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DOROTHY L. HARDER, APPELLANT, V. ROBERT W. HARDER, APPELLEE.

76 N. W. 2d 260

Filed April 13, 1956. No. 33921.

1. **Appeal and Error.** Affidavits filed with the clerk of the district court not preserved by the bill of exceptions will not be considered by the Supreme Court.
2. **Divorce.** By section 42-312, R. R. S. 1943, it is provided that in cases of divorce or annulment of marriage the decree may be revised as to care, custody, and maintenance of children if the circumstances of the parties shall change, or it shall be to the best interests of the children.
3. ———. An application for a change with respect to care, custody, and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of decree.

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

Shrout & Brown, for appellant.

Cropper & Cropper, for appellee.

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

YEAGER, J.

The proceeding here is an appeal from an order modifying a decree of the district court in an action wherein the plaintiff and appellant obtained a decree of divorce from the defendant and appellee and an award of the custody of the three minor children of the parties.

The formal decree of divorce was entered on February 16, 1955, with a declared effective date of December 8, 1954. By the decree the plaintiff was awarded the custody of Robert W. Harder, age 9 years, Gay Lea Harder, age 7 years, and Cheri Ann Harder, age 4 years. She was awarded $35 a week for the support and maintenance of the children from and after February 15, 1955.

By an order of court entered March 4, 1955, to which

the defendant filed a written consent, the plaintiff was granted leave to remove the children to the State of Texas. The provision of the decree as to support and maintenance was in nowise modified or changed.

On August 11, 1955, the defendant filed a supplemental petition in the divorce action the object and purpose of which was to have the custody and control of the three children given to him. The alleged ground for change was that the plaintiff, because of incapacity to provide a home for the children, was unfit and unsuitable to continue as custodian of the children and that for the benefit and welfare of the children their custody should be transferred to the defendant. Issue was joined by a denial of these allegations of the petition.

A trial was had on September 21, 1955. The bill of exceptions discloses that the defendant adduced all of his evidence and rested. Thereafter plaintiff moved for dismissal of the petition. The motion was overruled. After this motion was overruled the plaintiff took the stand and gave testimony in her own behalf. Apparently before the direct examination of plaintiff had been concluded the court peremptorily brought the trial to an end and by formal order dismissed the petition of the defendant.

On September 23, 1955, the order of dismissal was vacated and set aside. On that date by recital in the order it appears that the parties appeared with their respective attorneys and their witnesses, at which time a trial was had and evidence taken.

The plaintiff challenges the assertion that there was a hearing and evidence taken on September 23, 1955, by affidavit filed in the office of the clerk of the district court. The affidavit may not however receive consideration since it has not been preserved in the manner provided by law. This court has said: "It is the rule that affidavits not included in a bill of exceptions will not be considered by the Supreme Court." Frye v. Frye,

158 Neb. 694, 64 N. W. 2d 468. See, also, Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704; State ex rel. Sorensen v. State Bank of Ravenna, 127 Neb. 338, 255 N. W. 549; Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540.

There is nothing in the body of the bill of exceptions or any of its certificates to indicate when the evidence was taken upon which the court made either of its determinations.

Under these circumstances there is nothing to impeach the verity of the finding of the court that a hearing was had with all parties present and evidence taken, which hearing and evidence was the basis of the order entered on September 23, 1955.

As a result of this trial the petition of defendant was in part sustained and in part denied, and the decree was modified accordingly. He was awarded custody of Robert W. Harder and the custody of the other two children was allowed to remain with plaintiff. The award for child support was reduced from $35 a week to $25 a week. The plaintiff duly filed a motion for new trial. This motion was overruled. From the order modifying the decree and the order overruling the motion for new trial the plaintiff has appealed. As grounds for reversal she contends that the judgment is contrary to the evidence; that it is contrary to law; and that the trial court abused its discretion in modifying the decree.

The power of the district court to revise its decree of divorce or annulment of marriage as to maintenance and custody of children is declared by statute as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." § 42-312, R. R. S. 1943. See, also, Stanley v. Stanley, 155 Neb. 125, 50 N. W. 2d 558; Hoff-

meyer v. Hoffmeyer, 157 Neb. 842, 62 N. W. 2