and to the funds and property of the trust estate established by the judgment.

We turn then to the question whether or not intervener had a charging lien upon the judgment. We conclude that he did.

Section 7-108, R. S. 1943, provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

As stated in Cones v. Brooks, 60 Neb. 698, 84 N. W. 85: "The statute does not require that the notice shall

be in any specific form, or that it shall be given in any particular way; and we have no right to add anything to the law by construction." See, also, Counsman v. Modern Woodmen of America, on rehearing, 69 Neb. 713, 98 N. W. 414.

Clearly, the purpose of notice is to protect innocent parties who have no notice or knowledge that an attorney claims a lien on the judgment. There are none such involved in this case. Defendants actually had notice, and certainly no more could be required than that the claim for a lien should be filed in the action in which the services were rendered, prior to effective dismissal thereof.

Plaintiff and defendants had full notice and knowledge at all times that intervener claimed a lien, and the amount thereof. But, in any event, the petition in intervention duly filed before dismissal and satisfaction, was of itself sufficient notice.

The trust estate here involved was obtained for plaintiff by the efficient legal services of intervener by a judgment and the processes of the equity court for the satisfaction of her claim. It was all in the hands of the adverse parties, but actually in the custody of the law and under the complete jurisdiction and control of the court for that purpose.

Ordinarily, in the absence of an agreement therefor, a lawyer has no lien as such upon the lands of his clients. However, if properly perfected, he does have a lien upon the judgment or any process of the court, which lien is enforceable by intervention in the original action upon any money or property recovered thereby for the satisfaction of his client's claim.

As early as Griggs and Ashby v. White, 5 Neb. 467, this court held that: "An attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained. And this right is paramount to the rights of the parties in the suit." That opinion affirmed a judgment enforcing an

attorney's lien against the lands recovered by the judgment.

In Zentmire v. Brailey, 89 Neb. 158, 130 N. W. 1047, it was held: "An attorney's lien in due form, when filed in a pending action, binds realty previously attached therein to satisfy the client's claim." The theory of the court was that the statute (section 7-108, R. S. 1943) was simply declaratory of the common law, and gave the attorney a lien on any judgment or process of the court which was effective for the purpose of collecting and enforcing the client's claim.

In Williams v. Miles, 63 Neb. 851, 89 N. W. 455, it was said: "Had the action proceeded to judgment, on which would attach a lien in favor of plaintiffs' attorneys, or were the controversy of such a character as to bring funds, money, or property into the possession of the court, or custody of the law, on which the plaintiffs' attorneys could claim a lien, legal or equitable, for the value of their professional services and expenses incurred in the prosecution of the suit, we would not doubt our authority to protect and preserve such lien for their benefit, when jeopardized by contemplated action of their clients, * * *."

In a specific sense, the rents and profits here involved, were money in the hands of the adverse party. On the other hand, the statute giving an attorney a lien on money in the hands of the adverse party must be liberally construed. 6 C. J., Attorney and Client, § 365, p. 768. The word "money" is used not only in a specific but also in a comprehensive and general sense, and when so used, as we do here, and in similar cases where money or property or both are recovered by a judgment or its equivalent process of the court, then the word "means wealth,—the representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce" for the satisfaction of a claim so established in litigation. See Black's Law Dictionary, Third Edition.

It is also a well-established rule that: "An agreement

between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered." 6 C. J., Attorney and Client, § 366, p. 769. "Moreover, a charging lien may arise out of an agreement between a client and his attorney that he is to receive a portion of the judgment recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds is to be looked to for security." 7 C. J. S., Attorney and Client, § 211, p. 1146. See, also, 5 Am. Jur., Attorney and Client, § 221, p. 394.

The foregoing propositions are squarely in point and controlling in the case at bar. Plaintiff had no money or property save and except the land and the rents and profits therefrom, which intervener, under his contract, recovered for her. She could pay him nothing for his services save and except therefrom. It was distinctly understood and agreed by plaintiff at all times that intervener was to have a portion of such recovery as compensation for his services. It was understood and agreed that the written contract between the parties so provided. The record admittedly and conclusively establishes that any recovery was to be security for the payment of intervener's compensation and that he was to have an interest in the funds and property recovered for the satisfaction of plaintiff's claims.

In that connection, plaintiff at one point was asked: "Q Well, you knew that he (intervener) was to have an interest in the property that you recovered, under the contract, didn't you? A If he had recovered it, yes, I would have felt like he had an interest; but I didn't feel like it was recovered." As a matter of course, it was recovered by the decree of this court and the judgment on the mandate of this court, and the very fraudulent intent and purpose of the purported settlement agreement between plaintiff and defendants and the very

fraudulent intent and purpose of plaintiff's purported dismissal and satisfaction, were to deprive intervener of that contractual interest and defeat his recovery of it as compensation for its creation.

Moreover, the record discloses that defendants had full notice and knowledge of the contract, and that intervener had such an interest at the time the conspiracy to defraud was entered into and perfected. Defendant Bert A. Wyman, who took the leading part in perfecting and carrying out the fraudulent plan, explained why it should be binding on intervener. In that regard, he testified at one point: "Q Well, anyway, the purpose was to settle around Frank Johnson? A That's right. * * *." At another point he testified: "* * * I was always under the impression that partners — what one did bound the other. * * * Q Now, what partners are you talking about? A Her and Frank Johnson. Q * * * You considered they were in more or less of a partnership in this matter? A That's right. Q And that what she did would bind Frank? A That's right."

Without doubt, intervener had a charging lien not only by statute but by agreement on any judgment recovered, which he had the right to enforce in the original action, paramount to the rights of the parties to the suit.

We turn then to the question of the method of enforcement. In that regard, this court has consistently affirmed that the proper method to enforce an attorney's lien is to file a petition in intervention in the original action. See, Spethman v. Hofeldt, 141 Neb. 83, 2 N. W. 2d 620; Zentmire v. Brailey, *supra*; and Jones v. Duff Grain Co., 69 Neb. 91, 95 N. W. 1. In each of the above cases, purported collusive settlements were made by the parties in an attempt to defraud the attorney of his compensation without his knowledge.

We conclude that intervener pursued the proper remedy and the question then presented is whether or not he could carry forward the litigation for the purpose of

establishing and protecting his own rights and interests, justly determining the amount of his compensation, and enforcing collection thereof, even though plaintiff might desire to terminate the case. We conclude that he had that right. Such procedure was approved by this court as early as Reynolds v. Reynolds, 10 Neb. 574, 7 N. W. 322, and thereafter affirmed in Spethman v. Hofeldt, *supra*, Zentmire v. Brailey, *supra*, Counsman v. Modern Woodmen of America, *supra*, and Jones v. Duff Grain Co., *supra*.

Other propositions of law are presented in the briefs, but we deem it unnecessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF ISAAC LARGE, DECEASED. EDNA TUTTLE, APPELLANT, V. BERT A. WYMAN ET AL., APPELLANTS, D. D. ERNST ET AL., INTERVENERS, APPELLEES.

32 N. W. 2d 751

Filed June 11, 1948. No. 32325.

1. **Wills: Executors and Administrators.** Section 30-1707, R. S. 1943, is not exclusive but permissive in character, and applicable in any event when only real estate is involved in the estate.
2. ———: ———. Where a will is offered and admitted to probate more than two years after the death of the testator, and an executor or administrator is appointed to administer the estate in which funds or personal property, as distinguished from realty, are also involved, the administration proceedings should not be dismissed or the representative discharged until after cash legacies provided for in the will and the claims filed therein are satisfied, the costs and expenses of administration are paid, and there is a final accounting and distribution of the estate, as provided by law.

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

M. O. Bates, R. E. Bannister, and *H. W. Baird,* for appellants.

Davis, Stubbs & Healey and *Beatty, Clarke & Murphy,* for appellees.

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

CHAPPELL, J.

This appeal involves the estate of Isaac Large, deceased, referred to and involved in the interwoven and interdependent cases of Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744, and Tuttle v. Wyman, *ante* p. 769, 32 N. W. 2d 742.

Isaac Large died in California on June 17, 1939. In 1932 he executed a will, drawn by a lawyer in Lexington, Nebraska. That will provided in substance for payment of the debts and funeral expenses of deceased out of his personal estate, gave a small cash legacy to a son, Wayne Large, and devised all the rest and residue of his estate, both real and personal, to his daughters, Edna Tuttle and Della A. Wyman, absolutely, share and share alike. It also constituted and appointed Della A. Wyman as executrix.

The will was left in the custody of the lawyer, who, after testator's death, put a notation on the will that Edna Tuttle should be notified. However, before that had been done, the lawyer suddenly died, and it was not until June 1943 that the lawyer's son, going through files preliminary to closing his office during the war, discovered the will and notation thereon. Thereupon he deposited the will with the county judge, and notified Edna Tuttle, who employed Frank M. Johnson as counsel to represent her and thus preserve and protect her rights in the estate of the deceased, which, at the time of his death, consisted not only of the lands involved in the two cases, Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744, and Tuttle v. Wyman, *ante* p. 769, 32 N. W.

2d 742, but also of the rents and profits thereof from June 13, 1932, to the date of testator's death, all of which Bert A. Wyman and Della A. Wyman held as constructive trustees by virtue of their actual fraud upon him during his lifetime.

In the meantime, Frank M. Johnson, as counsel for Edna Tuttle, had commenced the original suit in her behalf against Bert A. Wyman and Della A. Wyman, and as a result of preliminary proceedings in that action made necessary by them, filed a petition for Edna Tuttle seeking a probate of the will and administration of the estate of Isaac Large, deceased. Her petition sought the appointment of W. Rollin Smith as administrator with the will annexed, whereupon Della A. Wyman joined in the application for probate of the will and administration of the estate, but prayed in her petition therefor that letters testamentary should be issued and delivered by the court to her as executrix for that purpose. The latter instrument does not appear in the record in this case, but it does appear in the record in Tuttle v. Wyman, *ante* p. 769, 32 N. W. 2d 742, and the answer thereto appearing in this record confirms not only the filing thereof but that her interests were adverse to those of Edna Tuttle, she having long prior thereto fraudulently appropriated all of the funds and property of Isaac Large.

After the previous opinion of this court, Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744, and immediately after entry of the judgment on the mandate of this court therein, the administrator filed an inventory, including the lands involved therein and prospectively the rents and profits thereof when judicially ascertained, from June 13, 1932, to June 17, 1939, the date of the death of Isaac Large.

Thereafter, the administrator, upon being called into military service, resigned, and D. D. Ernst was duly appointed and qualified as successor administrator. He then filed a petition in intervention in Tuttle v. Wyman,

146 Neb. 146, 18 N. W. 2d 744, alleging that as administrator he was entitled to an accounting for and possession of the rents and profits of the lands to which the Wymans had fraudulently taken the legal title and possession from June 13, 1932, to June 17, 1939, for the purpose of paying the cash legacy provided for in the will, and the claims, costs, and expenses of administration prior to distribution, and closing of the estate, in conformity with law. That petition in intervention was pending before the district court at the time of the purported settlement, dismissal, and satisfaction of the judgment, which in Tuttle v. Wyman, *ante* p. 769, 32 N. W. 2d 742, this court held was of no legal force and effect.

In the meantime, claim for a debt of deceased was filed by the Albert J. Reed estate in the Isaac Large estate, together with an application for extension of time for filing thereof, to which the administrator filed objections. That claim and application were denied. No other claims for debts of deceased were filed. However, in the course of administration, Wayne Large, the son, filed a petition to set aside the probate of the will, to which petition the administrator filed an answer, as did also Della A. Wyman. That petition was finally dismissed by Wayne Large without a hearing on the merits.

After the purported dismissal of Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744, and evidently in furtherance of and in order more effectively to perfect the fraudulent conspiracy as adjudged in Tuttle v. Wyman, *ante* p. 769, 32 N. W. 2d 742, and, in addition, to defraud the administrator out of his costs, expenses, and compensation for his services, and to defraud the attorney for the administrator out of his costs, expenses, and compensation for his services as such, Edna Tuttle and Della A. Wyman joined in a petition and purported stipulation, filed in the Isaac Large estate, praying for dismissal of the administration proceedings and discharge of the administrator. The administrator filed objections thereto and the administrator and his attorney each filed

claims in the county court for the amount of their respective costs, expenses, and services as such.

County Judge M. O. Bates, who at all times had been one of counsel for the Wymans, was disqualified to hear the matter. Therefore, it was heard by E. A. Cook as county judge pro tem, whereupon a decree and judgment was entered, dismissing the entire administration proceedings, discharging the administrator, and allowing the administrator and his attorney nothing upon their respective claims. The administrator and his attorney appealed to the district court therefrom, and after hearing upon the merits, a judgment was entered, vacating, setting aside, reversing, and remanding the judgment of the county court, with directions. In that regard, the decree found and adjudged that the administration proceedings were wrongfully suspended and dismissed, and that the administrator was wrongfully discharged, since it was his legal right and duty to fully administer and close the Isaac Large estate in conformity with law, after payment of the cash legacy as provided in the will of deceased, and any claims against said estate, including the costs and expenses of administration.

Motion for new trial was overruled, whereupon Edna Tuttle and Della A. Wyman appealed to this court. Their assignments of error are substantially that the judgment was not sustained by the evidence and was contrary to the law and the evidence.

Many legal propositions were discussed in the brief which have no relationship whatever to the situation presented, and we will not discuss them here.

Among other contentions, it was argued that the appointment of an executor or an administrator was a useless act and in violation of section 30-1707, R. S. 1943. We cannot sustain that contention. That section is not exclusive but permissive in character, and applicable in any event when only real estate is involved. Further, since no appeal was ever taken from the appointment of either of the two administrators with the will annexed,

that action was not subject to collateral attack. Also, as a matter of fact, Edna Tuttle petitioned for the probate of the will and the appointment of such an administrator, and Della A. Wyman joined with her in a separate petition for like relief, except that she specifically prayed therein to have herself appointed executrix. She did so, evidently, for the purpose of utilizing such position to her own advantage in order to forestall any steps by the representative in seeking an accounting of the rents and profits, funds of the estate already misappropriated by her. Thus she could defraud her sister, since the appointment of a competent administrator, who was not interested adversely to her sister, was necessary to recover from Della A. Wyman such funds belonging to the estate. To permit Edna Tuttle or Della A. Wyman to thus escape the consequences of their own voluntary procedure and action would be but to permit a fraud upon the court, the administrator, and his counsel. They are in no position now to establish such a contention.

Likewise, it was argued that there never were any funds or property in the estate of Isaac Large upon which an administration could be had, since Bert A. Wyman and Della A. Wyman held the legal title thereto at all times. In other words, the contention was in effect that the opinion of this court in Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744, was a nullity. We cannot so hold.

The effect of the opinion of this court in that case was to hold that, at the time of his death, Isaac Large was the actual owner of all the real estate involved, together with the rents and profits therefrom, on and after June 13, 1932, until his death on June 17, 1939, and that Bert A. Wyman and Della A. Wyman simply held the naked legal title thereto as constructive trustees by reason of their own actual fraud perpetrated upon him in his lifetime. The holding therein was that the entire trust estate was at all times actually a part of Isaac Large's

estate at the time of his death, having been held by the trustees for his use and benefit during his lifetime, and for the benefit of the legatees and devisees under the will after his death, subject to the payment of his debts and the costs and expenses of administration. This court did not recognize the validity of the deeds of conveyance to Bert A. Wyman and Della A. Wyman as conveying any interest in the property to them. That opinion and the judgment on the mandate thereof is res adjudicata and not subject to collateral attack. The conclusion, therefore, is inevitable that, if Edna Tuttle or Della A. Wyman ever had any interest in the trust estate, it was solely by reason of the will of Isaac Large, deceased, after the final probate and administration of his estate, in conformity with law, but not otherwise.

That the rents and profits, and even the land itself, if necessary, were subject at all times by statute to the payment of costs and expenses of administration, there can be no doubt. See Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, wherein applicable statutes were discussed and applied.

We conclude that until the cash legacy provided for in the will of Isaac Large was paid, renunciated, or quitclaimed, and the costs and expenses of administration were paid, and final distribution was made, the administration of the estate could not be dismissed and the administrator discharged. To hold otherwise in the case at bar would permit a fraud to be perpetrated on the administrator and his attorney, who both labored diligently to preserve the estate, and would as well becloud the title to the funds and realty involved therein.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

BARBARA M. SHIPLEY, APPELLEE, V. WILLIAM A. MCNEEL, APPELLANT.

32 N. W. 2d 639

Filed June 11, 1948. No. 32398.

Appeal and Error. When it is sought to review the judgment of a district court, no motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had.

APPEAL from the district court for McPherson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

R. V. Hoagland, for appellant.

C. M. Bosley and *J. F. Ratcliff,* for appellee.

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

CHAPPELL, J.

This appeal is a forcible entry and detainer case, involving the same property as that involved in Shipley v. McNeel, *post* p. 793, 32 N. W. 2d 636.

On April 3, 1947, after notice was duly served upon defendants to vacate the property, plaintiff filed her complaint in the county court for McPherson County, praying for restitution of the property, upon the premise that she was the owner and entitled to immediate possession of the same. She alleged substantially that defendant forcibly and unlawfully detained possession of the premises from plaintiff by reason of his failure to pay any rent as provided in a certain described lease with him, dated February 18, 1946, for the term March 1, 1946, to March 1, 1947. The nature of defendant's answer in the county court does not appear for the reason that the transcript therefrom to the district court does not contain any answer filed by him.

However, the case was, as shown by the transcript,

tried on the merits, and on April 17, 1947, the county court dismissed plaintiff's action upon the ground that it had no jurisdiction because the evidence disclosed that title to the real estate was involved. Plaintiff thereafter appealed to the district court, and on September 22, 1947, filed therein a petition on appeal, substantially repeating the allegations of her original complaint, and attaching a copy of the lease entered into with defendant on February 18, 1946, wherein he agreed to pay cash rent of $700 on or before October 1, 1946, or surrender possession of the premises upon failure so to do, without the necessity of making demand for payment of the same on the date the rent was due.

Defendant filed an answer on October 21, 1947, denying that he was guilty of forcible entry and detainer, and alleging that on April 20, 1943, which it will be noted was approximately three years prior to execution of the lease heretofore referred to, defendant signed a contract with the then owner for the purchase of the realty involved, which gave him an interest in the same, by reason of which he prayed for dismissal of the action. On October 23, 1947, plaintiff filed a reply thereto.

In that connection, it will be noted that theretofore, on September 11, 1947, a decree had been entered, affirmed by this court in Shipley v. McNeel, *supra,* quieting the title, ownership, and right to possession of the realty in plaintiff as against defendants, of whom this defendant was one, and forever foreclosing and estopping defendants from claiming or asserting any right, title, possession, or right to possession or other interest in and to said described real estate here involved. Writ of assistance was also awarded plaintiff, which was returned without execution on October 10, 1947, but was finally fully executed and return was made on December 1, 1947, after defendant's appeals, both in that case and the one at bar, had been lodged in this court. The entire record in Shipley v. McNeel, *supra,* was offered in

evidence by plaintiff in the case at bar, and appears in the bill of exceptions.

On October 23, 1947, plaintiff filed a motion for judgment against defendant on the pleadings. On October 27, 1947, the parties and their respective counsel appeared in open court, whereat evidence was adduced and a trial of the case was had on the merits, without any demand for a jury trial.

The bill of exceptions recites that at the regular September 1947 term, on October 27, 1947, the cause was called for trial without intervention of a jury, and that it was stipulated and agreed by counsel for the parties that the bill of exceptions contained all of the evidence introduced on the trial of the case. The trial court certified that the bill of exceptions contained all of the evidence offered or given upon the trial of the case, together with all objections of counsel thereto, rulings of the court thereon, and exceptions taken thereto. The record discloses that defendant made no effective formal objections to the manner of procedure, and offered no evidence, although given opportunity by the court to do so.

Section 25-1103, R. S. 1943, provides: "A 'trial' is a judicial examination of the issues, whether of law or of fact in an action."

Contrary to defendant's contention, the case was disposed of on the merits after trial, and not by summary judgment, as argued by defendant. True, the trial court in its findings purported also to sustain plaintiff's motion for judgment on the pleadings, but regardless thereof, upon further consideration of the evidence, the court decided the case upon the merits and entered judgment finding and adjudging that the allegations of plaintiff's petition were true and awarded her restitution of the premises, as prayed, and taxed the costs to the defendant. Thereupon, application for supersedeas was made in open court but denied, and defendant appealed to this court without filing any motion for new trial.

In such a situation, the rule is that: "When it is sought to review the judgment of a district court, no motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had." In re Application of Rozgall, Rozgall v. Dorrance, 147 Neb. 260, 23 N. W. 2d 85.

Bearing that rule in mind, we have examined plaintiff's petition, and conclude that it did state a cause of action and supported the judgment of the trial court.

In conformity with section 27-1409, R. S. 1943, the trial court found that plaintiff's complaint was true, and rendered "a general judgment against defendant and in favor of plaintiff for restitution of the premises and costs of suit." Therefore, we conclude that the costs were properly taxed to defendant, contrary to his contention.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

BARBARA M. SHIPLEY, APPELLEE, V. WILLIAM A. MCNEEL ET AL., APPELLANTS.

32 N. W. 2d 636

Filed June 11, 1948. No. 32399.

1. **Judgments.** If an application to vacate a judgment or final order is filed at a subsequent term, and more than 10 days after rendition thereof, the court has no authority or power to vacate the same except for the reasons enumerated in section 25-2001, R. S. Supp., 1947, and within the time allowed by section 25-2008, R. S. 1943, which reasons must be presented in the manner prescribed by section 25-2002, R. S. 1943.
2. **Equity: New Trial.** While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief

will not be granted when there is an adequate remedy at law.

3. ———: ———. To be entitled to equitable relief in such a case, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 25-2001, R. S. Supp., 1947.

APPEAL from the district court for McPherson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

R. V. Hoagland, for appellants.

C. M. Bosley and *J. F. Ratcliff,* for appellee.

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

CHAPPELL, J.

This is an appeal from an order of the district court for McPherson County refusing to set aside a default judgment and give defendants a hearing on the merits. We sustain the judgment of the trial court.

The record discloses that on May 15, 1947, plaintiff filed a petition in the district court for McPherson County, seeking to quiet the title to certain described real farm property located in that county. Plaintiff, in her petition, among other things, alleged in substance that although defendants were in possession of the property under a written lease for one year, owned by her, which lease expired March 1, 1947, they thereafter refused to surrender possession, claiming to have some interest in the property by reason of a purported purchase contract executed in 1943 with the then owner.

Summons was duly served on defendants, designating answer day as June 16, 1947. No answer was filed by defendants on that date, but on June 27, 1947, they filed a motion to make paragraph 7 of plaintiff's petition more definite and certain by setting forth a true and correct copy of the purported alleged contract of purchase by defendant, referred to therein.

Under date of August 5, 1947, plaintiff, upon motion made in open court, was given leave to amend paragraph 7 of her petition by interlineation. Thereupon,

defendants' motion to make more definite and certain was overruled, and they were granted 10 days to file answer.

Plaintiff's amendment simply added the words: "and that plaintiff has never seen said purported contract; has never had it in her possession; does not know its contents, and denies that such purported contract ever existed." The law firm of which R. V. Hoagland, of counsel for defendants, was a member, knew of the order. R. V. Hoagland himself was informed thereof on September 5 or 6, 1947, by a member of his firm, and the contents of the amendment were available to defendants and their counsel by an examination of the court files at all times on and after August 9, 1947.

Defendants did not file an answer within 10 days from August 5, 1947, as required by the court, although admittedly on September 8, 1947, in open court, the trial court warned R. V. Hoagland that he "should get an answer on file immediately."

Thereafter, on September 11, 1947, in the district court for McPherson County, defendants not having yet answered, their default was duly entered, evidence was adduced in plaintiff's behalf, which does not appear in the record, and the trial court rendered its decree, finding generally for plaintiff and awarding her the relief sought by her petition.

The decree found generally that "the title, ownership and possession" of plaintiff was "quieted and confirmed in said plaintiff as against the defendants, and each of them, and as against all persons who may now or hereafter claim under or through said defendants, and that said defendants be and they hereby are forever foreclosed and estopped from claiming or asserting any right, title, possession or right to possession or other interest in and to said described real estate." The decree also awarded plaintiff a writ of assistance.

In the afternoon of September 11, 1947, the trial court advised counsel for defendants that they had been thus

defaulted. The decree was not filed by the clerk until September 15, 1947, but the decision was effective when rendered by the court on September 11, 1947. See Luikart v. Bredthauer, 132 Neb. 62, 271 N. W. 165.

Thereafter, on September 15, 1947, during the same term of court at which the default judgment was rendered, defendants filed an answer and cross-petition, together with a motion to vacate the judgment rendered on September 11, 1947, and for new trial, which motion was supported by the affidavit of R. V. Hoagland as counsel for defendants.

On September 22, 1947, at a subsequent term of court for McPherson County, defendants again failed to appear, and defaulted at the hearing upon the motion to vacate the judgment and for new trial. Whereupon the trial court entered an order, which, after reciting defendants' failure to appear, overruled their motion.

On September 25, 1947, at a subsequent term, and more than 10 days after rendition of the judgment, defendants filed an instrument designated as a motion and petition, praying substantially that the court should set aside the order of September 22, 1947, vacate the judgment rendered September 11, 1947, at a previous term, and grant them a hearing upon the issues set forth in their answer and cross-petition, in order that defendants could have their day in court. They also prayed for such other and further relief as might seem just and equitable.

On September 30, 1947, plaintiff filed a demurrer thereto, upon the ground that defendants' purported motion and petition did not state facts sufficient to constitute a cause of action. On October 27, 1947, plaintiff's demurrer was argued and submitted, whereat the purported motion and petition was found by the trial court to be essentially only a motion, and overruled the same, the effect of which, as assumed by defendants, was to sustain plaintiff's demurrer. Application for supersedeas was denied, and defendants appealed to this court only from the order of October 27, 1947.

The bill of exceptions consists solely of the affidavit filed by R. V. Hoagland in support of the motion filed September 15, 1947.

In the foregoing situation, defendants argued in their brief and before this court, not only that they were entitled to relief by virtue of subdivisions (3), (4), and (7), of section 25-2001, R. S. Supp., 1947, but also by virtue of the equitable powers of the court independently thereof. We cannot sustain that contention.

It appears from the substance thereof, that defendants' motion, filed September 15, 1947, was in legal effect only a motion for new trial, timely filed (section 25-1143, R. S. Supp., 1947), substantially for reasons enumerated in section 25-1142, R. S. 1943. The trial court, in its order of September 22, 1947, in effect found that defendants had not sustained any of those grounds, and unconditionally overruled the motion. That order was a final order, and appealable (Steele v. Haynes, 20 Neb. 316, 30 N. W. 63), but defendants did not appeal therefrom. Rather, in that situation, defendants, in order to obtain any relief, were required to appeal or pursue another and different remedy. See 46 C. J., New Trial, § 20, p. 68. Therefore, in their motion and petition filed September 25, 1947, at a subsequent term and more than 10 days from rendition of the judgment, they sought to vacate the same for reasons enumerated in section 25-2001, R. S. Supp., 1947, and in the manner provided by section 25-2002, R. S. 1943, or by virtue of the equitable powers of the court.

No contention was made in argument that defendants were entitled to a new trial within the time and in the manner prescribed in sections 25-1143 and 25-1145, R. S. 1943, as provided by subdivision (1) of section 25-2001, R. S. Supp., 1947. In any event, we conclude that no such reasons were either appropriately set forth in the motion and petition, or established by the affidavit of R. V. Hoagland, appearing in the bill of exceptions.

Viewed in that light, we have examined defendants'

motion and petition, and the affidavit of R. V. Hoagland. We do not deem it necessary to recite the contents thereof at length in this opinion. It is sufficient to say that comparable with Cronkleton v. Lane, 130 Neb. 17, 263 N. W. 388, defendants' motion and petition did not set out or plead any of the causes enumerated in section 25-2001, R. S. Supp., 1947, as required by section 25-2002, R. S. 1943. Moreover, comparable with Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197, the only reason which could be involved upon any plausible theory was "* * * (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; * * *."

In that connection, the transcript and affidavit of R. V. Hoagland disclose upon their face that the only thing which prevented defendants from having an opportunity to defend was either defendants' purposeful attempts to delay trial upon the merits by refusal to obey the orders and processes of the court, thereby permitting them to longer retain possession of the property for their own advantage, or lack of diligence and negligence on the part of their counsel, which was attributed to defendants. The first reason clearly could not be an unavoidable casualty or misfortune, and this court has consistently held that lack of diligence or negligence of counsel was attributed to the client and not an unavoidable casualty or misfortune within the meaning of section 25-2001, R. S. Supp., 1947. See, Lyman v. Dunn, *supra;* Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98; Scott v. Wright, 50 Neb. 849, 70 N. W. 396. Therefore, we conclude that under the circumstances presented here, defendants were not entitled to relief by virtue of any provision of section 25-2001, R. S. Supp., 1947.

With regard to defendants' contention that equity should grant them relief independently of the statute, it was held by this court in Lindstrom v. Nilsson, 133 Neb. 184, 274 N. W. 485, that: "While in a proper case an action in equity to obtain a new trial will lie, such

relief will not be granted when there is an adequate remedy at law.

"To be entitled to equitable relief, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 20-2001, Comp. St. 1929, (now section 25-2001, R. S. Supp., 1947) to obtain a new trial." The case at bar is controlled thereby, and we conclude that defendants were not entitled to relief in equity. Cases relied upon by them are clearly distinguishable, both upon the law and the facts. It would serve no useful purpose to discuss them at length herein.

Other propositions of law were presented in the briefs, but they are not controlling under the circumstances, and for the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

WATSON BROS. REALTY CO., A NEBRASKA CORPORATION, APPELLANT, V. COUNTY OF DOUGLAS ET AL., APPELLEES.

32 N. W. 2d 763

Filed June 18, 1948. No. 32360.

1. **Improvements.** Generally speaking, the word "improvement" may be said to include everything that enhances the value of premises permanently for general uses.
2. **Taxation.** The notice to an owner of property, provided for in section 77-1315, R. S. 1943, is not required in cases where real estate is assessed under the provisions of section 77-1306, R. S. 1943.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Beber, Klutznick, Beber & Kaplan, for appellant.

James J. Fitzgerald and *Ephraim L. Marks,* for appellees.

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

SIMMONS, C. J.

In this action plaintiff seeks an injunction restraining the collection of a part of a real estate tax. Issues were made and trial had. The trial court dismissed the plaintiff's petition with prejudice. We affirm the judgment of the trial court.

Plaintiff is and in 1943 was the owner of a tract of land in the city of Omaha. Sometime after June 1, 1943, it started the erection of a building on this land. On April 1, 1944, the building was in the process of construction. As of that date and with the building in an incompleted condition the property was assessed at $12,160 for the land and $30,000 for the improvements. Plaintiff did not then and does not now question the validity of that tax. The construction of the building was completed in June 1944. As of April 1, 1945, the building was assessed at $72,000, which added $42,000 to the previous assessment. This was reported to the county assessor and by him included in the assessment roll filed with the county clerk. This was done prior to the convening of the board of equalization. The board of equalization confirmed and ratified the assessment valuation, and thereafter taxes based on that assessment were levied. No notice of the action of the assessor or the board of equalization was sent to plaintiff.

Plaintiff does not question the amount of the increase but challenges the validity of the increase made as of April 1, 1945.

The trial court found that the assessment of April 1, 1945, was made under authority of section 77-1306, R. S. 1943, and that plaintiff was not entitled to a formal notice of the assessment.

The plaintiff's contention is that the increase was put upon the value of a building in existence on April 1,

1944, and falls within the provisions of section 77-1315, R. S. 1943, and that notice was required.

Section 77-1306, R. S. 1943, is as follows: "Each assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all real property that shall have become subject to taxation since the last previous listing of the property in the county, with the value thereof, and of all buildings and all other improvements of any kind, if over one hundred dollars in value, which shall not have been previously included in the value of the land and lots on which such improvements have been made, and shall make return thereof to the county assessor at the same time he is required to make his returns of personal property. In the return he shall give a description of the tract of land or lot upon which the improvement has been made, the kind of improvement so made, and the true value added to such parcel of land or lots by such improvements. The additional sum it is believed the land or lot on which such improvement has been made would sell for at private sale by reason of such improvement, shall be considered the value of such improvement, and taxed thereafter at such value until the next assessment."

Section 77-1315, R. S. 1943, is as follows: "The precinct assessors shall complete their assessment rolls, schedules, lists and returns, and deliver the same to the county assessor for revision, not later than the last Monday of May in each year. The county assessor shall complete his revision of the same and shall file them with the county clerk on or before the second Monday of June of each year. In years in which real estate is assessed for taxation purposes, it shall be the duty of the county assessor, before such filing, to notify the record owner of every piece of real estate which has been valued at a higher figure than at the last previous assessment. Such notice may be given by postcard, addressed to said owner's last known address. It shall describe said real estate, and state the old and new valuation thereof

and the date of the convening of the board of equalization."

It seems clear from a reading of the sections that the added value of the real estate involved resulting from the completion of the building after April 1, 1944, falls within the classification of "buildings and all other improvements" made in section 77-1306, R. S. 1943.

"Generally speaking, the word 'improvement' may be said to include everything that enhances the value of premises permanently for general uses. It includes not only buildings and fixtures, but also many other things which are not buildings or fixtures. Among the most common illustrations of improvements may be enumerated the erection of a building, the replacing of old buildings with new ones, the making of substantial additions or changes in existing buildings, the erection of fences or of a necessary sidewalk alongside property, the digging of wells thereon, or the planting of a fruit orchard." 27 Am. Jur., Improvements, § 2, p. 260. It may be an independent structure or an addition to or betterment of a building already in existence. Wimberly v. Mayberry & Co., 94 Ala. 240, 10 So. 157, 14 L. R. A. 305. It consists in the betterment of the premises. Ames v. Trenton Brewing Co., 56 N. J. Eq. 309, 38 A. 858; Provident Mutual Life Ins. Co. v. Doughty, 125 N. J. Eq. 442, 6 A. 2d 184; Harris v. Kelley, 10 Sadler 185, 13 A. 523. (The Harris case dealt with a wooden floor put in a building over a brick floor.)

It seems equally clear that the added value does not fall within the classification of "real estate which has been valued at a higher figure than at the last previous assessment" contained in section 77-1315, R. S. 1943. It is obvious that the materials and labor which went into the building after April 1, 1944, and the value resulting therefrom, were a new value which was not and could not have been included in the "last previous assessment."

The new value was properly subject to assessment under the provisions of section 77-1306, R. S. 1943.

Plaintiff's next contention is that the tax levied under the assessment is void because it was not notified as provided by section 77-1315, R. S. 1943. Clearly the notice there provided relates to an increased assessment of property previously assessed. It also is clear that the tax involved herein is not within that provision. The reason for the inclusion of that provision is stated in Rosenbery v. Douglas County, 123 Neb. 803, 244 N. W. 398. The Legislature intended that the owner of realty might rely upon the last previous assessed valuation as being that at which it would be returned again, and that he could rest secure against any increase over the last previous assessed valuation of his realty, unless he was given notice of the increase and was afforded an opportunity to appear before the board of equalization and contest the increase if he desired.

The reason for the rule does not exist here. Here the plaintiff knew that it had placed improvements on its realty which had not previously been included in the value of the land upon which the improvements were made. Likewise, the plaintiff was charged with notice that it was the duty of the assessor to return the value of the improvements, and that until the next assessment the property would be taxed at such value. It likewise was charged with notice of the statutory duty of the assessor, county clerk, and board of equalization, and of its statutory rights in the matter. The amount of the value placed upon the added improvements was of course a matter of public record. The Legislature specifically required that the assessor, when requested, should deliver to the person assessed a signed copy of the statement of property required by section 77-1306, R. S. 1943, showing the valuations of the property so listed. § 77-1308, R. S. 1943. Such a requirement would be a useless thing if it were the duty of the assessor to give that notice under the provisions of section 77-1315, R. S. 1943. Obviously, the Legislature did not intend that the notice required by section 77-1315, R. S.

1943, was likewise required in assessments made, as here, under section 77-1306, R. S. 1943. For the reasons herein given no such notice was required.

The judgment of the district court is affirmed.

AFFIRMED.

YEAGER, J., dissenting.

I cannot agree with the majority opinion in this case. I respectfully submit that it contains a misunderstanding and erroneous application of controlling statutory provisions. The following, I am persuaded, should be the opinion and determination upon the issues presented.

The plaintiff was the owner of the real estate and improvements involved in 1944 as well as in 1945. In 1944 the land was assessed at a valuation of $12,160 and improvements thereon at $30,000. The improvements at that time consisted of an incomplete large structure which was designed for use as a trucking depot. How nearly complete it was on the assessment date in 1944 is not disclosed. It had been started in 1943 and was completed some time near the middle of 1944. The chief deputy county field assessor furnished the valuation for the assessment of 1944. As of April 1, 1945, he also furnished an increased valuation for the improvements in the amount of $42,000. Assessment was carried out against the real estate by the county assessor accordingly. Just how this was done is not made clear. There appears to have been nothing in the nature of a return. It is inferable that it was done alone by entry on the book of real estate descriptions prepared by the county clerk for the real estate assessment of 1944. No notice of the increased assessment was given to plaintiff.

Pursuant to the assessment of 1944 together with the increased value of improvements added in 1945 taxes were levied in 1945. Plaintiff contends that the tax based on the increased value of improvements is void and it is this tax that plaintiff seeks to have enjoined.

The theory of the plaintiff is substantially that the county assessor was without power to increase the value

of these improvements in 1945, that year not being a regular one for the assessment of real property, and also that even if they could properly be added such addition was invalid in the absence of notice thereof to it.

The defendants contend substantially that the county assessor acted within his power, that what was done was not within the meaning of the law to increase the valuation of improvements but was an addition of improvements within the meaning of section 77-1306, R. S. 1943, and that since the statutes did not provide that notice should be given in such instances none was required.

A decision of the questions presented by this appeal necessitates an analysis of a number of statutory provisions relating to the assessment and taxation of real property. Section 77-1301, R. S. 1943, made provision for the assessment of all real property in the state subject to assessment for taxation as of April 1 of each even-numbered year. It was as follows:

"All real property in this state subject to taxation shall be assessed as of April 1 in each even-numbered year, which assessment shall be used as a basis of valuation for taxation until the next regular assessment, except as provided in sections 77-1306 and 77-1307."

Section 77-1306, R. S. 1943, made provision for assessment of improvements which had been added since the assessment of the last even-numbered year and was as follows:

"Each assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all real property that shall have become subject to taxation since the last previous listing of the property in the county, with the value thereof, and of all buildings and all other improvements of any kind, if over one hundred dollars in value, which shall not have been previously included in the value of the land and lots on which such improvements have been made, and shall make return thereof to the county assessor at the same

time he is required to make his returns of personal property. In the return he shall give a description of the tract of land or lot upon which the improvement has been made, the kind of improvement so made, and the true value added to such parcel of land or lots by such improvements. The additional sum it is believed the land or lot on which such improvement has been made would sell for at private sale by reason of such improvement, shall be considered the value of such improvement, and taxed thereafter at such value until the next assessment."

This section and section 77-1309, R. S. 1943, provided the mechanics for the assessment of improvements which had been added. Section 77-1309 provided as follows: "The precinct assessor shall forward to the county assessor the schedules of personal property assessments taken by him from time to time, and from these schedules the county assessor shall make up the books of assessment in his office; and on or before the last Monday in May of each year he shall appear before the county assessor and verify under oath the book of real estate assessment and the schedules of personal property assessments theretofore taken and returned by him, substantially in the following form: * * *."

It will be observed that section 77-1306 required that the assessor, obviously meaning precinct assessor when considered with the entire context of the section, at the time of taking the list and valuation of personal property should take a list of all real property that had become subject to taxation since the last previous listing of the property in the county, with the value thereof, and all buildings and all other improvements of any kind, if over one hundred dollars in value, which had not been previously included in the value of the land and lots on which such improvements had been made, and make return thereof to the county assessor, and section 77-1309 provided that on or before the last Monday in May of each year the precinct assessor should appear be-

fore the county assessor and verify under oath the book of real estate assessment.

There was no statute imposing a like or similar duty upon the county assessor or any of his deputies and none permitting the county assessor or his deputies in the odd-numbered years to in anywise carry out an assessment against real property or improvements not previously assessed, except in the performance of his proper functions after return had been made by precinct assessors agreeable to the provisions of sections 77-1306 and 77-1309.

There was clearly a noncompliance with these statutory provisions. It must then be ascertained whether this was but an irregularity still leaving this a valid and proper assessment of added improvements on real estate in an odd-numbered year or an act by the county assessor without jurisdiction amounting instead to an attempted increase in a valuation fixed in an even-numbered year.

If what was done may be considered but an irregularity then on that ground plaintiff is not entitled to equitable relief. Wood v. Helmer, 10 Neb. 65, 4 N. W. 968; South Platte Land Co. v. City of Crete, 11 Neb. 344, 7 N. W. 859; Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796; Spargur v. Romine, 38 Neb. 736, 57 N. W. 523; Bellevue Improvement Co. v. Village of Bellevue, 39 Neb. 876, 58 N. W. 446; Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903.

Injunction however will lie to restrain the collection of a tax when in making the assessment the taxing officers acted without jurisdiction. Rothwell v. Knox County, *supra;* Crane Co. v. Douglas County, 112 Neb. 365, 199 N. W. 791.

An illustration of the rule that a mere irregularity does not entitle one to equitable relief is found in South Platte Land Co. v. City of Crete, *supra.* There it was pointed out that failure to have afforded opportunity to appear before the board of equalization in the absence

of a showing that the property was assessed too high furnished no ground for relief.

In Wood v. Helmer, *supra*, it was pointed out that the failure to attach the oath of the assessor was not jurisdictional.

In Bellevue Improvement Co. v. Village of Bellevue, *supra,* it was pointed out that the failure to attach the oath of the assessor together with a showing that the valuation was not based on the assessor's judgment was not jurisdictional.

On the other side no pertinent illustrations have been found in the decisions of this court but in Touzalin v. City of Omaha, *supra,* it was said: "The rule is, that where public officers are proceeding illegally under claim of right they may be enjoined." The principle there announced was adhered to in Rothwell v. Knox County, *supra,* and Crane Co. v. Douglas County, *supra.*

Was the county assessor proceeding illegally under claim of right in the situation presented by the record herein? I think that he was.

As pointed out the assessor by the aid of his chief deputy field assessor assumed to perform a function committed by sections 77-1306 and 77-1309 of the statutes to the precinct assessor. Also no return as required by these sections was made. Reference to other statutory provisions also serves to demonstrate that the action by the county assessor was illegal.

As already pointed out section 77-1301, R. S. 1943, made April 1 of each even-numbered year the time for the assessment of real property. By section 77-1303, R. S. 1943, the county clerk in counties having a population of 200,000 or more was required on or before April 1, in detail which it is not necessary to set out here, to make up books, or unit valuation ledgers, for the assessment of real property. Section 77-1305 required delivery of these books to the assessor on or before April 1. Section 77-1311, R. S. 1943, required that all assessment rolls, lists, and returns, as soon as corrected and verified,

should be filed with the county clerk. Section 77-1315, R. S. 1943, required that this should be done not later than the last Monday in May.

This was the end of the statutory relationship of the county assessor to the assessment of real estate in his county, with two exceptions, until the next even-numbered year. The rolls, lists, and returns were gone from him and they thereafter reposed with the county clerk.

There was provision for correction of assessment thereafter and the addition of omitted real property but the functions in these respects belonged not to the county assessor but to the county clerk and precinct assessors. See §§ 77-1306 and 77-1317 to 77-1319, inclusive, R. S. 1943.

The exceptions referred to were found in sections 77-1306 and 77-1307, R. S. 1943.

The exception of section 77-1306, as already pointed out, permitted only that the assessor should receive the roll, list, or return of the precinct assessor assessing added improvements but did not permit him to make such an assessment.

Section 77-1307 did impose a duty upon the county assessor to act affirmatively with regard to valuation. It had no relation to increase but only with regard to decrease where there had been destruction by fire, flood, or otherwise. In such instances it was his duty to determine the deduction which was to be made and to make return thereof to the county clerk. This has no pertinence in the present controversy and it is given attention only for the purpose of making a full and clear delineation and definition of the duties and functions of the county assessor.

If this is a correct delineation and definition of the duties and functions of the county assessor and of precinct assessors, and I think it is, then it becomes necessary to say that since statutory requirements were not complied with the purpose of making an assessment of added improvements in an odd-numbered year was not

accomplished. What was done amounted to an attempt by the county assessor to increase an assessment of improvements on real estate in an odd-numbered year and was illegal and without jurisdiction, and the tax based on such increase was void thus entitling plaintiff to injunction as prayed.

The decree should be reversed and the cause remanded to the district court with directions to enter decree in conformity with the prayers of the petition.

IN RE APPLICATION OF MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT. MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES.

32 N. W. 2d 874

Filed June 18, 1948. No. 32365.

Judgments. Affirmed on authority of North Loup River Public Power and Irrigation District v. Loup River Public Power District, *post* p. 823, 32 N. W. 2d 869.

APPEAL from the Department of Roads and Irrigation: *Affirmed.*

C. A. Sorensen, for appellant.

Walter & Flory, Neighbors & Danielson, Blackledge & Sidner, Barlow Nye, Bert L. Overcash, Raymond P. Medlin, Charles Dobry, Carroll Thompson, M. J. Buckley, John E. Deming, Robert C. Brower, Kelley & Deming, and *A. F. Alder,* for appellees.

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

SIMMONS, C. J.

This is a companion case to North Loup River Public Power and Irrigation District v. Loup River Public Power District, *post* p. 823, 32 N. W. 2d 869, released con-

currently herewith. It is submitted on the same bill of exceptions. The factual situation varies largely as to names, dates, and in part as to parties. The issue presented and determined is substantially the same.

Herein the Middle Loup Public Power and Irrigation District will be referred to as the irrigation district; the Loup River Public Power District as the power district; and the Department of Roads and Irrigation as the department. The companion case will be referred to as the North Loup case.

The factual situation in the two cases is substantially the same. These differences are noted. The application for water in behalf of the irrigation district was filed December 28, 1932, and given number 2293. A corrected application was filed September 13, 1933. The irrigation district filed the same objections that were filed in the North Loup case. A hearing was had on this application and the objections at the same time the hearing was had on the application and the objections in the North Loup case. The same stipulation and acceptance were made, except that the reference was to the Middle Loup River, to 45,000 acre-feet and a maximum rate of 300 second-feet. The grant of the appropriation of the power district, made on March 23, 1934, contained the provision that "The amount of the appropriation shall not exceed thirty-five hundred (3500) cubic feet per second of time, and shall not; (a) Prevent, curtail or limit the diversion of water from the Middle Loup River by the Middle Loup Public Power and Irrigation District for irrigation purposes to the extent of 45,000 acre feet per year at a maximum rate of 300 second feet, when and if its said project is approved by the Federal Emergency Administration of Public Works of the United States, or other Governmental authority, and when and if its pending application for water for irrigation is granted."

On September 25, 1936, the department granted the application of the irrigation district subject to the same

conditions as set out in the grant to the irrigation district in the North Loup case, with the exception of the reference to application 2293, and 300 cubic feet per second of time.

Here the irrigation district seeks a nunc pro tunc order correcting, modifying, and amending its permit so as to permit it to divert from the Middle Loup River, at the headgates of its canal, sufficient water to enable it to deliver one acre-foot of water for each acre irrigated. Objections were filed by numerous junior appropriators for irrigation purposes and by the power district.

It appears that at the time the irrigation district was being promoted it was anticipated that it would furnish water to 45,000 acres of land. At the time of the hearing herein there were about 12,000 acres actually under irrigation.

Under date of February 25, 1937, Mr. Tilley wrote a letter to the manager of the irrigation district of substantially the same import as the one of February 24, 1937, in the North Loup case. Under date of February 17, 1937, Mr. Willis wrote a letter to the manager of the irrigation district to the effect that its appropriation was governed by the conditions and limitations in the permit, and that it could divert up to three acre-feet in the twelve-month period. The letter of July 30, 1941, referred to in the North Loup case, applied likewise to the irrigation district here. There also is in evidence a letter to the attorney for the irrigation district from Mr. Willis, dated July 10, 1940, stating that the water user is entitled only to one acre-foot per acre on the land during the calendar year, but referring likewise to the limitations and conditions in the grant.

The law applicable and our conclusions in the North Loup case are applicable here. For the reasons there stated we affirm the determination of the department denying the application.

AFFIRMED.

YEAGER, J., dissenting.

In this case an opinion was written which was adopted by the majority of the court. In the case of In re Application of North Loup River Public Power and Irrigation District, *post* p. 823, 32 N. W. 2d 869, a case wherein identical issues and incidents were presented, but where there was a difference as to names, dates, amount of land, and in part as to parties, a much more exhaustive majority opinion was adopted. The opinion in the latter case has equal application in all particulars, except those mentioned, to the present case therefore what shall be said herein shall have equal application to both majority opinions and to the issues and questions involved, again except as to the particulars noted.

I must respectfully dissent from the majority opinion.

There was but one issue presented for determination in this proceeding and that was as to whether or not under the facts and circumstances the Department of Roads and Irrigation should be required to amend nunc pro tunc its Certificate of Approval of Application 2293 of the Middle Loup Public Power and Irrigation District, dated September 25, 1936, for diversion of water for irrigation for a contemplated maximum area of 45,000 acres of land.

I submit that the majority opinion decided this question contrary to well-established principles of law and the undisputed and uncontradicted evidence.

I submit also that the effect of this decision is to take away from many thousands of acres of fertile land the water necessary to make them productive, which water they once enjoyed, without even the allowance of an opportunity to litigate the question of whether or not the waters should be so taken away.

Further it is not too much to say in the light of the record in this case and matters of common knowledge in the State of Nebraska that if the majority opinion is allowed to become the law of this case its effect may well be to make of the works of this district and the prepa-

ration of lands therein for irrigation into which vast amounts of public and private funds have gone well nigh a total financial and economic loss, an end result of which will be to take from an all too famished world a goodly portion of much needed sustenance.

This ought not to be allowed to happen without the right to litigate the question of whether or not the lands of this district are entitled to the amount of water intended for them by the Department of Roads and Irrigation which intent is clearly shown by the record presented to this court for review.

This court should allow and require the Department of Roads and Irrigation to declare nunc pro tunc its clear intent and then leave to the courts under issues properly joined the question of whether or not its intention thus clearly expressed was a valid exercise of the powers and prerogatives of that department.

Since, as I believe, the majority opinions fail to portray the complete picture presented by the records and the briefs I deem it advisable and proper, in order that a comprehensive view may be had of all matters properly before the court, to carry what follows into very considerable detail.

This is an appeal by the Middle Loup Public Power and Irrigation District, a public corporation, from an order of the Department of Roads and Irrigation of the State of Nebraska refusing to interpret its original official order granting and defining and prescribing the appropriation of waters for irrigation out of the Middle Loup River for use in the irrigation district of the said corporation in conformity with what this corporation contended was its proper interpretation and intendment, and its refusal to amend its said original order or promulgate an interpretation thereof so as to include or make clear the contended for interpretation and intendment.

Instead of adopting the interpretation of this corporation it adopted a different one contended for by the Loup River Public Power District and others.

As pointed out the Middle Loup Public Power and Irrigation District is the moving party herein and the appellant. Others joined in support of its contentions. The Loup River Public Power District with others were objectors and are appellees here. Since rights ought not to be determined in this proceeding the identity of parties outside of the Middle Loup Public Power and Irrigation District and the Loup River Public Power District is not important and accordingly they will not be identified.

The order in question was signed and approved on September 25, 1936, and is the following:

"This is to certify that the foregoing application has been examined and is hereby granted subject to the following limitations and conditions:

"1st. The work of construction shall begin on or before March 25, 1937.

"2nd. The time for completing the work of construction shall extend to November 1, 1939.

"3rd. The time for completing the application of water to the beneficial use indicated shall extend to October 1, 1944.

"4th. The water appropriated shall be used for the purpose of irrigation.

"5th. The prior rights of the owners of land bordering on this stream, or through which this stream flows, to so much of the natural flow of this stream as is necessary for domestic uses, including stock water, must be respected.

"6th. The prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters in Water Division Number 2-A must not be interfered with by this appropriation, with the exception of Application 2287 for power, which by stipulation, is subsequent in priority to Application 2293.

"7th. The amount of the appropriation shall not exceed 300.00 cubic feet per second of time; neither

shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one acre-foot for each acre of land to which water is actually and usefully applied on or before October 1, 1944.

"8th. The applicant shall file in the office of the Department of Roads and Irrigation on or before March 25, 1937, a map or plat, which map or plat shall be made to conform to the rules and regulations of the department. A failure to comply with this section shall work a forfeiture of this appropriation and all rights thereunder.

R. L. COCHRAN
Governor of Nebraska
DEPARTMENT OF ROADS AND IRRIGATION
A. C. TILLEY
State Engineer

"Approved September 25, 1936."

The interpretation contended for by the appellant was and is that the Department of Roads and Irrigation by the appropriation order intended that a maximum of one acre-foot for each acre of land to which water is actually and usefully applied was deliverable to the district in such manner as to permit the use of that amount of water on the land. This contention of course embodied the further contention that it was intended that a sufficient further amount of water, within statutory limits, should be released at the point of diversion to insure delivery of one acre-foot for each acre upon the land.

It is of course common knowledge of which the Department of Roads and Irrigation and the courts take notice that in the transportation of water for irrigation from the point of diversion to the area of use there is loss, the amount of which is dependent on distance,

temperature, character of soil through which it is transported, and other factors.

It appears well to interpolate here that no appropriation shall exceed three acre-feet in the aggregate during one calendar year for each acre of land for which an appropriation shall be made. § 46-231, R. S. 1943.

The appellees contend that the Department of Roads and Irrigation by the order intended that the appropriation was for a maximum of one acre-foot for each acre of land to which water is actually and usefully applied, measured at the point of diversion. This of course would give appellant for use upon the land only what was left over after loss from transportation.

A complete hearing was had before the Department of Roads and Irrigation and at the conclusion thereof an order was entered denying the request of the appellant for the interpretation it sought to have placed upon and the amendment it sought of the order granting the appropriation.

If we assume the propriety of the request of appellant for an interpretation and amendment of the order then we cannot, on the evidence, do other than conclude that the relief requested must be granted. That the department intended that a maximum of one acre-foot should be delivered for use upon the land there can be but little, if any, question. There is no evidence indicating a contrary intention unless it may be said that the order by its terms on its face does so. The State Engineer gave testimony that it was the intention that one acre-foot might be delivered upon the land and that water not to exceed three feet might be released at the point of diversion to accomplish this purpose. In 1937 by letter which is in evidence this same intendment was expressed. All other witnesses who had a connection with this matter have placed this same interpretation upon the order and acted in accordance with that interpretation until they assumed that they were by opinions of this court (Loup River Public Power District v. North Loup

River Public Power and Irrigation District, 142 Neb. 141, 5 N. W. 2d 240, and Loup River Public Power District v. Middle Loup Public Power and Irrigation District, 142 Neb. 156, 5 N. W. 2d 249,) prevented from further so acting. Even the Loup River Public Power District appears to have accepted this interpretation and intendment and to have recognized its effectiveness, at least as late as September 1939. In a letter dated September 7, 1939, to H. C. James, Chief Engineer and General Manager of the Middle Loup Public Power and Irrigation District, Fred C. Albert, Supervising Engineer and Assistant General Manager of the Loup River Public Power District, wrote with particular reference to this subject, among other things, the following:

"As I interpret your water right, you are allowed to divert from the river one acre foot per year for each acre actually under irrigation, and at a maximum rate of one second foot for each 140 acres being served. Since the twelve inches of water is to be measured at the land, I believe we should come to some agreement on an average figure for canal losses in order to determine the quantity which must be diverted from the river in order to deliver the twelve inches of water to the land."

There is no word of evidence in this record indicating a claim for an interpretation other and different than the one contended for by the appellant prior to the commencement of action in Loup River Public Power District v. North Loup River Public Power and Irrigation District, *supra,* and Loup River Public Power District v. Middle Loup Public Power and Irrigation District, *supra.*

It is clear that, as contended by appellant, the Department of Roads and Irrigation by its order intended an appropriation of a maximum of one acre-foot of water for each acre of land not at the point of diversion but at the land. It appears that the Loup River Public Power District acquiesced in this intendment as late as September 7, 1939.

Of course the evidence of the intention herein discussed may not be considered or regarded as declaratory of or as containing the intent of the Department of Roads and Irrigation if the order itself clearly, completely, and unambiguously contains an expression of intent different from the one which the evidence other than the order itself clearly sustains. It is only in the case of ambiguity, uncertainty, or lack of clarity that it is permissible. to show by extrinsic evidence the intent in the making and promulgation of an order by an administrative tribunal and for such body to amend its order to express the true purpose and intention at the time of making. 49 C. J. S., Judgments, § 237, p. 449; 42 Am. Jur., Public Administrative Law, § 174, p. 535.

The question which must be answered here is whether the following statement is so clear that the only interpretation of which it is capable is that placed upon it by the appellees or if it is also subject to the interpretation placed upon it by the appellant: "* * * said appropriation, under any circumstances, shall be limited to one acre-foot for each acre of land to which water is actually and usefully applied * * *."

On the one side, among other arguments, it is argued the department must have meant one acre-foot of water for each acre of land measured at the point of diversion since that is the only way that irrigators generally may have any reasonable assurance of benefits from irrigation.

On the other hand, likewise among other arguments, it is argued that by the terms of the order itself it was apparent that the department understood that this land required for profitable irrigation one acre-foot of water for use upon each acre of land and that it was the purpose of the order to respond to that need.

Attention is called to the arguments in order to point out that when each of them in its turn is analyzed in the light of statutory pronouncement, declared legal principle, proved facts, and known experience, it cannot be said that any of them is without convincing logic

or rationalism to one reasonable mind but not to another.

This being true how then can it be said that these words in and of themselves carry a purport, an effect, a meaning, clear, certain, and unambiguous? It must therefore be concluded that the order is not clear in its terms on its face and that extraneous information must be resorted to in order to ascertain the intendment of the Department of Roads and Irrigation in its making.

The Loup River Public Power District asserts in substance that there was no error in the refusal of the Department of Roads and Irrigation to grant the relief requested by appellant, in truth that it was barred from doing so by the opinion and decisions in Loup River Public Power District v. North Loup River Public Power and Irrigation District, *supra,* and Loup River Public Power District v. Middle Loup Public Power and Irrigation District, *supra.* It says substantially that the opinions and decisions in those cases are conclusive on the propositions that appellant under the order is limited to a maximum of one acre-foot of water for each acre of land measured at the point of diversion without any allowance for loss in transportation.

It is clear that the department in its decision herein accepted and was controlled by the interpretation placed upon those decisions by the Loup River Public Power District.

The interpretation thus placed upon the decisions and the acceptance thereof by the department were incorrect and without sound legal basis. The decisions in those cases were neither an interpretation of the appropriation order herein in question nor a determination of any substantial right thereunder.

The decisions in those cases were, and could have been, only that the petitions therein, wherein the Loup River Public Power District was seeking to have the Middle Loup Public Power and Irrigation District and the North Loup River Public Power and Irrigation District enjoined from taking more than one acre-foot of

water for each acre of land in their respective districts, were not vulnerable to a general demurrer, or in other words, that they stated a cause of action. The decision which was made is in the following words which appear in the opinion in Loup River Public Power District v. North Loup River Public Power and Irrigation District, *supra,* and refer to the petition: "In our opinion, it states a cause of action, and the trial court was in error in sustaining a general demurrer thereto." Nothing else could have been properly decided since that was the only matter before the court for determination and decision. 21 C. J. S., Courts, § 222, p. 408.

The decisions in those two cases left the substantial rights of the parties under the appropriation order in question judicially undetermined. It may be well to say here that the determination of the matters properly before this court at this time will also leave judicially undetermined the substantial rights of the parties under the appropriation.

Finally the appellees say that the relief requested herein may not be granted for the reason that the Department of Roads and Irrigation is without power to amend its order.

Of course if the application here is to have made what may be properly termed a judicial correction, change, or amendment it cannot be granted. The general rule is that after the term at which it was rendered, or of the statutory period of limitation, in cases governed by statute, a judgment is no longer open to amendment, revision, modification, or correction which involves the exercise of judgment or discretion of the court on the merits or on matters of substance. 49 C. J. S., Judgments, § 238, p. 451; Wilson v. City of Fergus Falls, 181 Minn. 329, 232 N. W. 322; Kroier v. Kroier, 95 Fla. 865, 116 So. 753; State ex rel Holtkamp v. Hartmann, 330 Mo. 386, 51 S. W. 2d 22; Oregon Mortgage Co., Ltd., v. Kunneke, 76 Mont. 117, 245 P. 539; College Coal Mining Co. v. Smith, 160 Tenn. 93, 21 S. W. 2d 1038; Frost v.

District Court, 96 Utah 106, 83 P. 2d 737, rehearing denied, 96 Utah 115, 85 P. 2d 601.

This rule however does not obtain where the purpose is to correct or amend clerical or formal errors and misprisions so as to make the record entry speak the truth and show the judgment which was actually rendered by the court. 49 C. J. S., Judgments, § 237, p. 449; Hoagland v. Way, 35 Neb. 387, 53 N. W. 207; Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N. W. 935; Ackerman v. Ackerman, 61 Neb. 72, 84 N. W. 598; Phelps v. Wolff, 74 Neb. 44, 103 N. W. 1062; Calloway v. Doty, 108 Neb. 319, 188 N. W. 104.

What has been said up to this point with regard to corrections and amendments has had application to courts but the same general rules are applicable to administrative bodies, however, the opposite is true in some jurisdictions. The two lines of authority are referred to in 42 Am. Jur., Public Administrative Law, § 174, p. 535. I submit that the general rule is the better one and accordingly approved.

I conclude that the relief requested by appellant of the Department of Roads and Irrigation did not call for an exercise of judicial discretion but only to have the record entry speak the truth and show the appropriation order which was actually rendered by the department.

The Department of Roads and Irrigation erred in its refusal to amend its order of appropriation so that it would show the intent that the appellant was entitled to a maximum of one acre-foot of water delivered to each acre of land to which water was actually and usefully applied, if in the exercise of good husbandry the land in the district required that amount of water.

The judgment should be reversed and the cause remanded to the Department of Roads and Irrigation with directions to amend its order of September 25, 1936, nunc pro tunc as of that date to conform with the intendment of the department at that time.

PAINE, J., concurs in the dissent.

IN RE APPLICATION OF NORTH LOUP RIVER PUBLIC POWER AND IRRIGATION DISTRICT. NORTH LOUP RIVER PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT, v. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES.

32 N. W. 2d 869

Filed June 18, 1948. No. 32366.

1. **Judgments.** If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order.
2. ———. The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth.
3. ———. Such a judgment must conform to and be no broader in its terms than the judgment actually entered.

APPEAL from the Department of Roads and Irrigation: *Affirmed.*

Monsky, Grodinsky, Good & Cohen and *Munn & Norman,* for appellant.

Blackledge & Sidner, Davis & Vogeltanz, Neighbors & Danielson, Walter & Flory, Barlow Nye, M. J. Buckley, Robert C. Brower, Carroll Thompson, Raymond P. Medlin, John E. Deming, and *A. F. Alder,* for appellees.

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

SIMMONS, C. J.

In this case the North Loup River Public Power and Irrigation District filed an application with the Department of Roads and Irrigation seeking an order nunc pro tunc modifying, amending, and correcting its permit No. 2312 granting an appropriation of water for irrigation

purposes. A petition in intervention supporting the application was filed on behalf of the North Loup River Water Users Association. The Loup River Public Power District filed objections, as did a considerable number of junior appropriators of water from the stream involved. Issues were made and a hearing had resulting in an order of the Department of Roads and Irrigation denying the application. Motion for rehearing was filed and denied. On appeal here we sustain the decision.

Herein the North Loup River Public Power and Irrigation District will be referred to as the irrigation district; the Loup River Public Power District as the power district; and the Department of Roads and Irrigation as the department.

This is a companion case to Middle Loup Public Power and Irrigation District v. Loup River Public Power District, *ante* p. 810, 32 N. W. 2d 874. Whenever necessary herein we will refer to the companion case as the Middle Loup case. The two cases were tried together. The bill of exceptions in the Middle Loup case is a copy of the bill in this case.

On September 15, 1932, an application for an appropriation of water from the Loup River for power purposes was filed by Phil R. Hockenberger with the department. It was numbered 2287. A corrected application was filed June 12, 1933, on behalf of the power district.

On March 28, 1933, there was filed on behalf of the irrigation district an application for water for irrigation purposes from the North Loup River, a tributary of the Loup River. It was numbered 2312. A corrected application was filed June 23, 1933.

On September 21, 1933, the irrigation district filed objections to the granting of the power district's application insofar as and to the extent that the granting of said application would prevent, curtail or limit the diversion of water from the North Loup River by the irrigation district under its application.

A hearing was had on December 27, 1933, on the application of the power district and the protest of the irrigation district. At that hearing the irrigation district stated that it had no objection to the granting of the application of the power district provided it be on condition that the appropriation did not prevent, curtail or limit "the diversion of water from the North Loup River" by the irrigation district for irrigation purposes to the extent of 38,000 acre-feet per year at a maximum rate of 260 second-feet, when and if the irrigation district's project was approved by the Federal Emergency Administration of Public Works of the United States, or other governmental authority, and when and if its pending application for water for irrigation was granted. The power district accepted the conditions so stated of the irrigation district subject to the reservation that if the Public Works Administration refused to finance the power district under those conditions, a rehearing could be had and the whole matter again considered.

On February 24, 1934, the application of the power district was granted, and on March 23, 1934, a modified order was entered providing, so far as material here, that "The amount of the appropriation shall not exceed thirty-five hundred (3500) cubic feet per second of time, and shall not; * * * (b) Prevent, curtail or limit the diversion of water from the North Loup River by said North Loup River Public Power and Irrigation District for irrigation purposes to the extent of 38,000 acre feet per year at a maximum rate of 260 second feet, when and if its said project is approved by the Federal Emergency Administration of Public Works of the United States, or other Governmental authority, and when and if its said pending application for water for irrigation is granted." Under this grant the power district, having secured the funds, completed its project and it was put into operation in 1937.

On August 25, 1936, the power district, the irrigation district, and the Middle Loup Public Power and Irri-

gation District entered into an agreement to the effect that for a period of three years the irrigation districts would allow a fixed minimum of water to pass their lowest headgates; that any and all water grants to the irrigation districts should "strictly conform to the provisions of the grant of water rights" to the power district, dated March 23, 1934; and that the power district, and each irrigation district, as to the other, agreed not to object to nor interfere in the granting of the then pending applications of the irrigation districts for water rights. The agreement by express terms expired three years after its date.

On September 15, 1936, the department granted the application of the irrigation district subject to the conditions material here that:

"6th. The prior right of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters in Water Division Number 2-A must not be interfered with by this appropriation, with the exception of Application 2287 for power, which by stipulation, is subsequent in priority to Application 2312.

"7th. The amount of the appropriation shall not exceed — 260.00 — cubic feet per second of time; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited ~~to one-seventieth (1/70) of a cubic foot per second of time, for each acre of land to which water is actually and usefully applied on or before~~ to one-acre foot for each acre of land to which water is actually and usefully applied on or before October 1, 1944."

Under this grant the irrigation district, having secured the funds, completed its project and it was put in operation in the fall of 1938, and began delivering water in 1939.

It does not appear that the irrigation district was dissatisfied with this order at the time it was entered and did not appeal from it, and it has become final. (See Loup River Public Power District v. North Loup River Public Power and Irrigation District, 142 Neb. 141, 5 N. W. 2d 240.) It is this order which the irrigation district now seeks to have modified, amended, or corrected nunc pro tunc, so as to provide a limitation of one second-foot to each seventy acres irrigated, and to allow a sufficient total seasonal headgate diversion to deliver one acre-foot per acre per season on the land, with a maximum of 260 second-feet and 38,000 acre-feet, limited only in relation to the power district's appropriation, and with permission to take additional water above 38,000 acre-feet after the priority of the power district is satisfied and within the above limitations for the land actually irrigated.

It appears from the evidence that at the time the irrigation district was being promoted it was anticipated that it would furnish water to 38,000 acres of land. At the time of the hearing herein there were actually under irrigation about 22,000 acres, with a possible 5,000 acres more subject to being so irrigated.

The irrigation district here alleges in the application that the limitation of one acre-foot to each acre of land was inadvertent, ill-advised, and contrary to the intention of the parties to the stipulation of December 27, 1933, and contrary to the intentions of the department; that the limitation should have been to the diversion of 38,000 acre-feet at a maximum rate of 260 second-feet, a maximum of one second-foot for each seventy acres and a maximum of three acre-feet per acre per year; that it was intended that the one acre-foot per acre was to be measured at the land to which should be added a sufficient amount of water at the point of diversion to enable the irrigation district to deliver the one acre-foot for each acre actually irrigated; and that in the light of our decision in Loup River Public Power District

v. North Loup River Public Power and Irrigation District, *supra,* the inadvertent and unintentional omission from its permit of a specific provision as to the place where the water was to be measured casts a cloud upon its appropriation, and the amount of water it may divert has been rendered uncertain and subject to controversy, and that because of the inadvertence the order should be corrected and modified so as to make allowances for losses in transportation.

The power of the department to enter an order nunc pro tunc, to the same extent as a court may, is not disputed here. The question is, is the irigation district entitled to a nunc pro tunc order.

We have held and consistently followed the rule that the authority of a court to enter a judgment nunc pro tunc is an inherent power, and that "If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order." Van Etten v. Test, 49 Neb. 725, 68 N. W. 1023. See, also, Hyde v. Michelson, 52 Neb. 680, 72 N. W. 1035, 66 Am. S. R. 533; Gund & Co. v. Horrigan, 53 Neb. 794, 74 N. W. 257; Clark & Leonard Investment Co. v. Rich, 81 Neb. 321, 115 N. W. 1084, 15 L. R. A. N. S. 682.

In Central West Investment Co. v. Barker Co., 79 Neb. 47, 112 N. W. 291, we held that before the rule may be applied it must appear that there was a judgment or order announced which the court intended as the disposition of the issue considered.

In Calloway v. Doty, 108 Neb. 319, 188 N. W. 104, we held: "It must be borne in mind that the proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through

some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth." This holding was restated and followed in the recent case of O'Grady v. Volcheck, 148 Neb. 431, 27 N. W. 2d 689.

We have also held that such a judgment must conform to and be no broader in its terms than the judgment actually rendered. Phelps v. Wolff, 74 Neb. 44, 103 N. W. 1062.

Mr. Tilley was the State Engineer at the time the irrigation district's appropriation was granted on September 15, 1936. He received from the supervising project engineer of the Public Works Administration an oral request for an interpretation of the conditions and limitations of paragraph seven of the irrigation district's appropriation. At that time the project engineer was reviewing the application of the irrigation district for funds. Mr. Tilley testified that the interpretation "might have considerable bearing on whether the district got funds" or not; that there was "quite a little pressure to get government funds"; and that he "didn't try to be unfavorable" to the irrigation district. He replied under date of February 24, 1937, that the department "recognizes the right of the water users under Application 2312 to receive a maximum of one acre-foot of water measured at the land * * *." Mr. Tilley further testified that the failure to provide for three acre-feet diversion at the river in granting the irrigation district's appropriation "must have been an oversight, I presume. * * * there may have been something left out that should have been put in." He "wouldn't attempt to say now" what the order "should have contained"; "if they had been more definite on that one point it would have been a good thing"; "we were in doubt" as to the meaning of the order when the interpretation was made and he was testifying only as to "what I thought I was doing then"; and that the department intended that the irrigation district could divert up to three acre-feet per

acre but not to exceed one acre-foot actually delivered at the land.

Mr. Willis, chief of the Bureau of Irrigation, Water Power and Drainage in the department, testified that he did not recall what part he had in preparing the irrigation district's permit. However, on February 19, 1937, he sent a telegram to the engineer-manager of the irrigation district advising that it was his interpretation of the permit that the district could divert a maximum of 2.9 acre-feet per acre per year if needed to apply a total of one acre-foot per year to each acre irrigated. On August 30, 1939, he wrote the county agent of Valley County that the irrigation district had a right to divert water until the land described in the permit had received one acre-foot per acre for each calendar year, measured at the land. He proceeded to administer the water of the river on that basis so far as the irrigation district was concerned until our decision in Loup River Public Power District v. North Loup River Public Power and Irrigation District, *supra,* was filed.

Under date of July 30, 1941, the then State Engineer advised attorneys for the power district that the department would permit the irrigation district to divert sufficient water to deliver one acre-foot on each acre of land, until instructed to the contrary by the court or the Attorney General.

It is obvious that the evidence of Mr. Tilley and Mr. Willis, who had most to do with the granting of the order involved, does not reach back to nor establish that the order entered was not the order determined upon and made.

Further the testimony of Mr. Willis is that the department always measured the appropriation of water at the headgate; that the department never granted any permits with the understanding that the water was to be measured at the land; that it had no means of measuring water at the land; that the only appropriations ever undertaken to be administered at the land were

those involved in this action and in the Middle Loup case; that only in these two cases had the department ever undertaken to interpret a permit to mean water measured at the land, and in fact he never so interpreted this order but administratively had undertaken to determine how much must be diverted at the headgate to get one acre-foot at the land. He further testified that as "interpreted" there was no way for anyone to show from the order the amount of water that might be diverted from the stream. He further testified that in administering these appropriations he never gave much consideration to the provision in the power district's permit, based on the stipulation, referring to the "diversion of water from the North Loup River" by the irrigation district "for irrigation purposes."

By way of completing a summary of the evidence it should be stated that on September 7, 1939, the supervising engineer of the power district wrote the manager of the irrigation district a letter in which he recited that "the twelve inches of water is to be measured at the land." There is no showing that this was written with the approval of the power district. He testified that he "assumed" that proposition in writing the letter.

There is evidence in this record that would sustain a finding, based on the experience had in actual irrigation, that one acre-foot of water on the land is necessary for good husbandry in irrigated crops in this irrigation district and that losses in transportation would be about 60 percent of the total water diverted at the headgate.

On behalf of the water users there is evidence that the letter of Mr. Willis to the county agent was circularized to water users and that they signed contracts and made improvements based on the statements contained in that letter.

We have undertaken to summarize all the evidence offered to sustain the application of the irrigation district. It does not sustain their contention that they are entitled to the nunc pro tunc order sought.

It is apparent from this record that the grant of the appropriation of water to the power district was made in accord with the stipulation made by the power district and the irrigation district. It is also apparent that the grant of the appropriation to the irrigation district was made in accord with the same stipulation. Those grants as to language and content were not questioned by any interested parties in direct proceedings before the department. Both districts began to operate in accord with them.

It likewise is apparent that the order entered by the department on the irrigation district's application for water was in truth and in fact the determination then made, and that the order entered correctly states that determination. It is likewise apparent that the irrigation district now seeks an amendment of the order so as to have it recite that which, in retrospect, it now deems should have been made. The effect of the modification sought would be to amend the stipulation of December 27, 1933, into which the irrigation district voluntarily entered. Obviously that cannot be done by a nunc pro tunc order. Events occurring and conditions arising subsequent to the order involved do not justify a modification of the order nunc pro tunc. To grant the application would be to broaden the judgment actually made. That the department is not permitted to do, even granting to it all the powers of a court in a nunc pro tunc proceeding.

We affirm the determination of the department denying the application.

AFFIRMED.

YEAGER, J., dissenting.

I dissent herein in the substance and for the reasons set forth in In re Application of Middle Loup Public Power and Irrigation District, Middle Loup Public Power and Irrigation District v. Loup River Public Power District, *ante* p. 810, 32 N. W. 2d 874.

PAINE, J., concurs in the dissent.

JAMES W. COZAD, APPELLEE, v. MATTHEW LEO MCKEONE, SR., ET AL., APPELLANTS.

32 N. W. 2d 760

Filed June 18, 1948. No. 32388.

1. **Appeal and Error.** Statutes shortening the time within which appeals may be taken do not apply to judgments, decrees, or orders rendered or entered before the statute took effect.
2. ———. Where the order appealed from was rendered and entered after the effective date of section 25-1140, R. S. Supp., 1947, the statutory requirements for preparing, serving, and settling a bill of exceptions are governed by that statute.
3. ———. The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment.
4. ———. In the absence of a bill of exceptions it is manifest the appellate court cannot determine that any instruction, however erroneous, was prejudicial, since the evidence may have been such as would have justified the trial court in directing the verdict which the jury returned.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Motion to quash bill of exceptions sustained and judgment affirmed.*

Chambers & Holland, for appellants.

Pierson & Scheele and *Davis, Stubbs & Healey,* for appellee.

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

CARTER, J.

This is an action to recover damages for injuries sustained in an automobile accident. The jury returned a verdict for the plaintiff and judgment was entered thereon. The defendants appeal.

The record shows that the judgment was entered in the district court on February 28, 1947, one of the days of the January 1947 term of the district court. Two motions for a new trial were filed by different defendants, which were overruled on October 17, 1947, one of the

days of the September 1947 term of the district court. Notice of appeal was given and the appeal perfected on November 5, 1947. A purported bill of exceptions was first presented to plaintiff's attorneys on January 30, 1948, 86 days after the filing of the notice of appeal. The plaintiff has at all times objected to the purported bill of exceptions and on April 8, 1948, filed a motion in this court to quash the bill.

The defendants filed motions for a new trial in the district court within three days after the entry of the verdict and judgment. The overruling of the motions for a new trial was the final order from which an appeal could be taken to secure a review of errors alleged to have occurred during the trial. The time for taking an appeal for this purpose commenced to run from the date of the overruling of these motions. § 25-1912, R. S. 1943. See, also, McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374.

The applicable statute provides that the party appealing must reduce the exceptions to writing within 40 days from the time notice of appeal was filed with the clerk of the district court, unless the time be extended pursuant to section 25-1140.07. See § 25-1140, R. S. Supp., 1947. The notice of appeal was filed on November 5, 1947. No extension of time having been obtained for preparing a bill of exceptions, the time for so doing expired 40 days after November 5, 1947. The bill of exceptions was presented to plaintiff's counsel on January 30, 1948, and settled by the trial court on February 7, 1948. The time for reducing the exceptions to writing having expired on December 15, 1947, the motion to quash the bill must be sustained. Joyce v. Tobin, 126 Neb. 373, 253 N. W. 413. In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment. Gilmore v. State, 148 Neb. 10, 26 N. W. 2d 296; Joyce v. Tobin, *supra*. The pleadings clearly sustain the judgment entered.

The defendants contend that their appeal is controlled by section 25-1140, R. S. 1943. The plaintiff contends that section 25-1140, R. S. Supp., 1947, is the controlling statute. The former statute provided that the 40 days for preparing a bill of exceptions commenced to run from the last day of the term at which the order appealed from was entered. In the latter statute it is provided that the 40 days commences to run from the date the notice of appeal was filed in the district court. The effective date of the amended statute, section 25-1140, R. S. Supp., 1947, is September 7, 1947, a date subsequent to the entry of the judgment and prior to the overruling of the motions for a new trial and the giving of the notice of appeal.

The general rule is that statutes shortening the time within which appeals can be taken do not apply to judgments, decrees, or orders rendered or entered before the statute took effect. Raddatz v. Christner, 103 Neb. 621, 173 N. W. 677. The final order appealed from in the present case was the order overruling the motions for a new trial. This order was dated November 5, 1947, a date subsequent to the effective date of the amendatory statute. Consequently, the amended statute controls and the statutory requirements for preparing, serving, and settling a bill of exceptions have not been met. We hold therefore that section 25-1140, R. S. Supp., 1947, and not section 25-1140, R. S. 1943, is the controlling statute.

It is urged that the instructions given in the present case show error on their face and that the case should be reversed for that reason, even though there is a bill of exceptions. A contrary conclusion seems to have been reached by this court.

In Doon v. Adcock, 127 Neb. 335, 255 N. W. 548, it was said: "* * * in the absence of a bill of exceptions, it is manifest the appellate court cannot determine that any instruction, however erroneous, was prejudicial, since the evidence may have been such as would have justified the trial court in directing the verdict which

was returned by the jury." See, also, Willie v. Wacker, 140 Neb. 663, 1 N. W. 2d 120. For the foregoing reason the rule is usually stated in substance as follows: The only question which can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment. Doon v. Adcock, *supra*. Under such circumstances it will be presumed that the verdict rendered is sustained by sufficient evidence. Landman v. City of Benson, 91 Neb. 479, 136 N. W. 43.

MOTION TO QUASH BILL OF EXCEPTIONS SUSTAINED AND JUDGMENT AFFIRMED.

YEAGER, J., dissenting.

I cannot agree with the majority that the defendants do not have the right to have their bill of exceptions considered on appeal by this court.

Concededly had there not have been a procedural change, which change became effective after judgment and filing of motion for new trial, the preparation and service of the bill of exceptions would have been in time and proper.

While it is true that the final order which conferred the right of this court to consider the bill was the ruling on the motion for new trial yet fundamentally the relief sought by appeal was reversal of the judgment.

It therefore appears to me that to say that the new procedure, and not that in being at the time the judgment was entered, shall control is a discouraging resort and return to and refinement upon technicality whereas the modern and enlightened trend is in the opposite direction.

CLARENCE ALLEN, APPELLEE, v. DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

32 N. W. 2d 740

Filed June 18, 1948. No. 32461.

1. **Workmen's Compensation.** Temporary disability within the meaning of section 48-121, R. S. 1943, is the period the injured employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
2. ———. The extent of the permanent disability is not finally determinable within the meaning of section 48-121, R. S. 1943, until the employee is restored insofar as the nature of his injuries will permit. An injured employee is entitled to temporary disability until this determination can be made.

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

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

William C. Smith, Jr., and *G. A. Farman, Jr.,* for appellee.

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

CARTER, J.

This is a suit to recover benefits under the Workmen's Compensation Act. From an award by the district court the defendant appeals.

The case was commenced in the compensation court upon the joint petition of the parties. On appeal to the district court a joint petition was also filed. This is equivalent to the filing of a case stated and it will be so considered on this appeal. If this were not so, defendant's appeal would be here on the pleadings only, as a bill of exceptions was not prepared and filed in this court. Adkisson v. Gamble, 143 Neb. 417, 9. N. W. 2d 711.

The record shows that plaintiff was an employee of

the Department of Roads and Irrigation of the state when on May 17, 1942, he was injured to such an extent that it was necessary to amputate his right arm. The amputation was performed on May 30, 1942, from which plaintiff's arm did not heal in a normal manner. A further amputation became necessary with the result that final recovery was not brought about until December 1, 1943. The defendant has paid the medical and hospital bills of the plaintiff and has paid temporary total disability payments to and including May 30, 1942, the date of the first amputation, together with permanent partial disability for 225 weeks as provided by section 48-121, R. S. 1943. The only question is whether the plaintiff is entitled to temporary total disability payments to the date of the first amputation of his arm, or whether he is entitled to them to the time of the final healing of the arm after the last amputation. The time here involved which affords the basis of the dispute is 78 3/7 weeks.

The compensation law provides in part as follows: "The following schedule of compensation is hereby established for injuries resulting in disability: * * * (3) For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; Provided, however, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained, * * *." It is the contention of the department in the present case that the extent of the permanent disability is ascertained at the time of the first amputation of the arm.

We are of the opinion that the phrase "compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained" means that temporary disability shall end when the condition becomes fixed. This simply means that in the present case temporary disability should be paid to the time when it becomes apparent that the arm will get no better or no worse because of the injury. Temporary disability con-

templates the period the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. Temporary disability ordinarily continues until the employee is restored so far as the permanent character of his injuries will permit. Knobbe v. Industrial Commission, 208 Wis. 185, 242 N. W. 501.

It frequently happens that a finger needs amputation, and then it is found later that due to infection or other causes the hand must be amputated, and later, perhaps, the arm. Without question, the extent of the permanent disability within the meaning of the statute is not finally determinable until after the last amputation and until the employee is restored insofar as the nature of his injuries will permit. Consequently, plaintiff is entitled to temporary total disability until that point is reached which in the present case is December 1, 1943. The trial court awarded temporary total disability for the period from May 30, 1942, to December 1, 1943, a period of 78 3/7 weeks, in addition to that already paid. The award is in all respects correct.

AFFIRMED.

MICHAEL J. BARRY, APPELLANT, v. CLARENCE L. KIRKLAND, APPELLEE.

32 N. W. 2d 757

Filed June 18, 1948. No. 32446.

1. **Libel and Slander.** The rule is that language when spoken, to constitute slander per se, or when transcribed in writing for the purpose of radio broadcasting, to constitute libel per se, must be of such a nature and obvious meaning as to impute to a person alleged to have been injured thereby, the commission of crime, or to subject him to public ridicule, ignominy, or disgrace.
2. ———. The words spoken by the defendant, as set forth in the plaintiff's petition, transcribed and broadcast over the radio, not constituting slander per se or libel per se, and not being defamatory, no cause of action is stated in the plaintiff's petition in the absence of an allegation of special damages.

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

James P. Keenan and *Michael J. Barry,* pro se, for appellant.

Schall, Robinson, Hruska & Garvey and *Charles A. Nye,* for appellee.

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

MESSMORE, J.

This is an action at law whereby the plaintiff seeks to recover damages based on acts and spoken words by the defendant in a public auditorium at a public forum in the city of Omaha, Nebraska, and his acts in connection with a broadcast of said words spoken at the public meeting. The only question before this court is that of whether or not the petition states a cause of action.

The portion of the petition necessary to be examined in order to determine whether or not it states a cause of action, is as follows: Plaintiff's petition alleges that he is engaged in the business of selling books, both wholesale and retail, chiefly to public schools and to public libraries throughout the state of Nebraska and states contiguous thereto and beyond, and in all territory considered a part of the trade territory of Omaha, Nebraska; that during the conduction of his book business the plaintiff earned a livelihood except and until acts hereinafter set out as being acts of defendant were committed; that on June 9, 1946, there was held at a public auditorium in the city of Omaha, Nebraska, a meeting in the nature of a public forum, attended by a large audience. A person in the audience propounded the following question to the defendant: "Questioner: 'Mr. Kirkland, is it true that a local book seller is trying to bring court action against the school authorities, including the school board, because text books are not

bought on the basis of the lowest bid; in other words, because they are bought from book sellers who do not give the school district the benefit of the full discount that could be given and that other parts of the laws regarding the purchase of text books are not followed.' Mr. Kirkland: 'Well, I believe that you do have a point there; however, I am not prepared to answer it in full. I do recall some months ago, before Dr. Corning left to go to Washington, that a book seller here in Omaha brought suit against him personally for his not having purchased some of his books. Then, Mr. Corning was able of course to avoid having that served on him and now this book vender, I don't know who he is, is threatening to sue each of the board members individually, the school district collectively, and he might even get some of the students involved on a book or two or a series of books that he has to sell. That's always the case when you're buying anything. It is true that because of our present rather impoverished condition we always try to buy the lowest bid. Now we usually mean the lowest bid consistent with what the commodity is that we are purchasing. And there might be times when certain books are specified by the educational committee or by the school district and it becomes mandatory to buy that book, and that book might be a little bit higher priced. I'm a member of the building and site committee and very often we're hard put whether to buy a certain stoker, or a certain metal or certain equipment even though the price is lower. However, I am not able to answer your question other than to say that I do know that there is some such a suit pending - I do not know the details.' "

The next evening, June 10, 1946, the above meeting was, in part, broadcast upon the ether and over the air from a radio broadcasting station in the city of Omaha, and the above words of the questioner and the defendant were so broadcast as set out above; that the defendant well knew, and persons in the audience well knew, that

in his speaking of a "book seller here in Omaha" and "this book vender", he was speaking of the plaintiff. The statements of the defendant were false and wrongfully stated, and the defendant thus directly, by inference and otherwise, held plaintiff to public scorn and contempt and by said words used wrongful means to injure the plaintiff, to injure his business, to injure his standing as an honorable active member of the Nebraska Bar Association, and by and through said wrongful means was improperly and falsely publicly speaking of pending legal actions brought by the plaintiff as a taxpayer, based on violation of statutory law in the purchase of text books by the Omaha public schools; the defendant as a member of the school board was made a defendant in the taxpayers' suit. The defendant well knew that a transcription of his remarks was in fact made for the purpose of broadcasting to the public over a radio station; that the defendant possessed personality as a speaker and was a prominent citizen, lending the words spoken greater significance than the conclusion justified by the words themselves; and that, by reason of the aforesaid slanderous acts of the defendant, the plaintiff has been damaged.

The defendant demurred to the plaintiff's petition on the ground that it failed to state a cause of action. The trial court sustained the demurrer and gave the plaintiff ten days in which to amend his petition. The plaintiff elected to stand upon the petition, and his petition was dismissed. From this order he perfected his appeal to this court.

For convenience the appellant will be referred to as the plaintiff and the appellee as the defendant.

The plaintiff predicates error on the court's ruling sustaining the demurrer, contending that the acts and words spoken by defendant, as set out in the plaintiff's petition, at a public meeting and transcribed for radio broadcasting and later broadcast by a radio station, were slanderous, libelous, and actionable.

It might be stated at the outset that it is apparently the plaintiff's contention that the words spoken by the defendant in answer to the questioner, as alleged in the plaintiff's petition, constituted slander. It is further apparent, although not stated in the petition, that the broadcasting over the radio station of the question and the answer thereto where the same had been transcribed is based on libel as a defamatory writing. See Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098.

The rule is that any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself. See, World Publishing Co. v. Mullen, 43 Neb. 126, 61 N. W. 108, 47 Am. S. R. 737; Williams v. Fuller, 68 Neb. 354, 94 N. W. 118; Sheibley v. Huse, 75 Neb. 811, 106 N. W. 1028; Nelson v. Rosenberg, 135 Neb. 34, 280 N. W. 229.

An examination of the alleged slanderous and libelous statements reveals the fact that they do not charge the plaintiff with criminal misconduct, nor subject him to public ridicule, ignominy, or disgrace within the meaning of the rule applicable to this class of cases. They do not in any way reflect upon his honesty, his integrity, or his ability as a lawyer or a tradesman in selling books.

The general rule is that mere words of general abuse and vituperation, however opprobrious, ill-natured or vexatious, whether written or spoken, do not constitute a basis for an action for defamation, in the absence of an allegation of special damages. See Dalton v. Woodward, 134 Neb. 915, 280 N. W. 215.

The words spoken, as set forth in the plaintiff's petition and alleged to have been transcribed and broadcast over a radio station, not being defamatory, and there being no allegation in the petition from which it can be found that the plaintiff has suffered special damages for which the defendant is liable, the judgment rendered by the district court in sustaining the defendant's demurrer to the plaintiff's petition and dismissing the

plaintiff's cause of action, was the only possible judgment. See Callfas v. World Publishing Co., 93 Neb. 108, 139 N. W. 830.

AFFIRMED.

NATIONAL CITY BANK OF CLEVELAND, APPELLEE, V. ALFRED K. JONES, APPELLANT.

32 N. W. 2d 755

Filed June 18, 1948. No. 32353.

1. **Judgments.** A judicial record of another state, authenticated as provided in section 25-1286, R S. 1943, is admissible in evidence as proof of a foreign judgment.
2. ———. A judgment of a sister state, when properly authenticated, imports verity, and it is not incumbent upon the plaintiff to allege or prove that the foreign court had jurisdiction of the person of the defendant.
3. **Evidence.** The laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own. There are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice of this state, are authorized by the laws of the state in which they act.
4. **Trial: Appeal and Error.** In a case where the opposing parties at the close of all the evidence, without reservation, move for a directed verdict, such parties invite the court to discharge the jury, determine the facts, and apply the law thereto; and error cannot be predicated upon the acceptance of the invitation.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

John A. McKenzie, for appellant.

W. J. Papenbrock, Cloid J. Wilson, and *Joseph B. Fradenburg,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER,

CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

JACKSON, District Judge.

This action originated in Nebraska by the commencement of proceedings in the municipal court of the city of Omaha. Appellee, hereinafter called plaintiff, sought recovery therein on judgment entered against appellant, hereinafter called defendant, in the court of common pleas of Cuyahoga County, Ohio, the same being based upon a cognovit note, admittedly executed by defendant and delivered to plaintiff. The municipal court found and entered judgment in favor of plaintiff. Thereupon defendant appealed to the district court for Douglas County, where, at the close of all evidence, and upon motion by both plaintiff and defendant for directed verdict, the court discharged the jury, overruled the motion of defendant, sustained the motion of plaintiff, and entered judgment in its favor.

Defendant insists that the trial court erred in directing a verdict for plaintiff when it did not plead or prove the law of the State of Ohio with reference to procedure; in allowing plaintiff to offer testimony as to the law of that state when the same was not pleaded either in the municipal or district court; and in dismissing the set-off and recoupment pleaded by defendant.

At the trial plaintiff introduced in evidence a duly authenticated copy of proceedings had in the Ohio court, and then called as a witness a regularly admitted practitioner of law of that state, who testified that the proceedings were in accordance with the law and practice of Ohio. The note was also received in evidence.

Defendant testified that he had made a payment on the note for which he was not given credit, and that he was defrauded in the sale by plaintiff to him of certain stock pledged as collateral to the note.

In Ohio the legality of cognovit notes is recognized by

law; and the regularity and propriety of all proceedings had in the Ohio court was adequately proven.

Under the circumstances, it was the duty of the trial court, and is now the duty of this court, under the Constitution of the United States, to give full faith and credit to the Ohio judgment.

This court has heretofore had occasion to consider the propositions here involved.

The case of Chamberlain v. Vanderhoof, 114 Neb. 47, 206 N. W. 10, announces the rule that a judicial record of another state, authenticated under section 8920, Compiled Statutes 1922, now section 25-1286, R. S. 1943, is admissible in evidence as proof of a foreign judgment; that a judgment of a sister state, when properly authenticated, imports verity; and that it is not incumbent upon the plaintiff to allege or prove that the foreign court had jurisdiction of the person of the defendant.

The case of Council Bluffs Savings Bank v. Griswold, 50 Neb. 753, 70 N. W. 376, is also in point. Therein this court said that the laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own; that there are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise, and that the methods of procedure pursued by them are authorized by the laws of the state in which they act.

It would seem, therefore, that the first two assignments in error are without merit and that the propositions contended for by defendant should be resolved against him.

The claim of defendant that he was not credited with payment made by him on the note would also seem to be groundless. An employee of plaintiff bank produced the original ledger sheet of its dealings with defendant and, on the strength thereof, testified that defendant had been credited with the alleged payment.

Under this apparent conflict in testimony, the trial

judge found in favor of plaintiff. The case of In re Estate of Allen, 147 Neb. 909, 25 N. W. 2d 757, is authority for the proposition that where parties at the close of the evidence move for a directed verdict, they invite the court to discharge the jury, determine the facts and apply the law thereto, and that error cannot be predicated upon the acceptance of such invitation.

The only other question presented was whether the alleged counterclaim or recoupment was properly denied. Plaintiff insists that such question was or should have been adjudicated by the courts of Ohio, and could not properly be considered by the trial court. Plaintiff also insists that such claim, if any existed, is barred by the statute of limitations.

The cases of Baker v. Somerville, 138 Neb. 466, 293 N. W. 326, and Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78, announce the rule that the doctrine of res adjudicata includes not only the things which were determined in a former suit, but also any other matter properly involved which might have been determined therein.

This action being on a judgment and not the note, it would seem that the contention of defendant is without merit, especially in view of the fact that the statutory period for the commencement by defendant against plaintiff of an action for fraud has long since expired.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT S. BALLANTYNE ET AL., APPELLEES, v. CHARLES W. LEEMAN, MAYOR OF THE CITY OF OMAHA, ET AL., (GLEN CUNNINGHAM ET AL., SUBSTITUTED), APPELLANTS.
32 N. W. 2d 918

Filed June 29, 1948. No. 32441.

1. **Elections: Municipal Corporations.** The referendum section of

the Omaha home rule charter, section 14-211, R. S. 1943, applies to legislative acts of the city council, but not to administrative or executive matters.

2. **Municipal Corporations.** If an ordinance serves simply to put into execution a previously enacted law, it is clearly executive or administrative in character.
3. ———. The crucial test for determining that which is legislative from that which is administrative is whether the ordinance was one making a law or executing a law already in existence.
4. **Elections: Municipal Corporations.** It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters.
5. ———: ———. To allow a referendum to be invoked to annul or delay executive conduct would destroy the efficiency necessary to successful administration of the business affairs of a municipality.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and dismissed.*

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

Fitzgerald & Smith, J. Robert Hoff, Eugene N. Blazer, and *Robert L. Smith,* for appellees.

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

PAINE, J.

This is a mandamus action. The relators were among the signers of a referendum petition seeking to enforce the Omaha city council to suspend or repeal a certain ordinance, or submit it to the voters of the city. The trial court issued a peremptory writ of mandamus. Motion for a new trial being overruled, respondents appealed.

The facts necessary to an understanding of the issue will be set out, and then the legal questions discussed.

At a special election on July 18, 1922, the city of Omaha established the Omaha home rule charter by adopting chapter 116, Laws 1921. Such charter is also

found as sections 14-101 to 14-816, R. S. 1943, with certain charter amendments set forth in smaller type.

Leading up to the adoption of Ordinance No. 15706, which is the one involved herein, we find in the bill of exceptions exhibit No. 15, which is marked "Sample Ballot." It is the same as the official ballot used in a special election held in Omaha on November 5, 1946, at which there was submitted to the voters 16 entirely separate proposed bond issues. Among these bond issues, there was one for two million dollars for sewer bonds; there was another for over three million dollars for arterial highway bonds; there was one for over a million dollars for parking lot bonds; there was also one for over a million and a half dollars for park bonds; and there was the one for auditorium bonds under consideration in the case at bar. That particular part of the ballot submitted to the voters the question, in brief, as follows: Shall the charter of the city of Omaha be amended by an addition thereto of a new section, 22-I, of article IV, to be supplemental to and a part of the city charter, for the issuance by the city council of $3,540,000 of general obligation bonds, without a vote of the electors, for the purpose of constructing a municipal auditorium and acquiring land therefor, which power and authority are to terminate in ten years? This amendment for auditorium bonds was adopted by a majority vote (see section 14-210, R. S. 1943), but it did not receive a 60 percent vote, within section 14-202, R. S. 1943, the vote being 35,928 yes and 25,253 no.

There was also submitted to the electors at the same special election another ballot, being exhibit No. 14, carrying a number of entirely separate provisions for the institution of various administrative commissions to work with the city government. One of these, consisting of ten sections, was for a city charter amendment which provided for the appointment of an auditorium commission of seven members, with their powers and duties, which commission was to have entire charge of

the construction of the proposed city auditorium, with power to recommend to the city council the institution of condemnation proceedings of private property, as it might be required, on which to build said municipal auditorium. The vote on that particular provision on the ballot, exhibit No. 14, creating the auditorium commission, also carried by a vote of 33,573 yes and 27,437 no.

As a result of the passage of these two amendments to the Omaha city charter by a majority vote, one being the above provision for an auditorium commission and the other being an amendment to issue bonds for an auditorium, the city council, composed of the respondents, passed Ordinance No. 15706 on July 29, 1947, which is now before us for consideration in this action. This ordinance first declared "the necessity of appropriating certain private property and lands for the use of the City for the purpose of owning, establishing and constructing a municipal auditorium, the same being a needed public use of the City of Omaha; * * *."

This ordinance then described by lots, blocks, and otherwise all the private property lying generally between Seventeenth and Nineteenth Streets and between Capitol Avenue and Chicago Street in the city of Omaha, comprising four blocks.

In section 2 of said ordinance it provided for the appointment by the city council of three disinterested freeholders to assess the damages to each of the owners of said property. Section 3 provided: "That this ordinance shall take effect and be in force from and after fifteen days after its passage."

This action is controlled by section 14-211, R. S. 1943, which is a part of the Omaha home rule charter. In so far as this section applies to the facts in the case at bar, it might be briefly summarized as providing that no ordinance passed by the city council, except when otherwise required by the general laws of the state or by other provisions of the statutes, and also excepting or-

dinances to pay salaries of officers and employees of the city, or emergency ordinances for the immediate preservation of public peace, health, or safety, and which contain a statement of such emergency, shall go into effect before 15 days from the time of the final passage of such ordinance. Said section provides further that if, during said 15 days, a petition, duly signed and verified by electors of the city equal in number to at least 15 percent of the highest number of votes cast for any of the city councilmen at the last preceding election, protesting against the passage of said ordinance, shall be presented to such council, then such ordinance shall thereupon be suspended from going into operation and shall be reconsidered by the council. "If the same be not entirely repealed by the council, then the council shall proceed to submit to the voters such ordinance at a special election to be called for that purpose or at a general city election, and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof."

The ordinance under consideration was passed by the city council on July 29, 1947. On August 12, 1947, the relators filed with the city council a referendum petition, which contained 7,290 signers. Exhibit No. 1 was the bundle containing all the signed petitions brought into the council meeting by the city clerk, and exhibit No. 1-A was an unsigned petition, showing the printing at the top protesting against the passage of the ordinance, and then printing in full at the top of each sheet the entire ordinance No. 15706 verbatim, followed by blank lines for 30 electors to sign, with their street and house number, and at the bottom the affidavit of one of the signers.

The city clerk testified that, after a careful comparison with the registered voting lists, there were at least 3,081 of the signers who were qualified registered voters; that the highest vote cast for any councilman at the last

preceding election was 18,368 for Roy Towl; and that 3,081 was 16.774 percent of that vote, so that more than 15 percent of signers were on the petition.

Exhibit D, attached to the answer filed by the respondents, is a lengthy opinion of the city attorney, submitted while the council held the referendum petition in abeyance. It is said therein that, in adopting the charter amendments for the auditorium bond issue and for an auditorium commission, the people extended an authorization to the city council and exercised their legislative authority; that the passage of Ordinance No. 15706 was but completing the prescribed routine for the selection of the site; and the city attorney recommended in conclusion: "It necessarily follows that the referendum petition has no liability as a legal instrument, and is powerless to put into operation the referendum law." The council, in accordance therewith, placed the referendum petition on file and at once went forward with the eminent domain proceedings for the acquisition of the auditorium site.

The relators alleged in their application for writ of mandamus that they brought this action on behalf of themselves as legal voters, on behalf of all other legal voters who had signed said referendum petition, and on behalf of all the legal, qualified and registered voters in and for said city.

Among the sixteen assignments of error, we will first discuss the principal allegations for reversal: "The Court erred in finding that Ordinance 15706 is legislative in nature and, therefore, subject to referendum, as the legislative function had been completed in the election of November 5, 1946, when the voters provided the means and prescribed the method of acquiring and maintaining an auditorium." "The Court erred in holding that the selection of a site for a publicly owned auditorium is a legislative act or, if administrative, that it is nevertheless subject to referendum."

The appellants charge in their proposition of law No. 1

that "The referendum section of the city charter applies to legislative acts of the city council but not to administrative or executive matters and the test for determining the difference is whether the act is one making a law or one executing a law already in existence."

A case somewhat in point is that of Seaton v. Lackey, 298 Ky. 188, 182 S. W. 2d 336, in which it is shown that in the city of Paducah there is a provision for referendum which recites that an ordinance cannot become effective within ten days after its passage, and if a petition, signed by a certain number of voters, is presented protesting against the passage of the ordinance it shall be suspended from going into effect.

An ordinance was adopted directing the sale of the franchise right to operate motorbuses for a period of ten years, and a petition bearing the required number of voters was filed, protesting the passage of the ordinance. The council refused to reconsider such ordinance, and an action was filed seeking a mandatory injunction to compel the board to repeal the ordinance or certify it to be voted upon at the next election. It was held that such an ordinance was not subject to referendum. It was said: "Although initiative and referendum provisions widely differ in their terminology, it is the general rule that they are applicable only to acts which are legislative in character, and not to those dealing with administrative or executive matters."

It was set out generally that when an ordinance enacts a law, or lays down a rule of conduct or course of policy to guide the citizens, there can be no question but that it is legislative in character and referable; but, on the other hand, if it serves simply to put into execution previously enacted laws it is clearly executive or administrative in character.

Another opinion which we believe is helpful in arriving at the correct solution in the case at bar is one from Oregon, where the city charter of Portland had been amended by a vote of the people authorizing the city

council to issue and dispose of $300,000 worth of city bonds to acquire real property for the construction of a crematory. In strict accordance therewith, the city council enacted an ordinance for the purchase of 295 acres of land for the specified purpose. A referendum petition, signed by 8,007 voters, was submitted to the council, which refused to accept it for filing on the ground that the ordinance for the purchase of the site was administrative and not legislative, and therefore not subject to referendum. In the opinion it was said:

"The crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence: * * * the people of the city of Portland, in the exercise of their sovereign power, authorized the council 'to acquire real property, either by direct purchase or by condemnation proceedings, and when so acquired, to construct thereon a new crematory * * *.' The council, in directing the commissioner to purchase a tract of land, was executing that portion of the charter just referred to. * * * The act of purchasing a parcel of real estate is no more legislative than the act of purchasing a fire engine and truck. It is not the enactment of a permanent law for the guidance of the citizens of Portland: * * *." Monahan v. Funk, 137 Or. 580, 3 P. 2d 778.

In San Diego the council by ordinance decided to select a site and erect a police station thereon, and appropriated $179,730 for the expenses thereof on June 8, 1937. Thereafter, on June 28, 1938, the city council accepted a grant of $166,500 from the Public Works Administration, which required changes in the specifications and form of contract. While there had been no referendum of three original legislative acts fixing the policy of securing the site and erecting the building, an attempt was then made to require submission of the resolution of the city council acceding to changes required to secure the federal money. The court held

that the minor and unimportant changes did not affect the declared policy of the city to erect the police station on the designated site, and therefore the last resolution was not subject to referendum. Burdick v. City of San Diego, 29 Cal. App. 2d 565, 84 P. 2d 1064.

We now make reference to Keigley v. Bench, 97 Utah 69, 89 P. 2d 480, 122 A. L. R. 756, in which a peremptory writ was issued commanding the submission of the question to the voters. This was a case in which a new ordinance was passed after an original ordinance had been approved on referendum by the voters of the city of Provo, Utah, which last ordinance changed the financing and plans of payment, which was held to be a legislative rather than an administrative change. However, in Utah referendum is generally available against any ordinance passed by a city council, or city commissioners, as in this case, but this decision held it was only applicable to ordinances which are legislative in character.

In 122 A. L. R., beginning on page 769, this last case is followed by a most thorough and exhaustive annotation, covering the question before us from every angle and indicating the great diversity in the holdings of courts of last resort in the United States. It sets out the rule that "In the absence of special statutes making the acquisition of property, public utilities, and the like expressly subject to referendum, the courts have usually applied the general rule in determining whether the act providing for the acquisition of property is legislative and subject to referendum, or administrative or executive and therefore not within the operation of the provisions for direct legislation."

While many cases could be cited from this latest annotation in the A. L. R. on this subject, we find one of considerable interest. In McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 P. 132, the court held that, after a trust fund had been accepted for the purchase of a park site as a memorial, but a resolution to buy a

certain site was rejected on a referendum and an action brought by the landowner for specific performance of the agreement to purchase, such resolution was not subject to referendum, as it was merely incidental to the execution of the legislative policy implied from the acceptance of the trust fund.

In 1922 the city council of Lincoln by a resolution made a contract for a field survey for zoning said city. It was sought to refer this resolution to the voters, and this court said: "The resolution, in our opinion, does not attain to the dignity of a legislative act. It is rather an administrative act. The referendum is applicable to municipal legislation; that is, to an ordinance which is a declaration of the municipal law upon any subject, but it cannot be invoked to prevent the council from procuring information or from framing a proposed ordinance for its consideration." Schroeder v. Zehrung, 108 Neb. 573, 188 N. W. 237.

"To allow referendum laws to be invoked to annul or delay executive or administrative action would tend to delay, and in some cases to annul, the prompt and efficient administration of city affairs." Read v. City of Scottsbluff, 139 Neb. 418, 297 N. W. 669.

In a federal court decision, we find this statement: "The object of the referendum act is to enable the people to vote on questions which affect their government; and if the act were to be applied so as to enable a few people * * * to delay and obstruct an election which was already called, there would be an application of the act nullifying its purpose. Statutes in Nebraska are to be construed to effect their purpose and not so as to bring about absurd results." Central Power Co. v. Nebraska City, 112 F. 2d 471.

The appellants insist that the case of State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683, is closely in point, and that in that case this court decided that the resolution was not legislative in character. Therefore, it is claimed that the trial court erred in

granting a peremptory writ of mandamus, and that in the case at bar the action of the trial court must be reversed if the Nelson case stands as law.

The Nelson case was brought by the State of Nebraska against the mayor and city council of Omaha to require them to repeal an alleged legislative resolution or to submit it to a referendum vote of the people. The Legislature at its session in 1943 had enacted a bill, known as L B 204, providing for a power commission in metropolitan cities. The city council of Omaha adopted a resolution appointing such power commission and determining that an electric light and power plant should be erected or purchased by the exercise of the power of eminent domain. On appeal it was determined by this court that the true test in determining whether an ordinance or resolution of the city council is legislative or administrative is whether it is one making a law or one executing a law already in existence; and that the trial court erred in finding that the resolution was legislative in character and in granting a peremptory writ of mandamus with injunctive relief as prayed. We reversed that feature of the case, holding: "It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters."

This is in accordance with the general rule that "The right to a referendum on a measure passed by a municipal council is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance. The reason for this rule is that to allow a referendum to be invoked to annul or delay executive conduct would destroy the efficiency necessary to successful administration of the business affairs of a municipality. * * * an ordinance which simply puts into execution previously declared policies or previously enacted

laws is administrative or executive in character and not referable." 37 Am. Jur., Municipal Corporations, § 209, p. 845. See, Dooling v. City Council, 242 Mass. 599, 136 N. E. 616; State ex rel. Harlin v. Superior Court, 139 Wash. 282, 247 P. 4; Kleiber v. City and County of San Francisco, 18 Cal. 2d 718, 117 P. 2d 657.

In the case at bar, at a special election the voters of Omaha, by a large majority, amended the home rule charter of the city and directed that the city council issue $3,540,000 of municipal bonds, without a further vote of the electors, for the purpose of acquiring land and constructing thereon a municipal auditorium. This clearly was a legislative act of the electors of the city. It directed the city council to proceed with the purchase of land and to erect a city auditorium.

It is now contended that this first act of the council in starting to acquire a site therefor must be submitted to a referendum vote as a legislative act. Could not the same argument be used later and another referendum demanded on the letting of the contract for the erection of the building?

To permit a referendum on each of the various steps in carrying out a definite mandate of the voters to secure a site and build a city auditorium would delay executive conduct of the council and defeat the prompt and successful completion of the city auditorium as directed by vote of the people at the special election held for that purpose. We hold it was an act of legislation to direct and authorize the construction of a public building, to fix the cost, and provide bonds to pay for it, but that it is an executive and administrative duty to select the site, buy same, select plans and let a contract, provide precise cost of various items, terms of payment, and numerous other conditions incident to building a large municipal auditorium. No one of the many executive and administrative acts necessary to complete such project is referable to a vote of the people as a legislative act.

This being our view, the city council was right in denying a referendum, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

YEAGER, J., dissents.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WILLIAM NIKLAUS, RESPONDENT.

33 N. W. 2d 145

Filed June 29, 1948. No. 32112.

1. **Attorney and Client.** An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. A lawyer cannot serve two masters; and the one he has undertaken to serve primarily is the court.
2. ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.
3. ———. The events here involved have extended over a period of many years. They evidence such a lack of appreciation of, or concern for, the obligations and proprieties of the legal profession that the court cannot further justify the respondent being held out to the public as possessed of the honor, rectitude, and responsibility which the high office of attorney at law demands, and as meriting the confidence which clients necessarily repose in such a relationship.

Original proceedings by the State, on the relation of the Attorney General, to disbar the defendant. *Respondent disbarred.*

Herbert W. Baird, for respondent.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for relator.

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

CARTER, J.

This is a disciplinary action and an original proceeding initiated against William Niklaus, respondent, a duly licensed attorney at law, in conformity with the rules of this court. The purpose of the action is to question the right of the respondent to retain his license and to continue in the practice of the law.

The petition was filed in the name of the State of Nebraska ex rel. Nebraska State Bar Association, as relator, and will herein be referred to as such.

The matter was referred for hearing to Robert R. Moodie, as referee, and comes here on his report and the respondent's exceptions thereto.

Article X of the Rules Creating, Controlling, and Regulating the Nebraska State Bar Association provides: "The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

In adopting the rules of the integrated bar in the case of In re Integration of the Nebraska State Bar Assn., 133 Neb. 283, 275 N. W. 265, we said: "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court."

Prior thereto, in the case of State v. Fisher, 103 Neb. 736, 174 N. W. 320, we had said that: " 'The lawyer's life must be one of fidelity and stern integrity.' In re Sitton, 177 Pac. (Okla.) 555. 'In granting a license to

practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. * * *.' State v. Burr, 19 Neb. 593."

And, as stated in 7 C. J. S., Attorney and Client, § 23, p. 753: "A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. An attorney may be suspended or disbarred for perverting, or attempting to pervert, a decision of a cause on the merits, by deceiving or misleading the court, by bribing or tampering with witnesses or jurors, by stifling or suppressing evidence, by introducing evidence or allowing evidence to be given which he knows to be false or forged, by knowingly making false or forged affidavits, or having them made, for the purpose of deceiving the court, or by incorporating misstatements in the pleadings or in the papers in a case before the court."

The charges against the respondent arise out of litigation involving a tract of land in Lancaster County, Nebraska, which, according to the record, contains somewhere between 623 and 678 acres. This litigation has extended over many years. It involves numerous actions which either seek to relitigate the same issues which have already been determined or to litigate issues incident to and arising out of previous actions. Since, as stated in State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714, "In a disbarment proceeding only those matters which are specifically charged in the complaint can be considered," it would serve no useful purpose to set forth the history of this litigation, but it will be referred to only as it relates itself to the charges made.

In considering the charges we shall apply the rule that

they must be established by a clear preponderance of the evidence. See State ex rel. Nebraska State Bar Assn. v. Price, *supra.*

The petition charges, the referee found, and the evidence establishes that the respondent failed to properly account and actually pay to the trustee in bankruptcy of the bankrupt estate of Theodore F. Barnes money belonging to said trustee and which respondent received as his attorney.

The record discloses that on January 5, 1922, Theodore F. Barnes filed his voluntary petition in bankruptcy in the District Court of the United States for the District of Wyoming and was adjudicated a bankrupt and discharged as such on March 27, 1922. The bankrupt did not list any Lancaster County lands as part of his assets. Thereafter, on August 27, 1928, respondent, representing Gertrude D. Reed, one of the creditors of Theodore F. Barnes, filed a petition in said bankrupt estate asking that the proceedings be reopened and a trustee appointed for the reason that the bankrupt, at the time he filed his petition, was actually the owner of a tract of land in Lancaster County consisting of some 678 acres. The prayer of this petition was granted and on September 18, 1928, John C. Pickett was appointed and thereupon qualified and acted as trustee of said estate. The trustee, on October 1, 1928, through his attorney, the respondent, who had been authorized by the referee in bankruptcy to act as such, went into possession of the Lancaster County lands and collected the rents therefrom.

Thereafter, on February 15, 1929, ancillary proceedings were had in the District Court of the United States for the District of Nebraska, Lincoln Division, and William M. Holt was appointed and qualified as ancillary receiver. During the period he acted as such he collected the rents from the Lancaster County land and accounted therefor. During this period respondent acted as his attorney. On August 7, 1934, pursuant to proper authorization, the ancillary receiver paid to respondent as

attorney for John C. Pickett, the trustee, the sum of $2,842.50 in cash and delivered to him a note of $228.75. This note respondent subsequently collected in full together with interest thereon in the sum of $46.04.

Although these items are set forth in respondent's subsequent accounting as made to the trustee, the funds were never actually paid to the trustee by respondent. On August 25, 1938, Judge Kennedy of the District Court of the United States for the District of Wyoming ordered respondent to pay to either the clerk of that court or the trustee the sums which respondent had received from the ancillary receiver.

This order respondent failed to comply with. He retained the funds and, according to his testimony and accounting, applied $2,750 thereof in payment to himself as attorney for the trustee and ancillary receiver for services he had rendered to them, although such fees had never been allowed and were, on application for their allowance, denied. The balance he applied on expenses which he had had but which expenses had never been authorized and such authorization was, upon application, refused.

The rules of the District Court of the United States for the District of Wyoming provide, insofar as here applicable, as follows: "37. All moneys in bankruptcy estates shall be turned over by the referee, receiver, trustee, or any other officer of the bankruptcy court receiving same, including all deposits by anyone in composition, to the Clerk of the Court, who shall deposit the same to the credit of 'United States District Court, District of Wyoming—Bankruptcy,' in a designated depository who shall have first furnished a satisfactory bond to secure said deposit approved by the Court; and such moneys shall be paid out only upon checks signed by the Clerk of the Court and countersigned by the referee before whom proceedings are pending, in each case upon orders of the judge or referee as the case may require, authorizing

the disbursement of such funds for expenses, claims, dividends or otherwise."

Canon 11 of the Canons of Professional Ethics provides in part as follows: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

As stated in State ex rel. Nebraska State Bar Assn. v. McGan, 138 Neb. 665, 294 N. W. 430: "This court has long been committed to the rule that failure of an attorney to account for, or the misappropriation of, money of his clients collected or received in his professional capacity is in violation of his duty as an attorney to maintain the respect due to the courts and the profession, and is ground for disbarment. State v. Priest, 123 Neb. 241, 242 N. W. 433, and State v. Ireland, 125 Neb. 570, 251 N. W. 119."

And as stated in State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32: "From the moment a client's money comes into the possession of an attorney, it should never be viewed as creating a relation of debtor and creditor, but such money should always be considered by such attorney as trust funds, and promptly paid in full, strictly according to the terms of the contract. 2 R. C. L. 966, sec. 42; Armstrong v. Morrow, 166 Wis. 1, Ann. Cas. 1918E, 1156; Berman v. Coakley, 243 Mass. 348, 26 A. L. R. 92; Garceau v. McNamara, 125 Minn. 130; Moore v. Rochester Weaver Mining Co., 42 Nev. 164, 19 A. L. R. 830; State v. Scoville, 123 Neb. 457; State v. Kennedy, 124 Neb. 789; State v. Black, 125 Neb. 382."

These principles are applicable in all cases whether counsel is acting for a private client or for an officer of a court.

The record fully sustains the following conclusion of the referee: "In failing to pay over to his client John C. Pickett, Trustee in Bankruptcy, all of the rentals which

had come into his possession as attorney for said trustee as aforesaid, and in retaining a portion thereof in payment of his own services after the bankruptcy court had specifically denied him compensation for his services, respondent was derelict in his duty as an attorney at law."

The petition charges that the respondent was found guilty of contempt by the district court for Lancaster County in refusing to deliver the rent share of wheat to the receiver appointed by the court in a foreclosure action; that such act was contumacious and contemptuous; and that he was sentenced and served 30 days in jail because of his conduct.

The evidence shows that the district court for Lancaster County, in a foreclosure action therein pending involving the same lands as hereinbefore referred to, appointed a receiver to take charge thereof and collect the rents therefrom. On June 13, 1942, the court entered an order directing the tenant to attorn to and to pay to the receiver all rentals from the property being foreclosed. It appears that the respondent willfully interfered with and sought to prevent this order from being carried out and for which conduct he was found guilty of contempt. The record fully establishes that the respondent's conduct in relation to his interference with the carrying out of the order was contemptuous and contumacious. A full statement of the contempt proceedings can be found in the opinion of In re Application of Niklaus, Niklaus v. Holloway, 144 Neb. 503, 13 N. W. 2d 655.

The petition further charges that in actions before the district court for Lancaster County the respondent has taken a number of inconsistent and contrary positions regarding the facts, which facts were either known to him to be contrary to the representations made to the court in positively verified pleadings which he filed and presented or should have been known to him, by the exercise of reasonable care, to be such.

Canon 22 of the Canons of Professional Ethics provides

in part: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. * * * It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses in drawing affidavits and other documents, and in the presentation of causes."

The evidence shows that the trustee of the bankrupt estate of Theodore F. Barnes actually went into possession of the Lancaster County lands on October 1, 1928, through his attorney, the respondent, and, up until November 20, 1937, when the District Court of the United States for the District of Wyoming finally determined that Theodore F. Barnes had no interest in the lands, respondent filed many pleadings, which he positively verified, to that effect and obtained orders based thereon. After the ruling of November 20, 1937, the respondent, on April 13, 1938, obtained a quitclaim deed to the Lancaster County lands from the heirs of H. E. Erickson, deceased, who had died on November 9, 1932. Thereafter respondent filed positively verified pleadings and made representations that H. E. Erickson had been in actual possession since October 1, 1928, when he knew that from October 1, 1928, to the order of November 20, 1937, the trustee had actually been in possession thereof.

In respect to the foregoing it should be stated that although respondent testified that from sometime in 1927 up until the time of Erickson's death in 1932 he represented H. E. Erickson individually, the record conclusively establishes that he never did represent H. E. Erickson during Erickson's lifetime nor did he represent the Erickson estate. It is true that in being attorney for the trustee he indirectly represented H. E. Erickson for Erickson was one of the creditors of Theodore F. Barnes, the bankrupt. However, respondent had his first direct connection with the Ericksons when, on

April 13, 1938, he acquired his deed from the heirs of H. E. Erickson, deceased.

The referee further concluded that respondent violated canon 10 of the Canons of Professional Ethics when he acquired from the H. E. Erickson heirs their interest in the Lancaster County real estate, which real estate was involved in litigation which he was then conducting for the trustee of the bankrupt estate of Theodore F. Barnes.

Canon 10 of the Canons of Professional Ethics is as follows: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

We find the record fully sustains this finding for respondent acquired this interest during the time he was seeking to perfect an appeal for the trustee from the November 20, 1937, judgment of the District Court of the United States for the District of Wyoming finding that the bankrupt had no interest therein. By such purchase he sought to acquire an interest in the subject matter of the litigation which he was conducting for the trustee and in conflict therewith.

Other charges are made which find ample support in the record but will not be further set forth for what we have already set forth is sufficient to make necessary that we revoke the respondent's license and to disbar him from the further practice of law.

What was said in State ex rel. Nebraska State Bar Assn. v. Hyde, 138 Neb. 541, 293 N. W. 408, is particularly applicable here. Therein we said: "The events involved have extended over a period of several years. They evidence such a lack of appreciation of, or concern for, the obligations and proprieties of the legal profession, that the court cannot justify his being held out to the public as possessed of the honor, rectitude, responsibility and diligence which the high office of attorney at law demands, and as meriting the confidence which clients necessarily repose in such a relationship. State v. Marconnit, 134 Neb. 898, 280 N. W. 216; State v.

Sowards, 134 Neb. 159, 278 N. W. 148; State v. Hatteroth, 134 Neb. 451, 279 N. W. 153; State v. Goldman, 127 Neb. 340, 255 N. W. 32."

We find that the prayer of relator's petition should be and is granted and the license of the respondent to practice the profession of law is revoked and he is disbarred from the further practice of the profession of law in the State of Nebraska.

RESPONDENT DISBARRED.

CHAPPELL, J., not participating.

BEST & CO., INC., APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, ASSOCIATED RETAILERS OF OMAHA, A CORPORATION, ET AL., INTERVENERS, APPELLEES.

33 N. W. 2d 150

Filed June 29, 1948. No. 32369.

1. **Officers: Parties.** When public officers are engaged in litigation to protect public rights and their pleadings and procedure maintain the public interest, no private person, corporation, or association is entitled to intervene.
2. **Parties.** The interest in the matter of litigation to authorize intervention in an action under section 25-328, R. S. 1943, must be such direct and immediate interest that the person or persons seeking to intervene will either lose or gain by direct operation and legal effect of the judgment which may be rendered in the action.
3. **Equity.** It is the practice of courts of equity when they have obtained jurisdiction of a case to administer all of the relief which the nature of the case and the facts demand, and to bring such relief down to the close of litigation between the parties.
4. ———. An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
5. ———. In a proper case a court of equity may exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violation of city ordinances where their continued enforcement to recover penalties will interfere with

the transaction of commercial business lawful in itself and result in irreparable injury.

6. **Municipal Corporations: Equity.** A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance.
7. **Constitutional Law: Commerce.** "Interstate commerce", within the commerce clause of the Constitution of the United States, ordinarily consists of purchasing of merchandise by a resident of one state from a resident of another state, and the delivery of the article of commerce and the transportation thereof. The purchase may be made by the buyer in person, or through a traveling salesman of the nonresident, or by an order sent by the purchaser to the nonresident.
8. ———: ———. The displaying of samples of goods in temporary quarters by traveling salesman of nonresident seller to be purchased in another state is an element in the negotiation for the sale, and, therefore, constitutes "interstate commerce" within the commerce clause of Constitution of the United States.
9. **Courts.** State courts will look to decisions of the United States Supreme Court in determining issue involving a federal question.
10. **Municipal Corporations: Commerce.** Where a city, by enacting an ordinance, imposes an occupation tax and requires a license for sale of, or solicitation of orders for, goods, this constitutes an unlawful interference with interstate commerce as applied to solicitation of orders for goods not within the state at the time but to be shipped if and when the orders are accepted from another state in fulfillment of the orders previously taken.
11. ———: ———. A municipal ordinance which levies an occupation tax and makes other requirements as the ordinances set forth in the opinion on every person or corporation not a regular retail merchant in the state who displays samples in any hotel room, rented or occupied temporarily for the purpose of securing retail orders; held invalid under the Constitution of the United States as a discrimination against interstate commerce. So held as applied to nonresident merchant who took orders in the state and shipped interstate directly to customers where no corresponding fixed-sum license was exacted of regular retail merchants for the privilege of doing business.

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

Fraser, Connolly, Crofoot & Wenstrand, Strauss, Reich & Boyer, W. H. Wright, and *M. James Spitzer,* for appellant.

Edward F. Fogarty, Edward Sklenicka, Einar Viren, Ralph E. Svoboda, and *J. A. C. Kennedy, Jr.,* for appellees.

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

MESSMORE, J.

The two cases docketed in this court as General Numbers 32369 and 32370, by stipulation of the parties, were consolidated for trial in the court below on an agreed statement of facts.

The appellants are New York corporations. Best & Co., Inc., the appellant in No. 32369, is engaged in the retail sale of wearing apparel in New York City, and Frank Brothers Footwear, Inc., the appellant in No. 32370, is engaged in the retail sale of footwear and kindred products in New York City. In December 1946, both corporations filed petitions in the district court for Douglas County against the proper officers of the city of Omaha to procure an injunction to restrain the enforcement of article 1, chapter 22, of Ordinance No. 14924, and Ordinance No. 15524, as the same applied to each of the said corporations, on the ground that the ordinances were repugnant to the commerce clause, article 1, section 8, of the Constitution of the United States. The Associated Retailers of Omaha, a corporation, and the Omaha Master Furriers Guild, a non-profit association of furriers, unincorporated, were permitted to intervene.

The answers in intervention alleged in part and substance that the occupation tax and requirements under the ordinances assailed erect no barriers against interstate commerce, and freedom of competition as between the plaintiffs and the interveners was acknowledged, upon the payment by the plaintiffs of a fair share of the local cost of government and compliance with the reasonable requirements of the ordinances for the conduct of the local aspects of their business imposed for the

protection of the health and welfare of the local citizens. It was further alleged that the interveners had a direct interest in the outcome of the action for the reason that interveners were competitors with the plaintiffs; that interveners pay taxes not imposed on the plaintiffs; and should plaintiffs prevail in these actions, interveners would be placed in an unfair competitive position to their injury, and dislocation of tax outlay would result, casting an unfair burden of taxes upon the interveners. Prayer was for dismissal of the plaintiffs' petitions.

The answer of defendants, for the purpose of these appeals, denied that the ordinances in question violated the commerce clause of the Constitution of the United States or any other provisions of the Constitution of the United States; alleged that the proper authorities of the defendants charged with enforcing the ordinances intended to enforce the same with reference to the plaintiffs; and prayed dismissal of the plaintiffs' petitions.

Reply of the plaintiffs to the answer of interveners was a general denial.

The portions of chapter 22, article 1 of Ordinance No. 14924, pertinent to this case, in substance, follow: 22-1.1. The term "person", as used includes corporations. The term "itinerant vendor" is defined to be any person, either as principal, agent or employee, who does not intend to conduct his business in the city of Omaha for a period of longer than 120 days, or who does not maintain a regular place of business in Omaha for the conduct of retail trade; and who locates in a store, building, or place of business, or hotel room, or solicits by mail, and who offers for sale, or sells or takes orders for goods, wares, or merchandise. It is declared unlawful for an itinerant vendor as above defined to carry on or offer to carry on the character of business above defined, and to sell or offer to sell by any of the means above set out, any goods, wares, or merchandise. Any person desiring a permit to carry on a character of business as before set out shall make an application therefor in

writing to the city council of the city of Omaha. The application provides for inquiry into the character of the applicant and of the solicitors or agents named by him, and into the character of the merchandise to be handled; and if the council should find that the applicant or his agents, etc., are not persons of good character, or that the merchandise to be handled or the method of handling same are involved in misrepresentation or dishonesty, the application should be denied. If the application is approved, each solicitor shall personally appear before the city clerk and pay the sum of one dollar to secure a permit. The ordinance levies and imposes an occupation tax of $15 per day upon the business of the itinerant vendor, payable in advance, and provides for the collection of the tax and a penalty for violation of the ordinance.

Ordinance No. 15524, to amend chapter 22, article 1 of Ordinance No. 14924, by adding thereto two sections designated 22-1.6 and 22-1.7, provides that prior to the issuance of the license a $5,000 surety bond must be furnished to the city clerk, executed by a surety company authorized to do business in the state, conditioned upon the faithful compliance by the licensee with the terms and requirements of the ordinance, and conditioned to indemnify any purchaser of merchandise from the licensee, etc., against loss or damage by reason of misrepresentation as to the kind, quality or value of the merchandise. Before any license shall be issued, the itinerant vendor shall furnish, as part of his application, a health certificate by a duly licensed physician licensed to practice as such physician within the state of Nebraska, certifying that the licensee and all employees connected with such business are free from any contagious or infectious disease.

Other provisions of the ordinances need not be summarized.

The stipulated facts, abridged, show the adoption of Ordinance No. 14924 on May 13, 1941, which established

a municipal code, and on September 3, 1946, the adoption of Ordinance No. 15524, amending chapter 22, article 1 of Ordinance No. 14924; the nature of the business engaged in by plaintiff corporations and the continual existence thereof for a long period of time; and that neither corporation maintained branch stores in the city, or state, nor regular places of business therein. Prior to December 6, 1946, Best & Co., Inc., rented a display room at a local hotel for the purpose of displaying samples of its merchandise on December 6th and 7th, 1946. From its New York office this plaintiff mailed to its customers in and near the city notice in advance of such displays. On the dates mentioned a representative of this plaintiff, a nonresident of the state, displayed samples of merchandise to customers and obtained orders from same for the sale of merchandise for future shipment in interstate commerce. No merchandise was offered for sale at the display and none was available for that purpose. All orders taken were subject to acceptance or rejection at plaintiff's New York office. Orders accepted were filled by shipment direct from plaintiff's New York store to the purchasers by mail or through other regular channels of interstate commerce. No merchandise was sent by plaintiff to its representative for delivery to the purchasers. No payment or deposit on account of the purchase price of the merchandise so ordered was received or accepted by the plaintiff's representative. On all orders accepted by the plaintiff, invoices for the purchase price of the merchandise purchased were sent by mail from plaintiff's New York office to the purchasers who remitted payment direct to plaintiff's New York office. Displays of samples of its merchandise and the solicitation of orders for later out-of-state fulfillment, in the same manner as hereinbefore set out, have been conducted in Omaha by the plaintiffs for several years prior to 1946. Such displays have occurred only infrequently, never more than two in any one year, and never for a longer period of time than two days on

any one occasion. The plaintiffs intend to make similar displays at intervals in the future, unless prevented from doing so legally. Defendants are charged with the enforcement of the ordinances, and unless plaintiffs comply fully with the terms and provisions thereof, defendants will endeavor to enforce the ordinances against them. Local retail merchants who maintain a regular place of business in the city of Omaha and who sell merchandise of a similar class and type as that sold by the plaintiffs, and who are in competition with the plaintiffs, do not come under the provisions of the ordinances. Plaintiffs and other merchandising firms of like character, during their two or three day stands in hotel rooms without paying any tax therefor, receive as part of the public services of local government the police and fire protection and other services furnished by the local government and paid for by the taxpayers of the city and state, including, in part, the interveners. Interveners pay real estate taxes and various other taxes not paid in the city and state by the plaintiffs. The State of Nebraska or its municipal subdivisions have never embraced the sales tax or its concomitant use tax as a device for raising revenue for state and local government, but have instead relied on property taxes, occupation taxes, and license fees for such revenue.

The stipulated statement of facts with reference to Frank Brothers Footwear, Inc., is to the same effect and involves display and sale of its merchandise in the same manner. We deem it unnecessary to set forth such facts relative to this plaintiff, as the issues are the same in both cases.

The trial court found that the tax imposed, of $15 for each day of plaintiffs' local activities, was not unreasonable, excessive or prohibitive in amount; was not discriminatory with respect to the class of persons or occupations to which it was applied; and fairly apportioned the cost of local government among the plaintiffs and others of its class and local merchants with whom

it and they are in competition. The court further found that no irreparable injury to the plaintiffs warranting the intervention of the court had been demonstrated, and that no injunction should accordingly issue to restrain a criminal prosecution under or enforcement of the ordinance and its amendments; that the interveners represent, as a class, local merchants with whom the plaintiffs were in competition, and possess a special interest entitling them to intervene to oppose the attack of the plaintiffs upon the ordinance and its amendments whereby the interveners might be burdened with more than a fair share of the cost of local government, as against the plaintiffs.

The court overruled the motion of the plaintiffs to dismiss the petitions in intervention and decreed that the ordinance and amendments, as heretofore set out in substance, are valid and subsisting ordinances of the city in their application to the plaintiffs; that the activities of the plaintiffs constitute an identifiable occupation of a local character and a doing of business within the city of Omaha, which is segregable and separable and as to which a not unreasonable occupation tax may be levied; and dismissed plaintiffs' petitions.

Upon the overruling of motion for new trial, plaintiffs appealed.

The appellees moved to dismiss the appeals in this court, and by way of plea in abatement of such appeals, alleged that the appellants had separately paid the occupation taxes levied under, and had otherwise complied with, the ordinances against which injunctions are sought, thereby rendering the appeals moot. Since the entry of the decrees appealed from, the appellants have complied with the ordinances in all respects, under protest, reserving their contentions that the ordinances were unconstitutional and invalid as applied to appellants; further, the purpose of complying with the ordinance and its amendment was to enable the appellants to continue exhibits in the city and to avoid interruption of

business and criminal prosecution of employees. The appellants were not permitted to file a supersedeas bond, nor would the city authorities stipulate to not enforce the ordinances pending appeal.

In furtherance of the motion to dismiss the appeals and the plea in abatement, the appellees cite cases to the effect that: "An appeal presenting nothing but moot questions may be dismissed upon the appellate court's own motion." State ex rel. Spillman v. Dunbar State Bank, 119 Neb. 571, 230 N. W. 452. See, also, Dodge Agricultural Credit Ass'n v. Tighe, 121 Neb. 458, 237 N. W. 404, and several cases from the United States Supreme Court to the effect that to adjudicate a cause which no longer exists is a proceeding which that court uniformly has declined to entertain. The appellees especially rely on Singer Mfg. Co. v. Wright, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906; Little v. Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016; Harvey v. Early, 160 F. 2d 836, and other cases to the same effect which need not be cited.

In Singer Mfg. Co. v. Wright, *supra,* the only relief sought was to restrain a collection of the particular taxes for which executions were in the hands of the sheriff. When those taxes were paid, the reason and basis for granting injunctive relief terminated. In the instant case the appellants do not seek to restrain defendants from collecting the occupation taxes for the few exhibits that have been held and for which the appellants paid the taxes. The appellants seek an adjudication that the ordinance and its amendment are unconstitutional and plead for a permanent injunction to restrain the appellees and their successors in office from enforcing the ordinances against the appellants, and from interfering with the solicitation in the city, by appellants, of orders for the sale of merchandise in interstate commerce.

The applicable principle of law is expressed in First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb.

521, 542, 286 N. W. 766, quoting from Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 73 N. Y. 82, 95: "It is the practice of courts of equity, when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." Cases to this effect are too numerous to cite.

We conclude that the appellees' motion to dismiss the appeals must be overruled.

The appellants moved to dismiss the petitions in intervention for the reason that (1) there is no showing that the city of Omaha and its officials are not defending the actions in good faith, and (2) the interveners do not have any direct, substantial, or immediate interest in the subject matter of the action. The decree appealed from held that the interveners represented a class of local merchants with whom the appellants were in competition and thereby possessed an adequate interest entitling them to intervene. The motions to dismiss were overruled.

"The rule to which this jurisdiction is committed is: 'When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene.'" Smithberger v. Banning, 130 Neb. 354, 265 N. W. 10.

The City of Omaha, through its legally constituted authorities, was vigorously and ably doing everything that could be done to protect any rights which the defendant city might have, and we see no reason why these taxpayers should have encumbered the record by intervention.

The interest in a matter in litigation which will authorize a person to intervene in an action under section 25-328, R. S. 1943, must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal

effect of the judgment which may be rendered in the action. This interest must be one arising from a claim to the subject matter of the action or some part thereof, or a lien upon the property or some part thereof. An indirect, remote or conjectural interest in the result of the suit is not enough to permit intervention. See, Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482; Drainage District v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 582.

We conclude that the appellants' motion to dismiss the petitions in intervention should have been sustained.

The appellees contend that no injunction should have been granted in any event for the reason that no basis is shown under Nebraska statutes for the granting of injunctions, citing sections 25-1063, 77-1727, and 77-1728, R. S. 1943, because the application of an otherwise valid ordinance to an interstate commerce operation can be tested by an action to recover the tax after payment, and the raising of all defenses in the ordinary criminal proceeding, citing Beal v. Missouri Pacific R. R. Corporation, 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577, to the effect that courts of equity do not ordinarily restrain criminal prosecutions, even though unauthorized and hence unlawful; and will do so only to prevent irreparable injury. Other federal cases are cited to the effect that it is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions.

In the instant case the trial court denied an injunction on the grounds first, that the ordinances are constitutional, and second, that the appellants did not show that they would otherwise be irreparably injured, and consequently were not entitled to such redress.

In Hoyt Bros. v. City of Lincoln, 130 Neb. 79, 263 N. W. 898, an injunction was granted to prevent the city attorney and chief of police from interfering with the plaintiff's agents in soliciting orders for merchandise for future delivery from outside the state in violation of an ordinance forbidding peddling without a license

and without the payment of an occupation tax. The court pointed out that the plaintiff would be subject to a multiplicity of prosecutions and that the continued enforcement of the ordinance would interfere with the conduct of his business. This court held: "In a proper case, a court of equity may exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violations of city ordinances where their continued enforcement to recover penalties will interfere with the transaction of commercial business lawful in itself and result in irreparable injury."

The petitions alleged the ordinances were void on the ground, among others, that they were unreasonable, confiscatory, and amounting to the prohibition of the lawful business in which the plaintiff was engaged.

In Golden v. Bartholomew, 140 Neb. 65, 299 N. W. 356, this court said: " 'An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Standard Oil Co. v. O'Hare, 122 Neb. 89, 239 N. W. 467. 'A legal remedy which will oust the equity court of jurisdiction must * * * be capable of being asserted without rendering the litigant liable to the imposition of a penalty or forfeiture. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a statute.' 19 Am. Jur. 119, sec. 115."

In Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255, the court held: "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce

such a law against parties affected, may be enjoined from such action by a federal court of equity. * * * They (plaintiffs) are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution." See, also, Real Silk Hosiery Mills v. City of Portland, 268 U. S. 325, 45 S. Ct. 525, 69 L. Ed. 982; Speier's Laundry Co. v. City of Wilber, 131 Neb. 606, 269 N. W. 119; Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635.

That appellants could test the legality of the ordinance and its amendment by subjecting their representative to criminal prosecution and by having their business and property rights interfered with is not a sufficiently adequate remedy to preclude appellants from proceeding to secure injunctive relief.

The appellants predicate error on the trial court's holding that the ordinances in question would not contravene article 1, section 8, of the Constitution of the United States. Appellants contend that the ordinances place a burden on interstate commerce which amounts to an unlawful regulation thereof, interference therewith, and an impediment thereto, and discriminates against such commerce in favor of intrastate commerce.

The general rule in cases involving an analogous factual situation as in the instant case appears in the annotation at 162 A. L. R., p. 859, as follows: "* * * that a state statute or municipal ordinance imposing a tax or requiring a license for sale of, or solicitation of orders for, goods, constitutes an unlawful interference with interstate commerce as applied to solicitation of orders for goods not within the state at the time, but to be shipped, if and when the orders are accepted, from another state in fulfilment of the orders previously taken."

The leading case on the subject is Robbins v. Shelby

County Taxing District, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which involved a factual situation very similar to the cases at bar, and from which the general rule as stated above came into being. The court held that the power granted to Congress to regulate commerce among the states, being exclusive when the subjects are national in their character, and admitting only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. In the opinion the court said: "In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

The court further held that interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

The afore-cited case has been followed in a large number of cases, too numerous to cite. See note No. 3, and cases cited thereunder, on pages 859, 860, and 861 of the annotation above cited. This class of cases is commonly referred to as "drummer cases."

The rule as announced in Robbins v. Shelby County Taxing District, *supra,* was followed in Menke v. State, 70 Neb. 669, 97 N. W. 1020, and Purchase v. State, 109 Neb. 457, 191 N. W. 677. See, also, State v. Smith, 135 Neb. 423, 281 N. W. 851.

In addition to the cases cited, the appellants rely on Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275, decided December 23, 1940, involving one of the same appellants as in the instant case. The factual situation was the same as in the instant case. Before using the room to display merchandise, the appellant

paid under protest the tax required by the law of North Carolina which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of obtaining retail orders. The appellant was not a regular retail merchant of the state and admittedly was within the statute. The contention was that the tax was unconstitutional, especially in view of the commerce clause. The statute was held invalid under the federal Constitution as a discrimination against interstate commerce. The court said: "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, * * *." The court further said: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, the court pointed out that the line of decisions following Robbins v. Shelby County Taxing District, *supra,* read in their proper historical setting rested on the actual and potential discrimination inherent in certain fixed-sum taxes.

The appellees contend that Best & Co. v. Maxwell, *supra,* may be distinguished from the instant case. Later in the opinion we will briefly review the appellees' contention in such respect.

The appellants also rely on Nippert v. City of Richmond, 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760, the most recent decision of the Supreme Court of the United States involving a fixed-sum tax on solicitation of orders for the sale of goods to be shipped interstate into the taxing state. An ordinance of Richmond, Virginia, levied a license tax upon engaging in business as solicitor, and

required a license to be obtained from the director of public safety. The defendant went from place to place in the city of Richmond soliciting orders on behalf of a garment company of Washington, D. C., for the sale thereof. She received a down payment sufficient to pay her commission from the purchaser, and the orders were sent to the home office in Washington and the garments sent through the mail c. o. d. for the balance, to the purchaser. Defendant was convicted and fined. The Supreme Court of Appeals of Virginia affirmed the conviction and fine. The Supreme Court of the United States reversed such holding and held that the ordinance so applied violated the commerce clause of the federal Constitution, following Robbins v. Shelby County Taxing District, *supra.* The effects of the tax were not only prohibitive in an absolute sense, in many applications, but discriminatory in favor of the local merchant as against the out-of-state merchant. The court further said: "If the matter is to be settled solely on the basis of authority, nothing more is required than bare reference to the long list of drummer decisions, which have held unvaryingly that such a tax as Richmond has exacted cannot be applied constitutionally to situations identical with or substantially similar to the facts of this case."

The court cited Real Silk Hosiery Mills v. City of Portland, *supra,* in which a municipal ordinance requiring solicitors to pay a license fee was held unconstitutional as a forbidden burden upon interstate commerce when applied to an out-of-state corporation whose representatives solicited orders for subsequent interstate shipment. Cf. Best & Co. v. Maxwell, *supra.*

The appellees contend: That the foregoing cited cases, the so-called "drummer cases", afford no immunity to the appellants in the instant case. Since 1938 new concepts of permissible taxation embraced by the United States Supreme Court appear in the more recent, modern decisions, citing Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, decided in

1938, the contention being that in the cited case the Supreme Court of the United States departed from the prior formalistic approach to the taxing phase of the commerce question and conceded the compelling economic needs of the state and expressed the realization that the commerce clause does not compel complete immunization of interstate commerce to state taxation. The rationale of this new approach was the logical result of prior decisions, which condemned only undue or unreasonable burdens by the states upon the national commerce. Therefore the "drummer cases," including Menke v. State, *supra,* and Purchase v. State, *supra,* are outmoded.

It is further contended that the new trend appears in Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272; McGoldrick v. Berwind-White Coal Mining Co., *supra,* and other cases cited. There appears certain language in some of the cited cases to the effect that there is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field.

The appellees contend that an occupation tax of $15 a day in the instant case constitutes a modest and reasonable fee, and requires merely the appellants to bear their fair share of the cost of local government.

Other language appearing in decisions cited by the appellees is as follows: "The commerce clause was not designed or intended to outlaw all state taxes bearing 'directly' on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all *direct* state taxes, can be said to produce those effects." Concurring opinion by Rutledge, J., in Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 205.

Consequently the trend of recent decisions has been towards sustaining state taxes formerly regarded as outlawed by the commerce clause.

The trend, as pointed out in Vol. I, Prentice-Hall Corporation Service, paragraph 7062, is: "In the field of taxation, the modern trend is to allow the states to assess certain types of taxes on corporations doing interstate business, provided the tax or taxes are not discriminatorily burdensome on interstate commerce." And in paragraph 7064: "Even exclusive interstate commerce must apparently now pay its way, the modern trend seeming to regard all business as being subject to nondiscriminatory state taxes. No improper burden will ordinarily be found to exist unless interstate commerce is subjected to greater tax burden than local commerce, or unless it is taxed purely by reason of its interstate character."

An analysis of the principal cases cited by the appellees to show the new trend or approach discloses the following: In Western Live Stock v. Bureau of Revenue, *supra,* the state of New Mexico levied an occupation tax on the business of publishing newspapers and magazines of two percent on the gross receipts on the sale of advertising. The tax was upheld as applied to a magazine with an interstate circulation. The office and place of business of the publishers were in the state of New Mexico. The court neither directly nor by implication overruled the "drummer cases."

The case of Adams Mfg. Co. v. Storen, *supra,* involved the general gross income tax which of recent years has been adopted by some of the states, in this instance Indiana. The case in no manner overrules the "drummer cases."

In the case of Gwin, White & Prince, Inc. v. Henneford, *supra,* the state of Washington imposed an occupation tax for the act or privilege of engaging in business activities within the state of Washington at the rate of one-half of one percent of the gross income of the busi-

ness. The statute was held unconstitutional as applied to the receipts of a Washington corporation from its operations in marketing in other states fruit grown in Washington and Oregon.

The cases cited by the appellees with reference to the development of the new approach or trend have not overruled Robbins v. Shelby County Taxing District, *supra,* which has met the test and has been reaffirmed in Best & Co. v. Maxwell, *supra,* where the facts were substantially the same.

As previously stated, the appellees contend there is a distinction between the instant cases and the case relied upon by the appellants, Best & Co. v. Maxwell, *supra.* The basis of this contention is that the $250 annual occupation tax required of a nonresident merchant as against a $1 occupation tax required of a local merchant, makes a disparity that is evident, which results in the state of North Carolina not requiring the plaintiff to pay merely a fair share of the costs of local government, but it was enacting legislation obviously hostile or practically discriminatory towards interstate commerce. In the instant case the $15 per day occupation tax imposed by the city is within the orbit of state taxes on interstate commerce as being fair and reasonable, and there is no discrimination as between merchants outside the state and local merchants. We are not in accord with the appellees' contention in such respect. Considering the requirements of the ordinances in question of a nonresident merchant, the tax of $15 per day, plus a license fee of $1, the requirement of a $5,000 surety bond, medical certificates from a Nebraska physician, and a personal appearance to obtain the license before the city clerk, and in view of the fact that the appellants are subject to the same or similar taxes as the local merchant in the state in which the appellants are organized and have their principal place of business, and the further fact that in many cases with the same subject matter as in the instant

case taxes were struck down on a similar statement of facts involving payment of a less sum as occupation tax, we conclude that the distinction as contended for by the appellees between the instant case and Best & Co. v. Maxwell, *supra,* is without merit. The ordinances are discriminatory and unreasonable, in violation of the commerce clause of the Constitution of the United States which prohibits discriminatory regulation of interstate commerce, whatever may be its form or method. The ordinances challenged in this case are a clear attempt to regulate interstate commerce.

The appellees also contend that the same ordinance has been approved by the Supreme Court of this state, citing Erwin v. City of Omaha, 118 Neb. 331, 224 N. W. 692, where an ordinance imposing a tax of $15 a day for the privilege of operating a "rolling store" on the streets of the city was held to be a reasonable regulation, and the tax was held constitutional. The ordinance, although restrictive, was permissible because a municipality may impose taxes on local business that have a restraining or repressive effect, or even to prohibit the occupation or privilege. This case involved a local merchant, and a factual situation such as appears in the instant cases involving interstate commerce was not present. The case is not in point.

A review of the stipulated facts in the instant case shows that the appellants' activities in the city of Omaha were confined exclusively to soliciting orders for the sale of goods in another state which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce and not a local or intrastate act separable therefrom and subject to taxation or licensing by the city of Omaha, especially as provided for by the ordinances in question. We conclude that the ordinances in question directly and unlawfully regulate and burden interstate commerce in violation of article 1, section 8, of the Constitution of the United States.

Other assignments of error have been presented but need not be determined in view of our holding.

The decree of the district court is hereby reversed and the cause remanded with instructions to enter a permanent injunction against the appellees, defendants below, restraining them from enforcing the ordinances in question against appellant Best & Co., Inc.

REVERSED AND REMANDED.

FRANK BROTHERS FOOTWEAR, INC., APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, ASSOCIATED RETAILERS OF OMAHA, A CORPORATION, ET AL., INTERVENERS, APPELLEES.

33 N. W. 2d 161

Filed June 29, 1948. No. 32370.

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

Fraser, Connolly, Crofoot & Wenstrand, Strauss, Reich & Boyer, W. H. Wright, and *M. James Spitzer,* for appellant.

Edward F. Fogarty, Edward Sklenicka, Einar Viren, Ralph E. Svoboda, and *J. A. C. Kennedy, Jr.,* for appellees.

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

MESSMORE, J.

This case is controlled by Best & Co., Inc., v. City of Omaha, *ante* p. 868, 33 N. W. 2d 150.

The decree of the district court is hereby reversed and the cause remanded with instructions to enter a permanent injunction against the appellees, defendants below, restraining them from enforcing the ordinances in question against the appellant Frank Brothers Footwear, Inc.

REVERSED AND REMANDED.

RUDOLPH TESAR, APPELLEE, v. VERN A. BARTELS ET AL., APPELLANTS.

32 N. W. 2d 911

Filed June 29, 1948. No. 32330.

1. **Replevin.** In an action of replevin the inquiry is of the property in possession of and wrongfully withheld from the plaintiff by the defendant at the commencement of the suit. There can be no recovery of damages by plaintiff for property of which the defendant had not possession or control when the case was begun.
2. **Evidence.** Possession being a fact continuous in its nature, when its existence is once shown it will be presumed to continue until the contrary is proved.
3. **Replevin: Evidence.** Evidence of possession of personal property prior to the commencement of a replevin action, unless explained, is presumed to continue and, if believed, forms a sufficient basis for a verdict in favor of the plaintiff.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded with directions.*

Coffey & Jorgensen, for appellants.

James J. Fitzgerald and *Eugene F. Fitzgerald,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

BARTOS, District Judge.

This action in replevin was commenced in the municipal court for the city of Omaha, Nebraska, by the appellee, Rudolph Tesar, against Vern A. Bartels and Viola H. Bartels, appellants. For convenience the appellee will be hereafter designated as plaintiff and the appellants as defendants.

The plaintiff seeks to recover from the defendants the possession of over 1,100 articles of personal property enumerated in the affidavit for replevin. Most of the articles are such as are usually used in the operation of a beer tavern and restaurant.

The affidavit in replevin was filed on the 9th day of May, 1946. A writ of replevin was issued from said court on the same day. The officer's return to the writ discloses that on the same day he replevied the goods and chattels enumerated in the writ and that he left them in possession of the defendants at plaintiff's request.

An appeal was perfected from the municipal court to the district court for Douglas County, Nebraska. A trial to a jury was had and the jury returned a verdict for the plaintiff as follows: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the said Plaintiff and that he is entitled to the possession of said goods, chattels and personal property or the reasonable value of $932.21."

The court then entered the following judgment: "Whereupon, the above verdict of the jury having been received and entered, it is considered, ordered and adjudged that the right of property and the right of possession of" (describing all of the articles of personal property as enumerated in the affidavit in replevin) "taken under the writ of replevin in this cause, at the time of the commencement of this action be, and hereby is, confirmed in the defendants, and that the plaintiff return said described property into the possession of the defendants.

"It is further considered, ordered and adjudged, in event return of said property cannot be made, that the said defendant have and recover of and from the plaintiff the sum of $932.21, the value of said property as by the verdict of the jury assessed."

From this judgment the defendants appealed to this court. The defendants base their claim for the reversal of the case on two propositions, to-wit: (1) "That there is not sufficient evidence to show that the defendants had at any time any of the property belonging to the plaintiff," except a few specified articles, and (2) "There was no evidence that the defendants had at the commencement of the replevin suit, to-wit, May 9, 1946,

any of said property in their possession or under their custody or control," except a few specified articles.

As these propositions involve a review of the evidence introduced in the case, a brief outline of events as disclosed by the record leading to the transactions involved will materially aid in following the evidence hereafter outlined.

James Prohaska was, on and prior to April 26, 1943, the owner and operator of two beer taverns in the city of Omaha, one operated under the name of the "Gay Bar" and the other under the name of the "Arch Bar." The contents of the Arch Bar were sold at public sale by the constable sometime prior to April 26, 1943, but the date of sale is not satisfactorily shown by the evidence. Prohaska discontinued the operation of the Gay Bar prior to April 26, 1943. On that day Prohaska and the defendants entered into a partnership agreement, whereby they were to operate the Arch Bar, which in due time was named and operated as the "Union Labor Bar." The plaintiff in this action was acting as attorney for Prohaska in the formation of the partnership, during its stormy continuation, and until its final dissolution. He advanced money for Prohaska during his illness and hospitalization and at other stated periods. In consideration of the legal services rendered and the money so advanced, a bill of sale was executed to the plaintiff by Prohaska on the 29th day of November, 1945, covering the articles of personal property involved in this litigation. The partnership between the defendants and Prohaska was dissolved March 25, 1944.

The plaintiff contends that the property involved in this litigation was removed with other property by Prohaska from the Gay Bar to the Arch or Union Labor Bar after the formation of the partnership and while the Arch or Union Labor Bar was under the sole control and management of the defendants, a demand was made on the defendants for the delivery of the property, and the defendants refused to comply therewith.

The defendants contend that they never received any of the involved personal property into their possession, except a few specific articles for which they settled with Prohaska at the time of the dissolution of the partnership. They further contend that they bought most of the questioned property at a constable's public sale when the contents of the Arch Bar were sold before the formation of the partnership.

Prohaska testified that prior to 1943 he operated the Arch Bar for over five years and also operated another bar named the Gay Bar. He and the defendants, on the 26th day of April, 1943, entered into a partnership for the operation of the Arch Bar for a period of ten years. They renamed the place and thereafter it was known as the Union Labor Bar. The defendants had the complete management of the place and the witness took no active part in its management or its actual operation. Difficulties between the partners commenced after four or five months of operation and the partnership was dissolved sometime in March, 1944. The witness, in the early part of May, 1943, made a correct and accurate list of all the equipment that he moved from the Gay Bar into the Arch or Union Labor Bar. The list was introduced in evidence as exhibit No. 5 and it showed some articles marked out by a line drawn through them. These articles were from time to time removed by the witness and a receipt for them given to defendants. The articles not marked out are the articles involved in this lawsuit. He further testified that he was at the Union Labor Bar when the articles were delivered and placed there in the possession of the defendants. He further testified that the night before the trial of the case he went to the Union Labor Bar and found some of the articles which he designated on exhibit No. 6 by the letter "O". This exhibit was another list prepared by the witness and introduced. He further testified that on July 30, 1945, he, the defendants, the plaintiff, and an auditor met at the Union Labor Bar by prearrangement and went over

the property item by item. The defendants did not dispute any of the articles except the dishes and after he pointed out the pattern on them Bartels did not dispute his ownership of them, but later on would not permit him to remove any of the property except some little odds and ends. He further testified that all of said articles were hauled from the Gay Bar to the Arch Bar by a drayman and that he never gave the defendants permission to sell or to retain and use any of the items placed there by him.

The plaintiff testified on cross-examination that he had personal knowledge that the goods as described in the inventories were there at the time the bill of sale was executed to him by Prohaska and that some of the goods were there on May 9, 1946, but he was unable to enumerate them item by item.

The drayman and his helper on behalf of the defendants testified that they did not take any of the articles from the Gay Bar to the old Arch Bar but stored them in a building designated as Jensen Laundry.

The defendant Vern A. Bartels testified that at and prior to the time of the dissolution of the partnership on April 24, 1945, they did not have in their possession any of the articles enumerated in exhibit No. 6, the same being the articles involved, except some plywood and some two by fours which he bought or agreed to buy from Prohaska. He further claimed that some of the articles involved were bought by him from Fiedler at the constable's sale, or from Prohaska, or from other persons; that some of the articles in dispute were stored in the Jensen Laundry building. He further testified that none of the articles involved were in defendants' possession on May 9, 1946, when the affidavit for replevin was filed.

The constable who executed the writ of replevin testified that he did not see the property, but defendant Bartels told him that some of the property was there but "he didn't know where it was at." He left everything

in the place because the plaintiff told him to do so. He did not know which items were in defendants' possession.

The defendants argue that the plaintiff has utterly failed to prove that the property in dispute was in defendants' possession on the 9th day of May, 1946, at the time of the commencement of this action in the municipal court of Omaha and therefore there can be no recovery of the property or damages by the plaintiff from the defendants.

While the defendants' answer alleged, after denying the ownership and the right to possession of the property in the plaintiff, that the transfer of title to the property by Prohaska to the plaintiff was made without consideration and in furtherance of a conspiracy between them to fraudulently place title to said property in plaintiff's name for the purpose of defeating Prohaska's creditors, the case was actually tried and submitted to the jury on the sole issue: Was there a wrongful detention of the property by the defendants at the time of the commencement of the action? The defendants strenuously contend that there was no evidence introduced by the plaintiff that the defendants had possession of the property on May 9, 1946, when the replevin action was commenced and therefore the plaintiff failed to establish his right to recover. The defendants anchor their contention on the holdings of this court in several cases where the following rule of law has been announced, to-wit: "In an action of replevin the inquiry is of the property in possession of and wrongfully withheld from the plaintiff by the defendant at the commencement of the suit. There can be no recovery of damages by plaintiff for property of which the defendant had not possession or control when the case was begun." Burr v. McCallum, 59 Neb. 326, 80 N. W. 1040, 80 Am. S. R. 677. The defendants in support of their contention also cite to the same effect Heidiman-Benoist Saddlery Co. v. Schott, 59 Neb. 20, 80 N. W. 47; Depriest v. McKinstry, 38 Neb. 194, 56 N. W. 806; Wilkins v. Redding, 70 Neb.

182, 97 N. W. 238; and Frank v. Stearns, 111 Neb. 101, 195 N. W. 949. That undoubtedly is the accepted rule of law in all jurisdictions and must be adhered to, but after reading the cases we do not believe they go to the extent of holding that it is necessary to show that the plaintiff or his witnesses actually saw the property in the possession of the defendant on the day the replevin action was brought. If that be a necessary requirement, very few replevin actions could be maintained. The plaintiff would be denied the right of inspection by the defendant. The property may consist, as in this case, of a large number of items and an inventory necessarily taken, all of which could be and undoubtedly would be frustrated by the defendant. Other reasons suggest themselves why that, in the majority of cases, would be impossible to establish.

If testimony is introduced from which the jury could reasonably infer possession of the property on the date of the commencement of the action, that is all that should be required.

"It is well established that when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." 20 Am. Jur., Evidence, § 207, p. 205.

This court has applied the foregoing rule of law in several cases, none of which however were actions in replevin. Davenport v. Intermountain Railway, Light & Power Co., 108 Neb. 387, 187 N. W. 905; Lincoln Joint Stock Land Bank of Lincoln v. Bexten, 125 Neb. 310, 250 N. W. 84; Reitz v. Petersen, 131 Neb. 706, 269 N. W. 811; Finegold v. Union Outfitting Co., 110 Neb. 202, 193 N. W. 331.

That this rule of law applies in replevin actions has been held in the case of Wails v. Farrington, 27 Okla. 754, 116 P. 428, 35 L. R. A. N. S. 1174, wherein a replevin

action was brought to recover possession of a certain stock of jewelry or its value. It appears that possession of the jewelry was delivered to defendant February 15, 1904, the action was commenced December 9, 1904, and the court held that, " 'possession being a fact continuous in its nature, when its existence is once shown, it will be presumed to continue until the contrary is proved.' " This rule was followed in another replevin action, Bardon v. Endejan, 128 Okla. 293, 262 P. 693, decided in 1928, to recover possession of a diamond ring. The court after citing the fifth paragraph of the syllabus in the Wails v. Farrington case, *supra,* said: "The defendant having been shown to be in possession of the property sought to be recovered prior to the commencement of this action, the burden was upon him to show that he had parted with such possession prior to the commencement of the action, and the burden thus being upon him, it was not error for the trial court to overrule the demurrer to the evidence."

The Wails v. Farrington case, *supra,* was approved of in another replevin action, Beck v. Day, 178 Okla. 310, 62 P. 2d 1014, decided in 1936, involving the right of possession of a certificate of stock, delivered according to the testimony to the defendant about July 1927 and was never returned. The action was commenced April 24, 1929.

The Supreme Court of Oklahoma in the Wails v. Farrington case, *supra,* based its decision on the case of Nichols v. Dodson Lead & Zinc Co., 85 Mo. App. 584, where the Missouri court on page 586 said: "It is insisted that there is no evidence that the appellant was in possession of the property at the time the suit was instituted. This contention is not well founded. The evidence is that the zinc company had been in possession of the chattels just prior to the institution of the suit, and that it sold them on the day it was instituted, but there is nothing to show when (if ever) the property was delivered to the purchaser. There being proof of a previous possession

by the company the onus was on it to show that it had parted with it prior to the beginning of the action."

The general rule of law as stated in American Jurisprudence, *supra,* having been adopted by this court, no valid reason exists why it should not be applied with the same force and effect in a replevin action. There was sufficient evidence of prior possession introduced in this case to submit the question to the jury. The jury having resolved the same in favor of the plaintiff, this court must adopt the verdict of the jury as final for it is elementary that disputed questions of fact, and the credibility of witnesses as well, are for the jury.

It is apparent from the record in this case that the judgment rendered is not in accordance with the verdict of the jury and that all parties to this action in the district court apparently overlooked the discrepancy between the verdict and the judgment entered. We have come to the conclusion that the verdict of the jury is correct and the same should be upheld. The judgment erroneously rendered on the verdict should be reversed. Judgment in conformity with the verdict should be entered by the district court as of the date of the verdict, and it is so ordered with all costs taxed to appellants.

REVERSED AND REMANDED WITH INSTRUCTIONS.

WILLIAM G. SCHMEHL, APPELLANT, V. BUFFALO COUNTY, NEBRASKA, ET AL., APPELLEES.

32 N. W. 2d 915

Filed June 29, 1948. No. 32361.

SUPPLEMENTAL OPINION

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. On oral argument on motion for rehearing. See *ante* p. 277, 30 N. W. 2d 882, for original opinion. *Affirmed.*

S. E. Torgeson, L. Verne Halcomb, and *Bernard F. O'Brien,* for appellant.

O. A. Drake, for appellees.

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

WESTERMARK, District Judge.

The appellant, William G. Schmehl, hereinafter called defendant, has requested a rehearing in this case. The former opinion is published *ante* p. 277, 30 N. W. 2d 882. That part of our opinion relative to constructive service seems too general and might be interpreted to be in conflict with former holdings of this court. Therefore, that part of the opinion relating to service by publication on the defendant is hereby clarified.

The applicable part of the affidavit for service by publication in the tax foreclosure action by Buffalo County relating to the defendant herein is as follows: "* * * that the defendants of the respectively enumerated causes of action named following are non-residents of the State of Nebraska, or such defendant's whereabouts, if in this state, and residence are unknown to plaintiff and its attorney; * * * 729, William G. Schmehl and ——— Schmehl, first real name unknown, his wife."

This affidavit came within the provisions of section 25-518, R. S. 1943, which, insofar as material here, provides: "Before service can be made by publication an affidavit must be filed that the case is one of those mentioned in section 25-517, and that the defendant to be served is a nonresident of this state * * *; or that such defendant's whereabouts, if in this state, and residence are unknown to the plaintiff or person in whose behalf such affidavit is made."

Pursuant to the affidavit the district court for Buffalo County ordered that service of process be had upon "William G. Schmehl and ——— Schmehl, first real

name unknown, his wife," by publication. This was done.

It will be observed that section 25-518, R. S. 1943, does not provide that an order of the court shall or may be had and we have held that no such order is necessary. See West Nebraska Land Co. v. Eslick, 102 Neb. 761, 169 N. W. 729.

The facts in this action show at all times the defendant was a resident of Cheyenne County, Nebraska. We know of no case wherein this court has held that, when service was obtained by proceeding under section 25-518, R. S. 1943, although an order of the court was obtained, jurisdiction of the person of the defendant was obtained who was actually a resident of the state. Under those facts, the court had no jurisdiction of the person of the defendant. Further, there having been no proper service of process by publication on the defendant, the court did not acquire jurisdiction of defendant's property involved in the action. " 'This process, being first in order, is also of primary importance in the institution of a suit either at law or in equity; for its due service, actually or constructively, is necessary to give the court jurisdiction either of the defendant, in personal actions, or of the thing, in actions in rem.' " Armstrong v. Griffith, 94 Neb. 515, 143 N. W. 461.

It may be well to point out that if the affidavit and order had been under subsection six of section 25-517, R. S. 1943, the result would have been exactly the opposite.

In 1909 the Legislature amended section 77 of the Code of Civil Procedure by adding a sixth subdivision thereto as follows: "Sixth,- In all actions wherein the subject matter is as described in the First or Fourth Sub-divisions of this section and where the residence or place of abode of any defendant or defendants are to the plaintiff and his attorney unknown, whether said defendant or defendants may be residents or non-residents of the state of Nebraska, that in such cases the fact that

the residence or place of abode of said defendants are unknown to said plaintiff and his attorney shall be set out in the *vaification* to the petition filed by plaintiff in such action. That after the filing of such petition the plaintiff may apply to the District Court or to the Judge thereof in vacation, setting out in such application that the said defendant or defendants cannot be found in this state and that the residence or place of abode of such defendants are to said plaintiff and his attorney unknown and that by reason thereof personal service cannot be had upon said defendants, and praying for an order authorizing service upon such defendants by publication. The Court or Judge thereof in vacation shall hear said application and shall require any other and further showing relative to the allegations in such application and upon the full hearing of such application the Court or Judge thereof, if in vacation, shall, if satisfied that the residence and place of abode of said defendants or any of them are to said plaintiff and his attorney unknown and by reason thereof personal service cannot be had upon such defendant, enter an order in said action directing service to be had upon said defendants by publication, which publication shall be in manner and form as provided by the Code of Civil Procedure of the State of Nebraska for obtaining constructive service upon non-resident defendants." Laws 1909, c. 161, § 77, p. 575.

In this subsection the Legislature has authorized the court to enter an order and in West Nebraska Land Co. v. Eslick, *supra,* we said: "Following the familiar rule that such a construction should be given as will harmonize apparently conflicting provisions of a statute, we hold that, in cases where it is known that the defendant, or defendants, are nonresidents of the state, service by publication may be had in the same manner as before the amendment; but where a defendant, or defendants, cannot be found in this state, and the pleader is in doubt as to whether he is, or they are, residents or nonresidents,

the proper practice is to make the statutory averments in the verification to the petition, and then apply to the district court for an order for publication, as the amendment provides."

Subsequently, in 1921, the Legislature amended this same subsection six to read as follows: "Sixth - In all actions wherein the subject matter is as described in the first or fourth subdivisions of this section whether the defendant be a resident or non-resident of this state, wherein it is alleged in the petition or other pleading that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action, and when the court in which such action is docketed or a judge thereof, being satisfied that sufficient investigation has been made, shall make an order in such action directing that service be had upon such defendant or defendants by publication." Laws 1921, c. 222, § 81, p. 798.

Pursuant thereto in County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569, we held: "In certain kinds of actions subsection six of section 25-517, R. S. 1943, provides for service by publication upon a resident of the state when, after diligent investigation and inquiry, the whereabouts, if in this state, or residence of such person cannot be ascertained and is not known.

"When a sufficient affidavit therefor has been filed and, as provided by subsection six of section 25-517, R. S. 1943, an order of the court entered finding that sufficient investigation has been made and ordering service by publication, such order is conclusive and binding upon the parties until modified, vacated or set aside either on appeal or in an equitable or statutory proceeding instituted for that purpose and is not subject to collateral attack.

"When, pursuant to such authorization, a sufficient notice is published in the manner provided by statute and

a judgment or decree is entered thereon, such judgment or decree is not void because of lack of jurisdiction of the parties so served. It is final and binding on the parties until modified, vacated or set aside either on appeal or in an equitable or statutory proceeding instituted for that purpose and is not subject to collateral attack."

The defendant filed objections to confirmation before the hearing on confirmation. By doing so he submitted himself and his property to the jurisdiction of the court. The law applicable thereto is set forth in the former opinion and a further discussion of the law applicable thereto would serve no useful purpose here.

The request for a continuance for the hearing on confirmation was addressed to the county attorney. As pointed out in the former opinion, he did nothing to mislead the defendant. Further, the application for a continuance would have been proper only if made to the court. This was not done.

The appeal presents nothing upon which relief in favor of the defendant can be predicated. Therefore, the request for a rehearing is denied and, as in the former opinion, the judgment of the district court is affirmed.

AFFIRMED.

INDEX

Abatement and Revival.

The only defenses available against an application to revive are that there is no judgment to revive, that the judgment is absolutely void, or that the judgment was paid or otherwise discharged. *Gergen v. Western Union Life Ins. Co.* 203

Accession.

Ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land. *Joiner v. Pound* 321

Accord and Satisfaction.

Payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. *Abrahamson v. Brown* 267

Actions.

1. Where the plaintiff and defendant both seek equitable relief in their pleadings, and the cause is tried and decree entered in equity, the defendant cannot thereafter successfully complain that the form of the action was changed from one in law to one in equity. *Linville v. Kowalski* 402
2. A difference between the laws of two states, whether in statutory provisions or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state. *Whitney v. Penrod* 636
3. A petition for a declaratory judgment, seeking to hold a statute unconstitutional, is demurrable when the only defendants are two county officers who have no interest in upholding the statute or having it declared invalid. *Miller v. Stolinski* 679
4. In an action for a declaratory judgment, the opposition to the plaintiff's demand must come from a source competent legally to jeopardize his rights. *Miller v. Stolinski* 679

5. The Declaratory Judgments Act is applicable only where there is a present actual controversy, all interested persons are made parties, and justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent, or uncertain. *Miller v. Stolinski* 679

Adoption of Children.

Adoption proceedings under our statutes determine more than mere custody of the adopted child. Such proceedings create a status of parent and child between the adoptive parents and the minor child. *In re Application of Schwartzkopf* 460

Adverse Possession.

1. To secure a title by adverse possession, the plaintiff must prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years. *Curren v. Certain Parcel of Land* 477
2. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. *Stubblefield v. Osborn* 566
3. To obtain an easement by prescription, possession must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. *Stubblefield v. Osborn* 566
4. A permissive use of land of another, under license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. *Stubblefield v. Osborn* 566
5. To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. *Stubblefield v. Osborn* 566

Animals.

A brand on livestock is only prima facie evidence of ownership which may be rebutted. *Bendfeldt v. Lewis* 107

Appeal and Error.

1. The presumption is in favor of the validity of the service of a bill of exceptions. It is sufficient to sustain the bill that it does not appear that the service was not within the time allowed. *Haffke v. State* 83
2. In action of replevin for animal, evidence was sufficient to support verdict. *Bendfeldt v. Lewis* 107
3. Findings of fact made on appeal become the law of the case; and on retrial such findings are binding unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial. The burden of showing a difference rests upon the party making the claim. *Glissmann v. Bauermeister* 131
4. The rule with reference to findings of fact on appeal has the same force and effect where the remand is with directions as in the case of remand for a retrial of issues. *Glissmann v. Bauermeister* 131
5. Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. *Herlan v. Bleck* 197
6. In accounting action, evidence was sufficient to sustain judgment and warrant recovery on plaintiff's cross-appeal. *Herlan v. Bleck* 197
7. In an error proceeding from the county court to the district court, the latter court must look to the transcript of the proceedings of the county court filed with the petition in error to ascertain what happened there. *In re Estate of Vance* 220
8. An error proceeding is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript. *In re Estate of Vance* 220
9. Error cannot be predicated on the insufficiency of the evidence as a matter of law to support the findings and judgment of the county court from which error proceedings were prosecuted, where all the material and relevant evidence was not preserved in a bill of exceptions. *In re Estate of Vance* 220
10. Where the evidence is not preserved in a bill of exceptions, it will be presumed by the district court

and by this court that the evidence adduced in the county court was sufficient to sustain the findings of fact made in its decree and the judgment will be affirmed where the transcript fails to disclose error prejudicial to the party prosecuting error proceedings therefrom. *In re Estate of Vance* 220

11. A judgment will not ordinarily be reversed for refusal to give tendered instructions where other instructions given by the court fairly and correctly covered the issues involved in the tendered instructions. *Allen v. Massachusetts Mutual Life Ins. Co.* .. 233

12. In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to the specific evidence against which objection is urged. *Joiner v. Pound* 321

13. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused. *Joiner v. Pound* 321

14. An assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given. *Joiner v. Pound* 321

15. Error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court. *Joiner v. Pound* 321

16. If an appellant seeks reversal and dismissal of an action, and the appellee consenting thereto prays for the same result, the court will ordinarily reverse and dismiss the cause and tax costs to the appellee. *In re Estate of Simon* 382

17. While the law requires the Supreme Court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, the court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. *Pavel v. Goehner* 384

18. When, in an equity action, a motion to amend a

pleading is improperly overruled by the trial court and the case is before us for review, we will consider the pleading as having been amended and determine the question of the sufficiency of the evidence in support thereof. *Curren v. Certain Parcel of Land* 477

19. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism. *Yost v. State* 584

20. Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence. *Gee v. City of Sutton* 603

21. Where a defendant in a criminal proceeding negligently fails to file a transcript and petition in error in this court within three calendar months after the rendition of the judgment or the making of the final order complained of, a motion to dismiss the petition in error must be sustained. *Iron Bear v. State* 634

22. A finding of fact by the court in a law action, where a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong. *Witthauer v. Employers Mutual Casualty Co.* 728

23. The assignment of error must point out and specify the particular evidence of which complaint is made. *Colbert v. Miller* 749

24. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed. *Torres v. Bollman* 762

25. When it is sought to review the judgment of a district court in a law action, no motion for a new trial having been filed, the Supreme Court will examine the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Shipley v. McNeel* 790

26. Statutes shortening the time within which appeals may be taken do not apply to judgments, decrees, or

orders rendered or entered before the statute took effect. *Cozad v. McKeone* 833

27. Where the order appealed from was rendered and entered after the effective date of an amendatory statute, the statutory requirements for preparing, serving, and settling a bill of exceptions are governed by that statute. *Cozad v. McKeone* 833

28. The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment. *Cozad v. McKeone* 833

29. In the absence of a bill of exceptions the appellate court cannot determine that any instruction, however erroneous, was prejudicial, since the evidence may have been such as would have justified the trial court in directing the verdict which the jury returned. *Cozad v. McKeone* 833

30. In a case where the opposing parties at the close of all the evidence, without reservation, move for a directed verdict, such parties invite the court to discharge the jury, determine the facts, and apply the law thereto; and error cannot be predicated upon the acceptance of the invitation. *National City Bank of Cleveland v. Jones* 844

Appearances.

A party in a foreclosure action, upon whom service is defective, and who objects to confirmation on the ground of jurisdiction and for other reasons, suggesting a resale, makes a general appearance for all purposes and is in no position thereafter to complain for want of jurisdiction. *Schmehl v. Buffalo County* 277

Assault and Battery.

1. A battery is defined as an actual infliction of violence on the person, or an unlawful, that is, an angry, rude, insolent, or revengeful touching of the person. *Newman v. Christensen* 471

2. An assault and battery is not negligence. The former is intentional; the latter is unintentional. *Newman v. Christensen* 471

3. The action for a battery, which under the provisions of statute must be brought within one year, is an action founded upon an intentionally administered injury to the person, such an injury as could be

made the basis of a criminal prosecution. *Newman v. Christensen* 471

Attorney and Client.

1. Only when provided for by statute can an attorney's fee be allowed and taxed as costs. *County of Sarpy v. Gasper* 51
2. When provided for by statute an attorney's fee is payable to the party the statute designates. *County of Sarpy v. Gasper* 51
3. The Supreme Court may allow an employee a reasonable sum as attorney's fees for proceedings in such court when the employer appeals from the district court to the Supreme Court and fails to obtain any reduction in the amount of the award. *Sporcic v. Swift & Co.* 246
4. A recovery of counsel fees and costs incurred will not be allowed as element of damage in a suit on a bond given for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case. *Williams v. Hallgren* 621
5. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees and costs incurred by the trial of the case are proper to be allowed as damages caused by an injunction wrongfully issued. *Williams v. Hallgren* 621
6. A restraining order not being one of the main issues of a case, damages in the way of attorney's fees and costs incurred by its wrongful issuance are limited to those incurred in securing its dissolution, as distinguished from those incurred in the trial of the principal issues involved. *Williams v. Hallgren* 621
7. Attorney's lien statute, which should be liberally construed, does not require that the notice of an attorney's lien shall be in any specific form or that it shall be given in any particular manner. *Tuttle v. Wyman* 769
8. The purpose of notice of an attorney's lien is to protect innocent parties who have no notice or knowledge that an attorney claims a lien on the judgment, and a petition in intervention duly filed by an attorney to enforce his lien in the original action before effective dismissal or satisfaction thereof is of itself notice to the adverse party. *Tuttle v. Wyman* 769
9. Ordinarily, in the absence of an agreement therefor,

a lawyer has no lien for his services upon the lands of his client. However, if properly perfected, he does have a charging lien upon the judgment or any process of the court, which lien is enforceable by timely intervention in the original action upon any money or property recovered thereby for the satisfaction of his client's claim. *Tuttle v. Wyman* 769

10. An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto as soon as it is entered. *Tuttle v. Wyman* 769

11. Where a collusive settlement has been made by the parties to an action for the purpose of defrauding an attorney of his just compensation for services rendered and preventing the enforcement of his lien upon the judgment, the attorney may proceed by intervention in the original action and carry forward the litigation for the purpose of establishing and protecting his own rights and interests, justly determining the amount of his compensation, and enforcing collection thereof. *Tuttle v. Wyman* 769

12. An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. A lawyer cannot serve two masters; and the one he has undertaken to serve primarily is the court. *State ex rel. Nebraska State Bar Assn. v. Niklaus* 859

13. A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Niklaus* 859

14. Where events involved have extended over a period of many years, and evidence such a lack of appreciation of the obligations and proprieties of the legal profession that the court cannot further justify the respondent being held out to the public as possessed of the honor, rectitude, and responsibility which the office of attorney at law demands, attorney should be disbarred. *State ex rel. Nebraska State Bar Assn. v. Niklaus* 859

Automobiles.

1. As a general rule it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the headlights of his automobile. *Buresh v. George* 340
Dickman v. Hackney 367
2. The general rule requiring motorist to be able to stop within range of his vision has no application 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. *Dickman v. Hackney* 367
3. Under the law of Missouri, it is the duty of a driver of an automobile to keep a lookout on the highway in the direction the car is going in such manner as to see a condition which a person in the exercise of due care for his own safety and that of others would have seen under similar circumstances. *Whitney v. Penrod* 636
4. Under the law of Missouri, the driver of an automobile is required to exercise the greatest degree of care in its operation, and injury to a guest by failure to exercise such care renders the operator liable. *Whitney v. Penrod* 636
5. Under the law of Missouri, ordinary care upon the part of the driver of a motor vehicle requires him at all times and under all circumstances to anticipate and expect the presence of others on the highway, and to keep his machine always under control so as to avoid collision with them. *Whitney v. Penrod* 636
6. Under the law of Missouri, the test of control is the ability to stop quickly and easily, and when this result is not accomplished, an inference is permissible that the car was running too fast, or that a proper effort to control was not made. *Whitney v. Penrod* 636
7. Under the law of Missouri, the test of excessive speed is whether a motorist drove in a careful and prudent manner exercising highest degree of care with regard to situation and surroundings. *Whitney v. Penrod* 636
8. The presumption that an automobile in charge of its owner's employee is in the service of the owner is not evidence. The presumption vanishes when rebutted by evidence. The burden then rests on the party

asserting the fact to produce evidence to sustain his case. *Witthauer v. Employers Mutual Casualty Co.* 728

9. The emergency 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, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. *Roby v. Auker* 734

Bailments.

1. Statute defining larceny as bailee requires that there be a bailment of the property; that while so held that the bailee convert the property to his own use; and that such conversion must be with the intent to steal the same. *Yost v. State* 584
2. In order to prove a charge of larceny as bailee the burden is on the state to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. *Yost v. State* 584
3. The term bailment may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished. *Yost v. State* 584
4. In a prosecution for larceny of money by a bailee, where the transaction constituting the offense extends through different counties, the venue may be laid and the prosecution had in the county where the bailment arose, and where the defendant has to account for and pay over the money on demand to the one entitled to its possession. *Yost v. State* 584

Bonds.

The sheriff is obligated to faithfully discharge all duties required of him by law and he and the surety on his official bond are required to respond in damages to any person for a breach of this duty. *O'Dell v. Goodsell* 261

Cancellation of Instruments.

Where it is sought to cancel a deed or other convey-

ance for want of mental capacity of the grantor to make the instrument, the burden of proof is on the party alleging the mental incapacity to clearly establish that the mind of the grantor was so weak or impaired at the time of the execution of the instrument that he did not understand and comprehend the purport and effect of what he was then doing. *Kiihne v. Charf* 271

Children Born Out of Wedlock.

1. Where a statute provides that every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, a person claiming to be an heir under such statute has the burden of proving (1) that he is illegitimate, (2) that his alleged father was actually his illegitimate father, and (3) that the alleged father recognized the claimant as his illegitmate child in accordance with the statute. *In re Estate of Oakley* 556
2. Illegitimacy is a prerequisite to recovery under statute providing for acknowledgment of child born out of wedlock. The failure of proof of illegitimacy by one claiming to be an heir under the statute bars his right of recovery thereunder. *In re Estate of Oakley* 556

Commerce.

1. "Interstate commerce," within the commerce clause of the Constitution of the United States, ordinarily consists of purchasing of merchandise by a resident of one state from a resident of another state, and the delivery of the article of commerce and the transportation thereof. *Best & Co., Inc. v. City of Omaha* 868
2. The displaying of samples of goods in temporary quarters by traveling salesman of nonresident seller to be purchased in another state is an element in the negotiation for the sale, and, therefore, constitutes "interstate commerce" within the commerce clause of the Constitution of the United States. *Best & Co., Inc. v. City of Omaha* 868
3. Where a city imposes an occupation tax and requires a license for sale of goods or solicitation of orders, this constitutes an unlawful interference with interstate commerce as applied to solicitation of orders

for goods not within the state at the time but to be shipped if and when the orders are accepted from another state in fulfillment of the orders previously taken. *Best & Co., Inc. v. City of Omaha* 868

4. A municipal ordinance which levies a fixed-sum occupation tax and makes other requirements is invalid under the Constitution of the United States as a discrimination against interstate commerce as applied to nonresident merchants who took orders in the state and shipped interstate directly where no corresponding fixed-sum license was exacted of regular retail merchants for the privilege of doing business. *Best & Co., Inc. v. City of Omaha* 868

Conflict of Laws.

A difference between the laws of two states, whether in statutory provisions or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state. *Whitney v. Penrod* 636

Constitutional Law.

1. In the interpretation of a constitution, its terms must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers and of the people who adopted it. *State ex rel. Johnson v. Marsh* 1
2. In the interpretation of a constitution, a specific clause will be made effective as against a general clause in such manner as to give meaning to both, and the language of the specific clause will not be restricted by the general language, unless thereby the plain intent of the framers of such clauses and of the people who adopted them is thereby thwarted. *State ex rel. Johnson v. Marsh* 1
3. The Constitution of Nebraska allows the Legislature to fix the salary of any officer named therein in the first instance to begin at any time. *State ex rel. Johnson v. Marsh* 1
4. The Constitution of Nebraska prohibits the drawing of any money from the state treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the Auditor of Public Accounts thereon, and prevents the diversion of money from any appropriation made for any purpose or the taking thereof from any fund whatever by legislative resolution as distinguished

from legislative law enacted by bill in conformity with constitutional requirements. *Rein v. Johnson* 67

5. A constitutional provision requiring the existence of specific appropriations made by law is conservative, and, except as limited by the Constitution, secures to the Legislature plenary power to constitutionally enact laws prescribing how, when, and for what purposes public revenue derived from taxation shall be applied in carrying on the government of the state. *Rein v. Johnson* 67

6. The Constitution of Nebraska prohibits continuing legislative appropriations, and, unless reappropriated, all unexpended balances of appropriations of public revenue derived or to be derived from taxation and paid into the state treasury, automatically lapse into the general fund at the end of the fiscal quarter after adjournment of the next regular session of the Legislature. *Rein v. Johnson* 67

7. General appropriation bill of 1945 is not unconstitutional. *Rein v. Johnson* 67

8. It is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. *Sommerville v. Johnson* 167

9. The Constitution of this state is not a grant but a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. *Sommerville v. Johnson* 167

10. By an amendment in 1920, the people removed the prohibition against the creation of new executive departments previously in the Constitution, and did not restrict the power that the Legislature previously had to create boards, commissions, and agencies that are not executive departments. *Sommerville v. Johnson* 167

11. The terms "executive officers," "heads of such other executive departments," and "executive state office," used in the Constitution, mean such officers, departments, and offices as have comparable scope, functions, and purposes with the officers, departments, and offices specifically named in the Constitution. *Sommerville v. Johnson* 167

12. The Constitution does not restrict the power of the Legislature to create boards, commissions, and agencies that are not executive officers, heads of execu-

tive departments, or executive state offices within the constitutional meaning. *Sommerville v. Johnson* 167

13. The Nebraska Merit System Act does not create an executive department nor an executive state office within the terms of the Constitution, and is not unconstitutional because it did not receive a two-thirds majority of all members elected to the Legislature. Sommerville v. Johnson 167

14. In case of a conflict between the Constitution and a legislative enactment the statute must give way to the Constitution. *State ex rel. Bottcher v. Bartling* 491

15. Where there is a conflict between an act of the Legislature and the Constitution of the state the statute must yield to the extent of the repugnancy. *State ex rel. Bottcher v. Bartling* 491

16. The state is prohibited under the Enabling Act of Congress and the Nebraska Constitution from claiming benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation to keep inviolate such trust funds. *State ex rel. Bottcher v. Bartling* 491

17. A grant of specific power by the Legislature which is contrary to and out of harmony with the fundamental law is unconstitutional and void. *State ex rel. Bottcher v. Bartling* 491

18. Statutory provision for offsetting capital gains against past capital losses in permanent school fund is unconstitutional. *State ex rel. Bottcher v. Bartling* 491

19. The Closed Shop Amendment to the Constitution of Nebraska is not in violation of any provision of the Constitution of the United States or in conflict with or repugnant to any federal law, but integrated therewith and, having a relationship to the public welfare, is a reasonable and valid exercise of police power by the state. *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.* 507

20. If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, it is not subject to objection as local or special legislation. *Dorrance v. County of Douglas* 685

21. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. *Dorrance v. County of Douglas* 685

22. Statute relating to feeding of prisoners in jails is not a local or special law within the prohibition of the Constitution relating to bills containing more than one subject. *Dorrance v. County of Douglas* 685
23. Statute relating to county jails and care of prisoners therein does not abridge the privileges and immunities of county sheriffs affected by the act, or deny them the equal protection of the laws, in violation of the Constitution of the United States. *Dorrance v. County of Douglas* 685
24. Statute relating to county jails and the care of prisoners therein contains but one subject and is not within the prohibition of the Constitution of Nebraska. *Dorrance v. County of Douglas* 685
25. "Interstate commerce," within the commerce clause of the Constitution of the United States, ordinarily consists of purchasing of merchandise by a resident of one state from a resident of another state, and the delivery of the article of commerce and the transportation thereof. *Best & Co., Inc. v. City of Omaha* 868
26. The displaying of samples of goods in temporary quarters by traveling salesman of nonresident seller to be purchased in another state is an element in the negotiation for the sale, and, therefore, constitutes "interstate commerce" within the commerce clause of the Constitution of the United States. *Best & Co., Inc. v. City of Omaha* 868

Contempt.

1. Contempts are either direct, those committed in the presence of the court while in session, or constructive, those committed out of the presence of the court. *Leeman v. Vocelka* 702
2. Constructive contempts are classified as criminal or civil in character. *Leeman v. Vocelka* 702
3. Constructive contempts instituted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders, are criminal contempts which must be prosecuted by a separate action in the name of the State and by information. *Leeman v. Vocelka* 702
4. Contempts instituted to preserve and enforce the rights of private parties to a suit and compel obedience to orders and decrees made to enforce the rights and administer the remedies to which

the court has found them entitled, are civil contempts which may be prosecuted in the original action by the affidavit of any party therein who is injuriously affected. *Leeman v. Vocelka* 702

5. If the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as void and defendants in such case cannot be punished for contempt because of its alleged violation. *Leeman v. Vocelka* 702

Contracts.

1. The interpretation of a contract is the determination of the meaning attached to the words "written or spoken" which make the contract. *Wilderman v. Watters* 102
2. The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to such intention if it can be done consistently with legal principles. *Wilderman v. Watters* 102
3. In construing contracts, the court's sole duty is to ascertain what was meant by the language of the instrument. *Wilderman v. Watters* 102
4. It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. *Wilderman v. Watters* 102
5. Parol evidence is admissible to show that at the time of making a contract time was considered as of the essence when such evidence does not tend to vary or impeach the written agreement. This rule is at least applicable when and insofar as resort may be had to extrinsic aids to construction. *Wilderman v. Watters* 102
6. The manifestation of mutual assent may be made wholly or partly by written or spoken words, or by other acts or conduct. *Bendfeldt v. Lewis* 107
7. An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as it is out of the offeree's possession, without regard to whether it ever reached the offeror, unless the offer otherwise provides. *Anderson v. Stewart* 660

8. A request or authorization to communicate the acceptance by mail is implied where a person makes an offer to another by mail and says nothing as to how the answer shall be sent. *Anderson v. Stewart* 660
9. Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer. *Anderson v. Stewart* 660

Corporations.

A majority of the stockholders of a corporation cannot, by amending the articles of incorporation, deprive the minority, without their consent, of their contractual rights to dividends under the articles as originally adopted. *Starr v. Engineering Contracting Co.* 390

Costs.

1. Only when provided for by statute can an attorney's fee be allowed and taxed as costs. *County of Sarpy v. Gasper* 51
2. If an appellant seeks reversal and dismissal of an action, and the appellee consenting thereto prays for the same result, this court will ordinarily reverse and dismiss the cause and tax costs to the appellee. *In re Estate of Simon* 382

Counties.

1. The county board has exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu. *County of Sarpy v. Gasper* 51
2. The jurisdiction of the district court as to claims against a county arising on contract is appellate only. *County of Sarpy v. Gasper* 51
3. A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction. *County of Sarpy v. Gasper* 51

Courts.

1. The jurisdiction of the district court as to claims

against a county arising on contract is appellate only. *County of Sarpy v. Gasper* 51

2. Under the Constitution a rule of practice and procedure in criminal cases hereafter tried in all courts is promulgated with reference to procedure where statute defines crime and provides an enhanced penalty upon conviction of a second or subsequent offense. *Haffke v. State* 83

3. A court may not depart from settled rules of law in order to do what may in the particular instance appear to be substantial justice. *Oman v. City of Wayne* 303

4. The district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice. When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity. *In re Estates of Anderson* 551

5. In states where gross negligence of the host is the sole criterion of liability to a guest, courts have taken jurisdiction and have given effect to the law of the state in which the negligent act took place where the highest degree of care is required of a host to avoid liability to a guest. Such differences with respect to the degree or criterion of negligence are no ground for refusal to entertain jurisdiction. *Whitney v. Penrod* 636

6. State courts will look to decisions of the United States Supreme Court in determining issue involving a federal question. *Best & Co., Inc. v. City of Omaha* 868

Criminal Law.

1. The Supreme Court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that it can be said as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Haffke v. State* 83

2. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record

establishes a previous conviction for the violation of a statute. *Haffke v. State* 83

3. In the absence of a statute placing upon the jury a duty with reference to the penalty, the penalty to be imposed after conviction of a criminal offense is not for the jury but for the court to determine within the limits fixed by the statute. *Haffke v. State* 83

4. Where an offense consists of a series of acts, or various acts in connection with an offense take place in different counties, the prosecution for such offense may be had in any county where any one of the various acts, which constitutes an essential element of the crime, took place. *Yost v. State* 584

5. Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime. *Yost v. State* 584

6. To sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt. *Wilshusen v. State* 594

7. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it. *Wilshusen v. State* 594

8. Where an accused is identified by a witness who has had a reasonable opportunity to observe him, such evidence is admissible. The probative value of such evidence is a question for the jury. *Wilshusen v. State* 594

9. Where corpus delicti is proved, an unsupported extrajudicial admission may be sufficient to prove the defendant's connection with the criminal act. *Wilshusen v. State* 594

10. A person charged with a felony may not be convicted upon his unsupported extrajudicial admission that a crime has been committed, but such admission may be sufficient to prove his connection with the criminal act. *Wilshusen v. State* 594

11. The judgment or sentence of a court of record in a criminal case, when challenged by habeas corpus,

is supported by the usual presumptions of validity and regularity. *McAvoy v. Jones* 613

12. Where a defendant in a criminal proceeding negligently fails to file a transcript and petition in error in this court within three calendar months after the rendition of the judgment or the making of the final order complained of, a motion to dismiss the petition in error must be sustained. *Iron Bear v. State* 634

13. The time for the beginning of a sentence of imprisonment in a criminal action is not an essential part of the judgment. The essential element in such a judgment is the kind and amount of punishment, without reference to when it is to be inflicted. *Iron Bear v. Jones* 651

Damages.

1. The rule that the measure of damages is the difference in value of the real property before and after the removal of the articles is not an exclusive rule. *Joiner v. Pound* 321

2. Fixtures ordinarily have a value separate and apart from the realty to which they are attached. That value may properly be submitted to the jury to enable it to more accurately determine the loss suffered by the purchaser. *Joiner v. Pound* 321

3. Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced within a reasonable time, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality. *Cattin v. City of Omaha* 434

Deeds.

1. Where it is sought to cancel a deed or other conveyance for want of mental capacity of the grantor to make the instrument, the burden of proof is on the party alleging the mental incapacity to clearly establish that the mind of the grantor was so weak or impaired at the time of the execution of the instrument that he did not understand and comprehend the purport and effect of what he was then doing. *Kühne v. Charf* 271

2. An instrument is not delivered until it has passed

beyond the dominion, control, and authority of the maker and is no longer capable of being recalled. *Kula v. Kula* 347

3. Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to a deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed. *Colbert v. Miller* 749
4. Where the delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery. *Colbert v. Miller* 749
5. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Colbert v. Miller* 749
6. If a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution. *Colbert v. Miller* 749
7. In suit to set aside deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed. *Colbert v. Miller* 749
8. A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery. *Colbert v. Miller* 749

Divorce.

1. On petition to modify original divorce decree, award of custody of two minor boys to father, who obtained divorce, was for the best interest and welfare of the children where mother remarried and failed to show intelligent and proper regard as a mother should have for sons. *Madgett v. Madgett* 41
2. Where conveyance of property was ordered for support of minor children but was never complied with, modification of order for custody of children justified elimination from decree of order for conveyance. *Madgett v. Madgett* 41
3. Any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the

mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty. *Egbert v. Egbert* 227

4. Upon an application for a divorce where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill. *Egbert v. Egbert* 227

5. In the division of property and the allowance of alimony in a divorce action it is the duty of the court to take into consideration the estate of the parties, if any, at the time of the marriage, the wife's loss of interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed, the conduct of the parties leading up to the divorce, to which party the divorce was granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable. *Wade v. Wade* 502
Urban v. Urban 757

Domicile.

1. Residence in a community is determined by the intention of the party. Whether change of legal residence is effected by removal from one place to another depends on the intention of the party. *Egbert v. Egbert* 227

2. As a general rule the domicile of a wife follows that of her husband. *Wray v. Wray* 376

3. The residence of a person is where he or she has established a home, the place where he or she is habitually present, and to which, having departed therefrom, he or she intends to return. *Wray v. Wray* 376

4. A wife is not prevented from having a residence separate and apart from that maintained by her husband. *Wray v. Wray* 376

5. The residence of a party in a community is determined by the intention of such party. *Wray v. Wray* 376

Drains.

1. While a metropolitan city is not required to construct sewers and drains, if it does so it is bound

to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so. *Cattin v. City of Omaha* 434

2. A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property and negligently fails to provide a sufficient outlet for the escape of water thus brought upon such property, it will be liable to the owner thereof for any damage which may result from such negligence. *Cattin v. City of Omaha* 434

Easements.

1. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. *Stubblefield v. Osborn* 566
2. To obtain an easement by prescription, possession must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. *Stubblefield v. Osborn* 566
3. A permissive use of the land of another, under license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. *Stubblefield v. Osborn* 566
4. To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. *Stubblefield v. Osborn* 566

Elections.

1. The referendum section of the Omaha home rule charter applies to legislative acts of the city council, but not to administrative or executive matters. *State ex rel. Ballantyne v. Leeman* 847
2. It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to

those dealing with executive or administrative matters. *State ex rel. Ballantyne v. Leeman* 847

3. To allow a referendum to be invoked to annul or delay executive conduct would destroy the efficiency necessary to successful administration of the business affairs of a municipality. *State ex rel. Ballantyne v. Leeman* 847

Equity.

1. Equity courts have a broad discretion in formulating decrees, but they cannot ordinarily determine the rights or control the actions of persons who are not parties to the suit. No decree should be entered which is dependent for its fulfillment on the will of a stranger to the litigation or on that of a person not subject to its jurisdiction. *Olson v. Roscoe* 189
2. A court of equity, in dealing with legal rights, adopts and follows rules of law, in all cases to which those rules are applicable, and whenever there is a direct rule of law governing the case in all its circumstances, the court is bound to follow it. *Oman v. City of Wayne* 303
3. Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates. *Oman v. City of Wayne* 303
4. A court of equity will not entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, and uncertain. *Price v. Shiels* 330
5. Equity jurisdiction is limited to such matters as are practical and call for present action in the premises, and upon which the court may properly pronounce a present decree. *Price v. Shiels* 330
6. A court of equity has the power to reform an instrument to conform with the intention of the grantor and to correct a mistake of the scrivener. *Kula v. Kula* 347
7. Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. *Linville v. Kowalski* 402
8. A court of equity cannot exercise jurisdiction over a matter which has been by statute expressly entrusted to another tribunal of adequate power to deal with it. *Leeman v. Vocelka* 702

9. A suit in equity will not lie when the plaintiff has a plain, adequate, and speedy remedy at law. *Burkhardt v. Cihlar* 712

10. While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. *Shipley v. McNeel* 793

11. To be entitled to equitable relief to vacate judgment, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under statute to secure new trial after expiration of term. *Shipley v. McNeel* 793

12. It is the practice of courts of equity when they have obtained jurisdiction of a case to administer all of the relief which the nature of the case and the facts demand, and to bring such relief down to the close of litigation between the parties. *Best & Co., Inc. v. City of Omaha* 868

13. An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Best & Co., Inc. v. City of Omaha* 868

14. In a proper case a court of equity may exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violation of city ordinances where their continued enforcement to recover penalties will interfere with the transaction of commercial business lawful in itself and result in irreparable injury. *Best & Co., Inc. v. City of Omaha* 868

15. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance. *Best & Co., Inc. v. City of Omaha* 868

Estates.

1. Where real estate is devised to executors, to be held by them in trust until a child attains a certain age, when the same shall be conveyed to him in fee, with a devise over, in the event of the child's death prior to attaining such age, such a provision confers on the child a vested interest in fee simple, subject to the prior chattel interest given the executors and also subject to defeasance in the event

of his death before attaining such age. *Olson v. Lisco* 314

2. Where an absolute fee has been given in one clause of a will and a subsequent provision provides for a different distribution upon the happening of a contingency, such contingency must take effect before the period of distribution. *Olson v. Lisco* 314

Estoppel.

Estoppel may not be asserted to uphold fraud or misdoing. *Oman v. City of Wayne* 303

Evidence.

1. A party may not successfully complain of the introduction of evidence of a like character to that which it has introduced. *Allen v. Massachusetts Mutual Life Ins. Co.* 233
2. Persons engaged in performing services of the same character as those to be valued, and persons who have knowledge of the business in and for which the services have been rendered and of their value, may give their opinion as to the value of the services. *Sporcic v. Swift & Co.* 246
3. Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them. *Keyser v. Allen* 449
4. State courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law. *Keyser v. Allen* 449
5. Parol evidence is not admissible which seeks to modify, nullify, or change the character of a promissory note which has been delivered and has become an obligation by showing that it is to cease to be effective in whole or in part or is to have an effect different from that stated therein. *Lefferdink v. Schmutte* 695
6. Parol evidence is admissible to show that the delivery of a promissory note was given conditionally or for a special purpose only and not for the purpose of transferring the property in it, but is not admissible if there has been delivery for the purpose of transferring the property in the instrument. *Lefferdink v. Schmutte* 695
7. Where a promissory note in usual form calls for

the payment of money, evidence that it was to be paid in work and labor cannot be received against the objection of the holder. *Lefferdink v. Schmutte* 695

8. Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. *Colbert v. Miller* 749

9. The admissions and declarations of a party against his own interest upon a material matter pertinent to the issues being tried are admissible in evidence against such party. *Tuttle v. Wyman* 769

10. The laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own. There are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice of this state, are authorized by the laws of the state in which they act. *National City Bank of Cleveland v. Jones* 844

11. Possession being a fact continuous in its nature, when its existence is once shown it will be presumed to continue until the contrary is proved. *Tesar v. Bartels* 889

12. Evidence of possession of personal property prior to the commencement of a replevin action, unless explained, is presumed to continue and, if believed, forms a sufficient basis for a verdict in favor of the plaintiff. *Tesar v. Bartels* 889

Executors and Administrators.

1. An ancillary administrator is governed by the laws of this state and the orders and decrees of the court appointing him, and all questions arising in regard to his rights, powers, and liabilities must be determined according to the laws of this state and the courts thereof. *In re Estate of Vance* 220

2. If personal property has come into the possession of an administrator, the lawful possession and ownership of which is in dispute, it is the right and duty of such administrator to make application to the county court for directions relating to its lawful disposition, and such court has the power and authority to give and enforce its directions with reference thereto. *In re Estate of Vance* 220

3. An executor or administrator is entitled as such to maintain an action to recover funds and property or its value as belonging to the estate of a decedent then being administered, if there are no funds or insufficient funds or property in his possession with which to pay creditors or the costs and expenses of administration. *Tuttle v. Wyman* 769
4. Statute providing short form for determination of heirship is not exclusive but permissive in character, and applicable in any event when only real estate is involved in the estate. *In re Estate of Large* 783
5. Where a will is offered and admitted to probate more than two years after the death of the testator, and an executor or administrator is appointed to administer the estate in which funds or personal property as distinguished from realty are also involved, the representative should not be discharged until after regular administration of the estate has been completed. *In re Estate of Large* 783

Fixtures.
1. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser. *Joiner v. Pound* 321
2. Fixtures ordinarily have a value separate and apart from the realty to which they are attached. That value may properly be submitted to the jury to enable it to more accurately determine the loss suffered by the purchaser. *Joiner v. Pound* 321

Forcible Entry and Detainer.
1. An action in forcible entry and detainer lies in favor of a purchaser at judicial sale to recover possession of premises purchased, when the judgment debtor was in possession at the time the judgment or decree was rendered whereunder the sale was made. The remedies by forcible entry and detainer and by writ of assistance are in such circumstances concurrent. *Glissmann v. Bauermeister* 131
2. A court is not ousted of jurisdiction in a forcible entry and detainer action by mere averment that a question of title is involved, but it has jurisdiction to proceed until the evidence discloses such fact. *Glissmann v. Bauermeister* 131

Fraud.
1. When property is sold and delivered to a fraudu-

lent vendee an innocent purchaser of the property from the fraudulent vendee will take good title. *Sullivan Co. v. Larson* 97

2. To maintain an action for damages for false representation, the plaintiff must allege and prove (1) what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; and (5) was thereby injured. *Severin v. Lukovsky* 113
Falkner v. Sacks Bros. 121

3. A person is justified in relying upon a representation to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth. *Falkner v. Sacks Bros.* 121

4. The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. *Falkner v. Sacks Bros.* 121

5. The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of purchase and the value it would have had if seller's representations had been true. *Falkner v. Sacks Bros.* 121

Habeas Corpus.

1. The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceedings in error. *In re Application of Schwartzkopf* 460

2. Habeas corpus is a proper proceeding to determine the right to the custody of a minor child. *In re Application of Schwartzkopf* 460

3. Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child. *In re Application of Schwartzkopf* 460

4. Habeas corpus will not lie to discharge a person from a sentence of penal servitude when the court

imposing the sentence had jurisdiction of the offense charged and the person of defendant, and the sentence was within the power of the court to impose. *McAvoy v. Jones* 613

5. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *McAvoy v. Jones* 613
6. A relator cannot by habeas corpus collaterally attack increased punishment under the habitual criminal statute upon the ground that he was mentally incompetent at the time of a former conviction and sentence. *McAvoy v. Jones* 613
7. In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine the question of fact presented. But if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied. *McAvoy v. Jones* 613
8. The sufficiency of the allegations of relator's petition to support a writ of habeas corpus allowed by virtue thereof may be questioned before making return thereto by a motion to dissolve or quash the writ. *McAvoy v. Jones* 613
9. A motion to dissolve a writ of habeas corpus admits all ultimate facts well pleaded in relator's petition as distinguished from conclusions of law appearing therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ dissolved or quashed. *McAvoy v. Jones* 613
10. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. *Iron Bear v. Jones* 651
11. Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged from custody on habeas corpus, but a new date for the execution may be fixed by the proper court. *Iron Bear v. Jones* 651
12. Habeas corpus will not lie to discharge a person

from a sentence of death by electrocution imposed by a verdict of a jury where the court pronouncing the sentence of execution had the power to do so and had jurisdiction over the person of the defendant and the subject matter of the action. *Iron Bear v. Jones* 651

Highways.

Where a highway has been legally established, mandamus will lie to compel the proper authorities to open it. *Burkhardt v. Cihlar* 712

Husband and Wife.

1. As a general rule the domicile of a wife follows that of her husband. *Wray v. Wray* 376
2. A wife is not prevented from having a residence separate and apart from that maintained by her husband. *Wray v. Wray* 376
3. When a street improvement district is created and abutting real estate is held in joint tenancy by a husband and wife who are residents, each has the right to act separately and independently of each other with regard to the objection to such improvements. *Bonner v. City of Imperial* 721

Improvements.

1. Where the owner puts in improvements, the law at once raises a presumption of intention to make them a part of the land. *Joiner v. Pound* 321
2. Generally speaking, the word "improvement" may be said to include everything that enhances the value of premises permanently for general uses. *Watson Bros. Realty Co. v. County of Douglas* 799

Infants.

In a controversy for the custody of an infant of tender years, the court will consider the best interest of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties. *In re Application of Schwartzkopf* 460

Injunction.

1. Resident taxpayers of the state may maintain an action in any court having jurisdiction to enjoin an alleged unlawful transfer, diversion, or expendi-

ture of public funds by public boards or officers, without showing any interest or injury peculiar to themselves. *Rein v. Johnson* 67

2. Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors. *Olson v. Roscoe* 189

3. As a general rule injunction will not issue upon mere apprehension of the possibility of an invasion of rights. *Neff v. Boomer* 361

4. A recovery of counsel fees and costs incurred will not be allowed as element of damage in a suit on a bond given for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case. *Williams v. Hallgren* 621

5. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees and costs incurred by the trial of case are proper to be allowed as damages caused by an injunction wrongfully issued. *Williams v. Hallgren* 621

6. A restraining order not being one of the main issues of a case, damages in the way of attorney's fees and costs incurred by its wrongful issuance are limited to those incurred in securing its dissolution, as distinguished from those incurred in the trial of the principal issues involved. *Williams v. Hallgren* 621

7. If the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as void and defendants in such case cannot be punished for contempt because of its alleged violation. *Leeman v. Vocelka* 702

8. An injunction against an anticipated nuisance will issue if it is shown that the anticipated use of the property will be a nuisance per se, or that under the circumstances of the case a nuisance must necessarily result from the contemplated act. *Demont v. Abbas* 765

9. If the thing sought to be restrained is not a nuisance per se, and if the evidence is doubtful, eventual, or contingent that a nuisance would necessarily result, injunction is not an available remedy. The alleged wrong must be actually threatened and practically certain to result. *Demont v. Abbas* 765

10. If the thing which it is sought to restrain is not a nuisance per se, and will not necessarily become a nuisance, but may or may not become such, depending upon the use, manner of operation, or other circumstances, the remedy of injunction is not available. *Demont v. Abbas* 765

Insurance.

In an action upon a policy of life insurance the burden of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the insured died as a result of poison self-administered with suicidal intent. *Allen v. Massachusetts Mutual Life Ins. Co.* 233

Interest.

Where the reasonable value of services rendered pursuant to an irregular contract can only be ascertained by an action at law, and interest thereon could not be computed with a reasonable degree of mathematical certainty, the legal rate of interest runs from the date of rendition of the judgment wherein the reasonable value of the services are liquidated. *Gee v. City of Sutton* 603

Intoxicating Liquors.

The acts of local governing bodies of cities and villages in passing upon original applications for the renewal or revocation of licenses to sell alcoholic liquors at retail, being quasi-judicial in character and by statute expressly entrusted to that tribunal, are not subject to collateral attack or reviewable by resort to an injunction suit. *Leeman v. Vocelka* 702

Joint Tenancy.

1. Joint tenancies may be created in any kind of personal property that is subject to be held in severalty. *In re Estate of Vance* 220
2. While as between joint tenancies and tenancies in common the law prefers the latter, yet if the purpose to create a joint tenancy is clearly expressed in an instrument of conveyance or ownership, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created. *In re Estate of Vance* 220
3. Where in the attempted creation of a joint tenancy prior to the enactment of the Uniform Real Property

Act, in which one or more of the unities of time, title, interest, and possession are absent, a tenancy in common results if no contrary intent is expressed. *Anson v. Murphy* 716

Judges.

1. A district judge has the power to hold court in a district other than the one for which he was elected, and it will be presumed in case he does so, it was at the instance of the judge of the proper district. *Iron Bear v. Jones* 651
2. The power of a district judge to hold court in a district other than that for which he was elected does not depend upon the absence or disability of the proper judge. *Iron Bear v. Jones* 651

Judgments.

1. A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction. *County of Sarpy v. Gasper* 51
2. Any right, fact, or matter in issue, directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Glissmann v. Bauermeister* 131
3. If the district court attempts to render judgment on a subject within its general jurisdiction but which is not properly before it such judgment is a nullity. *Glissmann v. Bauermeister* 131
4. If the Supreme Court attempts on an appeal from the district court to render judgment on a subject within the general jurisdiction of the district court but which was not properly before that court such judgment is likewise a nullity. *Glissmann v. Bauermeister* 131
5. Where the district court over objection assumes to readjudicate matters upon which there was already a valid, binding, and conclusive judgment or decree such attempted readjudication is a nullity. *Glissmann v. Bauermeister* 131
6. Action of the Supreme Court confirming the action

of the district court where the district court over objection assumes to readjudicate matters upon which there was already a valid, binding, and conclusive judgment or decree is a nullity. *Glissmann v. Bauermeister* 131

7. New matter brought into an action not germane to the original subject matter may not over objection be litigated in that action. *Glissmann v. Bauermeister* 131

8. Where the record discloses that litigants tried an issue as though it were joined by the pleadings, though not so joined, a decree which responds to the issues thus tried has the same binding force and effect as one which responds to pleadings. *Glissmann v. Bauermeister* 131

9. Equity courts have a broad discretion in formulating decrees, but they cannot ordinarily determine the rights or control the actions of persons who are not parties to the suit. No decree should be entered which is dependent for its fulfillment on the will of a stranger to the litigation or on that of a person not subject to its jurisdiction. *Olson v. Roscoe* 189

10. If a defaulting defendant has been served with process upon plaintiff's original petition, failure to give notice to such defendant of an amendment thereto, or the filing of an amended petition after answer is due, which did not change plaintiff's cause of action or enhance the relief sought by him, would not preclude the entry of a valid judgment thereon. *Gergen v. Western Union Life Ins. Co.* 203

11. A satisfaction of judgment, even if entered on the judgment record, is but a receipt, and in the absence of intervening equities, may be explained or avoided by satisfactory evidence that payment was never in fact made or that the entry was induced by fraud or other causes not producing an actual satisfaction. *Tuttle v. Wyman* 769

12. If an application to vacate a judgment or final order is filed at a subsequent term, and more than ten days after rendition thereof, the court has no authority or power to vacate the same except for the reasons and within the time allowed by statute. *Shipley v. McNeel* 793

13. If a judgment in fact was rendered or if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing,

is invested with the power to render nunc pro tunc such judgment or make such order. *North Loup River Public Power & Irrigation District v. Loup River Public Power District* 823

14. The proper function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth. *North Loup River Public Power & Irrigation District v. Loup River Public Power District* 823

15. A judgment nunc pro tunc must conform to and be no broader in its terms than the judgment actually entered. *North Loup River Public Power & Irrigation District v. Loup River Public Power District* 823

16. A judicial record of another state, authenticated as provided by statute, is admissible in evidence as proof of a foreign judgment. *National City Bank of Cleveland v. Jones* 844

17. A judgment of a sister state, when properly authenticated, imports verity, and it is not incumbent upon the plaintiff to allege or prove that the foreign court had jurisdiction of the person of the defendant. *National City Bank of Cleveland v. Jones* 844

Larceny.

1. Statute defining larceny as bailee requires that there be a bailment of the property; that while so held that the bailee convert the property to his own use; and that such conversion must be with the intent to steal the same. *Yost v. State* 584

2. In order to prove a charge of larceny as bailee the burden is on the state to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. *Yost v. State* 584

3. In a prosecution for larceny of money by a bailee, where the transaction constituting the offense extends through different counties, the venue may be laid and the prosecution had in the county where the bailment arose, and where the defendant has to account for and pay over the money on demand to the one entitled to its possession. *Yost v. State* 584

Libel and Slander.

1. The rule is that language when spoken, to constitute slander per se, or when transcribed in writing for the purpose of radio broadcasting, to constitute libel per se, must be of such a nature and obvious meaning as to impute to a person alleged to have been injured thereby, the commission of crime, or to subject him to public ridicule, ignominy, or disgrace. *Barry v. Kirkland* 839
2. Where the words spoken by the defendant, transcribed and broadcast over the radio, did not constitute slander per se or libel per se, and were not defamatory, no cause of action is stated in the absence of an allegation of special damages. *Barry v. Kirkland* 839

Limitations of Actions.

The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Horrigan v. Quinlan* 538

Master and Servant.

The Closed Shop Amendment to the Constitution of Nebraska is not in violation of any provision of the Constitution of the United States or in conflict with or repugnant to any federal law, but integrated therewith and, having a relationship to the public welfare, is a reasonable and valid exercise of police power by the state. *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.* 507

Municipal Corporations.

1. A public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service. *Garner v. City of Aurora* 295
2. In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises. *Cattin v. City of Omaha* 434
3. While a city of the metropolitan class is under no obligation to construct a system of drainage for pro-

tection from surface water, it is not entirely absolved from liability for injury caused to private property when it fails to keep a sewer system in proper control after the same has been constructed. *Cattin v. City of Omaha* 434

4. When a metropolitan city makes a provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains. *Cattin v. City of Omaha* 434

5. While a metropolitan city is not required to construct sewers and drains, if it does so it is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so. *Cattin v. City of Omaha* 434

6. A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property and negligently fails to provide a sufficient outlet for the escape of water thus brought upon such property, it will be liable to the owner thereof for any damage which may result from such negligence. *Cattin v. City of Omaha* 434

7. Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. *Gee v. City of Sutton* 603

8. Where services are accepted by a municipal corporation without protest, defendant must pay the reasonable value of the services. The principle applied is that of reimbursement, and the plaintiff can only recover the actual cost of the services rendered and material furnished, without the allowance of profits, and not exceeding the legal rate of interest. *Gee v. City of Sutton* 603

9. When a street improvement district is created and abutting real estate is held in joint tenancy by a husband and wife who are residents, each has the right to act separately and independently of each

other with regard to the objection to such improvement. *Bonner v. City of Imperial* 721

10. In the case of objection by one joint tenant in which the other has not joined a presumption arises that the one objecting represents the entire property and his joint tenants and this presumption obtains unless and until the contrary is made to appear. *Bonner v. City of Imperial* 721

11. In the case of objection by one joint tenant in which the other has not joined the question of whether the one objecting represents the entire property and his joint tenant, or if such one is to be considered as objecting and the other not doing so, is one of fact. *Bonner v. City of Imperial* 721

12. The referendum section of the Omaha home rule charter applies to legislative acts of the city council, but not to administrative or executive matters. *State ex rel. Ballantyne v. Leeman* 847

13. If an ordinance serves simply to put into execution a previously enacted law, it is clearly executive or administrative in character. *State ex rel. Ballantyne v. Leeman* 847

14. The crucial test for determining that which is legislative from that which is administrative is whether the ordinance was one making a law or executing a law already in existence. *State ex rel. Ballantyne v. Leeman* 847

15. It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters. *State ex rel. Ballantyne v. Leeman* 847

16. To allow a referendum to be invoked to annul or delay executive conduct would destroy the efficiency necessary to successful administration of the business affairs of a municipality. *State ex rel. Ballantyne v. Leeman* 847

17. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance. *Best & Co., Inc. v. City of Omaha* 868

18. Where a city imposes an occupation tax and requires a license for sale of goods or solicitation of orders, this constitutes an unlawful interference with interstate commerce as applied to solicitation of orders for goods not within the state at

the time but to be shipped if and when the orders are accepted from another state in fulfillment of the orders previously taken. *Best & Co., Inc. v. City of Omaha* 868

19. A municipal ordinance which levies a fixed-sum occupation tax and makes other requirements is invalid under the Constitution of the United States as a discrimination against interstate commerce as applied to nonresident merchants who took orders in the state and shipped interstate directly where no corresponding fixed-sum license was exacted of regular retail merchants for the privilege of doing business. *Best & Co., Inc. v. City of Omaha* 868

Negligence.

1. Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. *Hartford Fire Ins. Co. v. County of Red Willow* 10
2. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Hartford Fire Ins. Co. v. County of Red Willow* 10
3. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. *Hartford Fire Ins. Co. v. County of Red Willow* 10
4. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Thomas v. Poulson* 44
5. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the question of negligence and comparative and contributory negligence are for the determination of the jury. *Thomas v. Poulson* 44
   Buresh v. George 340
   Dickman v. Hackney 367
6. If one comes to his death because of the failure of another owing due care to exercise care for his

safety, that other is bound to respond in damages for his failure. *O'Dell v. Goodsell* 261

7. The general rule in negligence cases is that if reasonable minds may honestly find that acts or omissions constitute negligence the question of negligence is for the jury. *O'Dell v. Goodsell* 261

8. When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is a proximate cause of the accident, then the court should direct a verdict for the defendant and dismiss the action. *Buresh v. George* 340

9. In the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury. *Fentress v. Co-Operative Refinery Assn.* 355

10. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Dickman v. Hackney* 367

11. The general rule requiring motorist to be able to stop within range of his vision has no application 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. *Dickman v. Hackney* 367

12. An assault and battery is not negligence. The former is intentional; the latter is unintentional. *Newman v. Christensen* 471

13. The violation of a statute enacted in the interest of public safety is not negligence as a matter of law, but evidence of negligence to be considered in connection with all the other evidence in the case. *Melcher v. Murphy* 541

14. Negligence is the failure to do that which an ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do, under the same circumstances. *Melcher v. Murphy* 541

15. Under the law of Missouri, it is the duty of a driver of an automobile to keep a lookout on the highway in the direction the car is going in such manner as to see a condition which a person in the exercise of due care for his own safety and that of others would have seen under similar circumstances. *Whitney v. Penrod* 636

16. Under the law of Missouri, the driver of an automobile is required to exercise the greatest degree of care in its operation, and injury to a guest by failure to exercise such care renders the operator liable. *Whitney v. Penrod* 636

17. Under the law of Missouri, ordinary care upon the part of the driver of a motor vehicle requires him at all times and under all circumstances to anticipate and expect the presence of others on the highway, and to keep his machine always under control so as to avoid collision with them. *Whitney v. Penrod* 636

18. Under the law of Missouri, the test of control is the ability to stop quickly and easily, and when this result is not accomplished, an inference is permissible that the car was running too fast, or that a proper effort to control was not made. *Whitney v. Penrod* 636

19. Under the law of Missouri, the test of excessive speed is whether a motorist drove in a careful and prudent manner exercising highest degree of care with regard to situation and surroundings. *Whitney v. Penrod* 636

20. 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. *Whitney v. Penrod* 636

21. To be guilty of contributory negligence as a matter of law, the law requires that if the guest knew, or in the exercise of ordinary care would have known, of the danger threatened and that the driver was remiss in guarding against it, and the guest failed to warn the driver with reference thereto, the guest cannot recover. *Whitney v. Penrod* 636

22. When plaintiff moves to dismiss, or for a directed verdict, or to withdraw from the jury consideration of defendant's claim upon a cross-petition in a negligence case, such defendant has a right to rely upon and have the benefit of any evidence of plain-

tiff's negligence which may appear in evidence adduced by plaintiff in his own behalf. *Roby v. Auker* 734

23. The emergency 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, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. *Roby v. Auker* 734

New Trial.

1. An assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given. *Joiner v. Pound* 321
2. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused. *Joiner v. Pound* 321
3. Error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court. *Joiner v. Pound* 321
4. While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. *Shipley v. McNeel* 793
5. To be entitled to equitable relief to vacate judgment, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under statute to secure new trial after expiration of term. *Shipley v. McNeel* 793

Nuisances.

1. An injunction against an anticipated nuisance will issue if it is shown that the anticipated use of the property will be a nuisance per se, or that under the circumstances of the case a nuisance must necessarily result from the contemplated act. *Demont v. Abbas* 765
2. The construction and maintenance of a rendering

plant in a rural area is not a nuisance per se. *Demont v. Abbas* 765

3. If the thing sought to be restrained is not a nuisance per se, and if the evidence is doubtful, eventual, or contingent that a nuisance would necessarily result, injunction is not an available remedy. The alleged wrong must be actually threatened and practically certain to result. *Demont v. Abbas* 765

4. If the thing which it is sought to restrain is not a nuisance per se, and will not necessarily become a nuisance, but may or may not become such, depending upon the use, manner of operation, or other circumstances, the remedy of injunction is not available. *Demont v. Abbas* 765

Officers.

When public officers are engaged in litigation to protect public rights and their pleadings and procedure maintain the public interest, no private person, corporation, or association is entitled to intervene. *Best & Co., Inc. v. City of Omaha* 868

Parent and Child.

Husband who obtained divorce has no legal duty to maintain and support son, not adopted, of divorced wife by a former marriage. *Madgett v. Madgett* 41

Parties.

1. When an action is brought by the party designated by the statute for that purpose, it complies with the law which requires all actions to be brought by the real party in interest. *Boone County Old Age Assistance Board v. Myhre* 669

2. When public officers are engaged in litigation to protect public rights and their pleadings and procedure maintain the public interest, no private person, corporation, or association is entitled to intervene. *Best & Co., Inc. v. City of Omaha* 868

3. The interest in the matter of litigation to authorize intervention in an action must be such direct and immediate interest that the person or persons seeking to intervene will either lose or gain by direct operation and legal effect of the judgment which may be rendered in the action. *Best & Co., Inc. v. City of Omaha* 868

Partnership.

1. In a given case, the chief criterion for determining whether certain property is or is not that of the firm is the intent of the partners to devote it to partnership purposes. In the absence of clear intent, the courts have recognized certain facts as indicia of such intent. *Bode v. Prettyman* 179
2. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. *Bode v. Prettyman* 179
3. The law requires the utmost frankness and absolute honesty in the dealings of one partner with another. As trustees, they cannot derive a secret profit from partnership transactions unknown to the other. *Bode v. Prettyman* 179
4. A partner, subject to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners. *Bode v. Prettyman* 179
5. Law will not permit those associated in relationships in which mutual confidence and trust are ingredients to put themselves into a position where their individual interests may tend to cause them to relax in their vigilance for the common good or to make secret individual profits out of common activities. *Bode v. Prettyman* 179
6. Where a partnership is employed to perform services in accordance with its business, and certain partners superintend and supervise the work on the project, the partnership is not barred from charging compensation for such services as the same constitute part of the cost of doing the job, as distinguished from partners' profits. *Gee v. City of Sutton* 603

Payment.

Payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. *Abrahamson v. Brown* 267

Penalties.

1. In an action by a purchaser to recover for an overcharge under the Federal Emergency Price Control Act, the burden is on him to prove: The purchase, that there was an established ceiling price, that the price paid exceeded the ceiling price, the amount of the excess, and that the article or merchandise purchased was for use other than in the course of trade or business. *Keyser v. Allen* 449
2. In case of sale over the ceiling price the liability is three times the excess, however, the judgment may not be for less than the overcharge nor more than three times that amount. *Keyser v. Allen* 449
3. If the seller shall prove that the violation of the price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of violation then the judgment shall be only for the amount of the overcharge. *Keyser v. Allen* 449
4. If the seller shall fail to prove either willful violation or failure to take practicable precautions, the amount of the judgment resides in the discretion of the court but should be not less than the overcharge nor more than three times that amount. *Keyser v. Allen* 449

Pleading.

1. A prayer for general relief in an equitable action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence adduced in support thereof. *Glissmann v. Bauermeister* 131
2. If a defaulting defendant has been served with process upon plaintiff's original petition, failure to give notice to such defendant of an amendment thereto, or the filing of an amended petition after answer is due, which did not change plaintiff's cause of action or enhance the relief sought by him, would not preclude the entry of a valid judgment thereon. *Gergen v. Western Union Life Ins. Co.* 203
3. Where a purchaser of real estate seeks to recover damages resulting from removal of articles attached to the freehold of a class that a prospective purchaser has a right to assume are a part thereof, the vendor has the burden of pleading a right of removal. *Joiner v. Pound* 321
4. If from the facts stated in the petition it appears

that the plaintiff is entitled to any relief, a general demurrer will not lie. *Joiner v. Pound* 321

5. A single paragraph of a statement of a cause of action is not subject to demurrer on the ground that it does not state a cause of action if the pleading as a whole states a cause of action. *Joiner v. Pound* 321

6. A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader. *Price v. Shiels* 330

7. When a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed. Of course, whether or not the evidence is sufficient to support a favorable finding thereon remains a question of fact. *Curren v. Certain Parcel of Land* 477

8. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Horrigan v. Quinlan* 538

9. A petition for a declaratory judgment, seeking to hold a statute unconstitutional, is demurrable when the only defendants are two county officers who have no interest in upholding the statute or having it declared invalid. *Miller v. Stolinski* 679

10. More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other. *Colbert v. Miller* 749

Prisons.

1. The sheriff is by statute given charge and custody of the county jail and it is his duty to receive and keep until discharged all prisoners lawfully committed. *O'Dell v. Goodsell* 261

2. Beyond statutory requirements a sheriff is bound to exercise in the control and management of the jail the degree of care requisite to the reasonably adequate protection of the prisoners or inmates. *O'Dell v. Goodsell* 261

3. The rule in the case of a charge that a sheriff as jailer has failed in the duty he owes a prisoner in his custody in consequence of which the prisoner

is injured or suffers death is not different from the one obtaining generally in negligence cases. *O'Dell v. Goodsell* 261

4. The statutory allowance for boarding occupants of county jails is not salary. A statutory requirement, therefore, that such service be provided at actual cost does not tend to fix sheriffs' salaries higher in counties of lesser population than in those with a greater population falling within the purview of the act. *Dorrance v. County of Douglas* 685

Public Assistance.

1. The fact that, in recoveries from the estates of recipients of old age assistance by the county old age assistance board, as the local administrator of said funds, a part of such funds may be paid to, or credited to, the assistance funds of the United States, does not require that the United States should be made a party to such actions. *Boone County Old Age Assistance Board v. Myhre* 669
2. The provisions of law relating to old age assistance providing for reimbursement are not in violation of state or federal Constitutions. *Boone County Old Age Assistance Board v. Myhre* 669
3. Where the recipient of old age assistance filed an application therefor, listed the real estate she owned, and accepted the monthly payments as made, she entered into a contract to be bound by the law making her real estate after her death subject to a claim in favor of the county old age assistance board for the payments she had received as provided by statute. *Boone County Old Age Assistance Board v. Myhre* 669

Public Utilities.

1. A public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service. *Garner v. City of Aurora* 295
2. The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public

rather than to individuals. *In re Application of Union P. R. R. Co.* 575

3. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence. *In re Application of Union P. R. R. Co.* 575

4. The ruling of the railway commission or of the Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *In re Application of Union P. R. R. Co.* 575

Railroads.

1. The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. *In re Application of Union P. R. R. Co.* 575

2. It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient. *In re Application of Union P. R. R. Co.* 575

3. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted artibrarily and unreasonably in denying an application for the discontinuance of an agency. *In re Application of Union P. R. R. Co.* 575

4. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported bv the evidence. *In re Application of Union P. R. R. Co.* 575

5. The ruling of the railway commission or of the

Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *In re Application of Union P. R. R. Co.* 575

Real Estate.

1. Ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land. *Joiner v. Pound* 321
2. Where a purchaser of real estate seeks to recover damages resulting from removal of articles attached to the freehold of a class that a prospective purchaser has a right to assume are a part thereof, the vendor has the burden of pleading a right of removal. *Joiner v. Pound* 321

Reformation of Instruments.

1. A court of equity has the power to reform an instrument to conform with the intention of the grantor and to correct a mistake of the scrivener. *Kula v. Kula* 347
2. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. *Kula v. Kula* 347

Replevin.

1. In an action of replevin the inquiry is of the property in possession of and wrongfully withheld from the plaintiff by the defendant at the commencement of the suit. There can be no recovery of damages by plaintiff for property of which the defendant had not possession or control when the action was instituted. *Tesar v. Bartels* 889
2. Evidence of possession of personal property prior to the commencement of a replevin action, unless explained, is presumed to continue and, if believed, forms a sufficient basis for a verdict in favor of the plaintiff. *Tesar v. Bartels* 889

Sales.

When property is sold and delivered to a fraudulent

vendee an innocent purchaser of the property from the fraudulent vendee will take good title. *Sullivan Co. v. Larson* 97

Schools and School Districts.

In the case of sale of bonds belonging to the school funds of the state at a price in excess of par value of such bonds with accrued interest the difference between such par value with accrued interest and the sale price is capital gain. *State ex rel. Bottcher v. Bartling* 491

Sheriffs and Constables.

1. The sheriff is by statute given charge and custody of the county jail and it is his duty to receive and keep until discharged all prisoners lawfully committed. *O'Dell v. Goodsell* 261
2. The sheriff is obligated to faithfully discharge all duties required of him by law and he and the surety on his official bond are required to respond in damages to any person for a breach of this duty. *O'Dell v. Goodsell* 261
3. Beyond statutory requirements a sheriff is bound to exercise in the control and management of the jail the degree of care requisite to the reasonably adequate protection of the prisoners or inmates. *O'Dell v. Goodsell* 261
4. The rule in the case of a charge that a sheriff as jailer has failed in the duty he owes a prisoner in his custody in consequence of which the prisoner is injured or suffers death is not different from the one obtaining generally in negligence cases. *O'Dell v. Goodsell* 261
5. The statutory allowance for boarding occupants of county jails is not salary. A statutory requirement, therefore, that such service be provided at actual cost does not tend to fix sheriffs' salaries higher in counties of lesser population than in those with a greater population falling within the purview of the act. *Dorrance v. County of Douglas* 685

States.

1. An action against state officers attacking the constitutionality of a statute and seeking to enjoin its enforcement or otherwise obtain relief from an alleged invalid act or abuse of authority by such

officers is not ordinarily a suit against the state. *Rein v. Johnson* 67

2. The Constitution of Nebraska prohibits the drawing of any money from the state treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the Auditor of Public Accounts thereon, and prevents the diversion of money from any appropriation made for any purpose or the taking thereof from any fund whatever by legislative resolution as distinguished from legislative law enacted by bill in conformity with constitutional requirements. *Rein v. Johnson* 67

3. The Constitution of Nebraska prohibits continuing legislative appropriations, and, unless reappropriated, all unexpended balances of appropriations of public revenue derived or to be derived from taxation and paid into the state treasury, automatically lapse into the general fund at the end of the fiscal quarter after adjournment of the next regular session of the Legislature. *Rein v. Johnson* 67

4. Public revenue derived from taxation and lawfully allocated to a special fund, or appropriated for any purpose, cannot be administratively or by legislative resolution diverted or taken therefrom, but otherwise all such public revenue in the state treasury is under the plenary control of the Legislature and subject to its constitutionally enacted laws. *Rein v. Johnson* 67

Statutes.

1. If a statute is ambiguous or susceptible of more than one meaning, it is to be given that meaning that will best effect its purpose, and which will, if reasonable, render it valid. *State ex rel. Johnson v. Marsh* 1

2. Words may be supplied by the courts in construing a statute where that is necessary to complete the sense thereof and give effect to the intention of the Legislature manifested therein. The rule is especially applicable where it is necessary to do so to prevent the law from becoming a nullity. *Board of Regents v. Gillette* 56

3. The purpose or design of an appropriation bill is to make provision for lawfully taking money out of the state treasury as distinguished from lawfully

putting money into the state treasury, there to be allocated to a particular fund. *Rein v. Johnson* 67

4. In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality. *Sommerville v. Johnson* 167

5. The Nebraska Merit System Act does not create an executive department nor an executive state office within the terms of the Constitution, and is not unconstitutional because it did not receive a two-thirds majority of all members elected to the Legislature. *Sommerville v. Johnson* 167

6. The amendment to the venue statute enacted in 1937 relates wholly to procedure, and, being remedial in character, should be liberally construed and not restricted in its operation to causes of action thereafter arising. *Gergen v. Western Union Life Ins. Co.* 203

7. In case of a conflict between the Constitution and a legislative enactment the statute must give way to the Constitution. *State ex rel. Bottcher v. Bartling* 491

8. Where there is a conflict between an act of the Legislature and the Constitution of the state the statute must yield to the extent of the repugnancy. *State ex rel. Bottcher v. Bartling* 491

9. If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, it is not subject to objection as local or special legislation. *Dorrance v. County of Douglas* 685

10. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. *Dorrance v. County of Douglas* 685

11. Statute relating to feeding of prisoners in jails is not a local or special law within the prohibition of the Constitution relating to bills containing more than one subject. *Dorrance v. County of Douglas* 685

12. Statute relating to county jails and care of prisoners therein does not abridge the privileges and immunities of county sheriffs affected by the act, or deny them the equal protection of the laws, in violation of the Constitution of the United States. *Dorrance v. County of Douglas* 685

13. Statute relating to county jails and the care of prisoners therein contains but one subject and is

not within the prohibition of the Constitution of Nebraska. *Dorrance v. County of Douglas* 685

Taxation.

1. Public revenue derived from taxation and lawfully allocated to a special fund, or appropriated for any purpose, cannot be administratively or by legislative resolution diverted or taken therefrom, but otherwise all such public revenue in the state treasury is under the plenary control of the Legislature and subject to its constitutionally enacted laws. *Rein v. Johnson* 67
2. The Supreme Court, affirming an order dismissing a petition brought to set aside an order for confirmation in a foreclosure action, cannot consider an application to redeem for the reason that title in the purchaser became absolute upon confirmation, no appeal having been taken therefrom. *Schmehl v. Buffalo County* 277
3. Where a deed is issued pursuant to sale under a tax foreclosure decree to a nominal purchaser and such sale and deed are void, a purchaser from the nominal purchaser at the sale with actual or constructive notice of the impairment of title takes nothing by his purchase. *Oman v. City of Wayne* 303
4. Where a city, in a tax foreclosure in its own name, pursuant to a scheme to evade statutory requirements for sale of real estate, purchases at foreclosure sale in the name of a third person with the intent and purpose of having resale made in the name of the third person for the city without formal action by it, any such sale is void. *Oman v. City of Wayne* 303
5. The words "to any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent," contained in Inheritance Tax statute, do not refer to natural children exclusively. The provision includes persons coming within its terms, whether or not they are relatives of the blood. *In re Estate of Dowell* 599
6. Notice to an owner of property is not required in cases where real estate is assessed under statute providing for assessment of additional improvements. *Watson Bros. Realty Co. v. County of Douglas* 799

Tenancy in Common.

Where language creating a tenancy in common is accompanied by appropriate words reciting a purpose to create a right of survivorship, the intention to create a survivorship is effectual. *Anson v. Murphy* 716

Torts.

1. Amended venue statute authorizes the commencement of a tort action in any court of competent jurisdiction in any county in this state wherein the cause of action arose, though neither plaintiff nor defendant were residents thereof, and authorizes the issuance of process by such court for any defendant to the county of his residence in this state, and for the due service thereof upon him therein. *Gergen v. Western Union Life Ins. Co.* 203
2. The fact that a practical joke is the cause of an injury to a person does not excuse the perpetrator from liability in damages for the injury sustained. *Newman v. Christensen* 471
3. When one does an act which proves injurious to another, an action in tort generally arises in favor of the injured person, although the act was done without malice and no injury was intended. *Newman v. Christensen* 471

Trial.

1. Where there is competent evidence which sustains the theory of the plaintiff as presented by the pleadings, it is prejudicial error for the trial court to fail to instruct the jury on such theory. *Hansen v. Lawrence* 26
2. Instructions to a jury which are inapplicable to the proved facts, and which thereby mislead the jury, will ordinarily constitute reversible error. *Hansen v. Lawrence* 26
3. A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Thomas v. Poulson* 44
   Buresh v. George 340

Dickman v. Hackney 367
Roby v. Auker 734

4. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them. *Allen v. Massachusetts Mutual Life Ins. Co.* 233
5. When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is a proximate cause of the accident then the court should direct a verdict for the defendant and dismiss the action. *Buresh v. George* 340
6. In stating the issues to the jury, it is error that may be prejudicial for the trial court to include allegations of which there is no proof. *Melcher v. Murphy* 541
7. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but on the other hand, where the evidence shows, beyond a reasonable dispute, that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. *Melcher v. Murphy* 541
8. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism. *Yost v. State* 584
9. Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence. *Gee v. City of Sutton* 603
10. In a law action where, at the close of the evidence, each party requests a directed verdict in his favor, and the court discharges the jury and decides the case, the losing party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence. *Witthauer v. Employers Mutual Casualty Co.* 728
11. When plaintiff moves to dismiss, or for a directed

verdict, or to withdraw from the jury consideration of defendant's claim upon a cross-petition in a negligence case, such defendant has a right to rely upon and have the benefit of any evidence of plaintiff's negligence which may appear in evidence adduced by plaintiff in his own behalf. *Roby v. Auker* 734

12. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury. *Roby v. Auker* 734

13. It is the duty of the trial court to submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence. *Roby v. Auker* 734

14. A dismissal after final submission of a case to a court, where trial is by the court, to be effective, must be by leave of court and upon its order, which order is required to be entered on its journal. *Tuttle v. Wyman* 769

15. The right of a plaintiff to dismiss his action is not always absolute, in the sense that the court has no power over or discretion with respect to its exercise, because if justice to the court or its officers or to any of the parties whose rights would be otherwise jeopardized requires imposition of terms or retention of the cause on the docket, the court, in its discretion, may impose such terms or refuse to permit dismissal. *Tuttle v. Wyman* 769

16. In a case where the opposing parties at the close of all the evidence, without reservation, move for a directed verdict, such parties invite the court to discharge the jury, determine the facts, and apply the law thereto; and error cannot be predicated upon the acceptance of the invitation. *National City Bank of Cleveland v. Jones* 844

Trusts.

1. When one person buys real estate, pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price. *Holbein v. Holbein* 281

2. A resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance. *Holbein v. Holbein* 281
3. So reluctant are the courts to engraft a trust by parol on the legal title to real estate, that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence. *Holbein v. Holbein* 281
4. A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence. *Holbein v. Holbein* 281
5. Generally, when bonds, securities, or other properties of a trust are sold at a profit the profit becomes a part of the principal and may not be considered as income. *State ex rel. Bottcher v. Bartling* 491
6. If a trust is a manufacturing or merchandising trust involving buying and selling for profits, the profits are to be considered as income. *State ex rel. Bottcher v. Bartling* 491
7. Capital gains of trusts may be considered as income for income tax purposes. *State ex rel. Bottcher v. Bartling* 491
8. The state is prohibited under the Enabling Act of Congress and the Nebraska Constitution from claiming benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation to keep inviolate such trust funds. *State ex rel. Bottcher v. Bartling* 491
9. A trustee will not be permitted to offset losses occasioned by his breach of trust against profits to the trust. *State ex rel. Bottcher v. Bartling* 491
10. Where a constructive trust arises out of and was the result of actual fraud, the constructive trustee should be denied any recovery for personal services rendered by him to the trust estate. *Tuttle v. Wyman* 769

Vendor and Purchaser.

1. In the ordinary contract for the sale of land, equity does not regard time as of the essence,

though it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances. *Wilderman v. Watters* 102

2. If it appears that it was the intention to make time of the essence of a contract for sale of real estate, it will be so regarded. *Wilderman v. Watters* 102

3. If time becomes material to the rights and interests of the parties to any substantial degree, time will be regarded as of the essence of a contract for sale of real estate. *Wilderman v. Watters* 102

4. A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased. Where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby. *Cooper v. Marr* 211

5. Where a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage. *Cooper v. Marr* 211

6. The acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition. *Anderson v. Stewart* 660

7. An acceptance specifying a different place for the delivery of the conveyance or payment of the price from that stated in the offer or implied as a matter of law is not a sufficient unconditional acceptance. *Anderson v. Stewart* 660

8. If no place for payment is specified in the offer, where the negotiations are carried on by correspondence, it is implied that payment is to be made to the vendor in the city where he resides. *Anderson v. Stewart* 660

9. If no place for delivery is specified the vendor

is entitled to have the transaction closed where he lives. *Anderson v. Stewart* 660

Venue.

Amended venue statute authorizes the commencement of a tort action in any court of competent jurisdiction in any county in this state wherein the cause of action arose, though neither plaintiff nor defendant were residents thereof, and authorizes the issuance of process by such court for any defendant to the county of his residence in this state, and for the due service thereof upon him therein. *Gergen v. Western Union Life Ins. Co.* 203

War.

1. In an action by a purchaser to recover for an overcharge under the Federal Emergency Price Control Act, the burden is on him to prove: The purchase, that there was an established ceiling price, that the price paid exceeded the ceiling price, the amount of the excess, and that the article or merchandise purchased was for use other than in the course of trade or business. *Keyser v. Allen* 449
2. In case of sale over the ceiling price the liability is three times the excess, however, the judgment may not be for less than the overcharge nor more than three times that amount. *Keyser v. Allen* 449
3. If the seller shall prove that the violation of the price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of violation then the judgment shall be only for the amount of the overcharge. *Keyser v. Allen* 449
4. If the seller shall fail to prove either willful violation or failure to take practicable precautions, the amount of the judgment resides in the discretion of the court but should be not less than the overcharge nor more than three times that amount. *Keyser v. Allen* 449

Waters.

1. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstruc-

tions to interfere with its accustomed flow to the damage of another. *Olson v. Roscoe* 189

2. In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises. *Cattin v. City of Omaha* 434

3. While a city of the metropolitan class is under no obligation to construct a system of drainage for protection from surface water, it is not entirely absolved from liability for injury caused to private property when it fails to keep a sewer system in proper control after the same has been constructed. *Cattin v. City of Omaha* 434

4. When a metropolitan city makes a provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains. *Cattin v. City of Omaha* 434

5. Where the evidence is in controversy as to whether or not the rainfall at the time the plaintiff's premises were flooded was unusual, excessive, or unprecedented, it is a question for the jury. *Cattin v. City of Omaha* 434

6. Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. *Stubblefield v. Osborn* 566

7. The thread or center of a channel must be the line which would give the owners on either side access to the water, whatever its stage must be, and particularly at its lowest flow. *Stubblefield v. Osborn* 566

8. Under the evidence adduced, the trial court was not in error in determining the plaintiffs' rights superior to those of the defendants in the use and occupancy of the islands in question. *Stubblefield v. Osborn* 566

Wills.

1. In a will contest based on objection that the testator was mentally incompetent to make a will the

burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury. *In re Estate of Johnsen* 34

2. The essential qualities of mental capacity to make a will are that the testator knew the extent of his property, that he understood the nature of his act in making the will, that he understood the disposition he was making of his property, and that he knew the natural objects of his bounty. *In re Estate of Johnsen* 34

3. A nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if that condition becomes a subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Johnsen* 34

4. Before a lay witness will be permitted to give an opinion as to the mental capacity of a person to make a will it must appear that the facts and circumstances testified to by the witness were sufficient upon which to base an opinion or draw an inference that the deceased lacked such mental capacity. *In re Estate of Johnsen* 34

5. Provision at the end of a will just after appointment of the executrices as follows: "I do hereby further request that no proceedings be taken on the mortgage held by me on the home of my sister Louise Klein of 2546 Chicago Street, Omaha," held in view of other provisions of the will to be neither a gift of said mortgage to said sister, nor a cancellation of it, nor to preclude its foreclosure after the death of the sister. *Rawls v. Hewitt* 160

6. It is the court's duty in the construction of a will to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. *Olson v. Lisco* 314

7. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted meaning, and indulge the presumption that testator understood the meaning of the words used. *Olson v. Lisco* 314

8. Where real estate is devised to executors, to be held by them in trust until a child attains a certain age, when the same shall be conveyed to him in fee, with a devise over, in the event of the child's death prior to attaining such age, such a provision confers on the child a vested interest in fee simple, subject to the prior chattel interest given the executors and also subject to defeasance in the event of his death before attaining such age. *Olson v. Lisco* 314
9. Where an absolute fee has been given in one clause of a will and a subsequent provision provides for a different distribution upon the happening of a contingency, such contingency must take effect before the period of distribution. *Olson v. Lisco* 314
10. The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs at law or next of kin in property as to which the testator died intestate. *Kula v. Kula* 347
11. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty and the purposes of his devises and bequests, he is mentally competent to make a will. *In re Estate of Scoville* 415
12. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument. *In re Estate of Scoville* 415
13. In a will contest based on objection that the testator was mentally incompetent to make a will the burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury. *In re Estate of Scoville* 415
14. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will. *In re Estate of Scoville* 415
15. The elements necessary to be established to war-

rant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Scoville* 415

16. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own. *In re Estate of Scoville* 415

17. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *In re Estate of Scoville* 415

18. Statute providing short form for determination of heirship is not exclusive but permissive in character, and applicable in any event when only real estate is involved in the estate. *In re Estate of Large* 783

19. Where a will is offered and admitted to probate more than two years after the death of the testator, and an executor or administrator is appointed to administer the estate in which funds or personal property as distinguished from realty are also involved, the representative should not be discharged until after regular administration of the estate has been completed. *In re Estate of Large* 783

Witnesses.

1. The effect of a clause in an insurance policy authorizing a physician to disclose knowledge or information acquired while attending or examining an insured is to remove the statutory prohibition and to permit the physician to testify subject to the same rules that apply to any other witness. *Allen v. Massachusetts Mutual Life Ins. Co.* 233

2. An expert witness will be permitted to give his opinion as to mental capacity if it is predicated on a proper and sufficient foundation. *In re Estate of Scoville* 415

3. The opinion of a medical expert must be predicated on one or more of the following: Examination and observation of the person who is the subject of the inquiry, examination and history, or supposed

facts of which there is evidence. *In re Estate of Scoville* 415

4. A nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if that condition becomes a subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Scoville* 415

Workmen's Compensation.

1. In making a case for compensation under the workmen's compensation law, more than a preponderance of evidence is not required. *Sporcic v. Swift & Co.* 246
2. To sustain an award in a workmen's compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, and preexisting disease combined to produce disability. *Sporcic v. Swift & Co.* 246
3. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted. *Sporcic v. Swift & Co.* 246
4. The Supreme Court may allow an employee a reasonable sum as attorney's fees for proceedings in such court when the employer appeals from the district court to the Supreme Court and fails to obtain any reduction in the amount of the award. *Sporcic v. Swift & Co.* 246
5. On review de novo of the record, evidence sustained finding that plaintiff was permanently and totally disabled as a result of a compensable accident. *Werner v. Nebraska Power Co.* 408
6. Employer is not entitled to a reduction in the amount of compensation payable for a period of time that employee was gainfully employed subsequent to the injury. *Werner v. Nebraska Power Co.* 408
7. Where employer appealed to district court and did

not obtain reduction in award, allowance of attorney's fee was proper. *Werner v. Nebraska Power Co.* 408

8. On appeal to Supreme Court by employer, attorney's fee was properly allowed when judgment was affirmed. *Werner v. Nebraska Power Co.* 408

9. The intent of the Workmen's Compensation Act, as it relates to an accidental injury to an eye, is to compensate and indemnify the owner of an eye, capable of industrial use and injured in industry, to the extent therein provided for the loss occasioned thereby. *Gruber v. Stickelman* 627

10. Temporary disability is the period the injured employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Allen v. Department of Roads and Irrigation* 837

11. The extent of the permanent disability is not finally determinable until the employee is restored insofar as the nature of his injuries will permit. An injured employee is entitled to temporary disability until this determination can be made. *Allen v. Department of Roads and Irrigation* 837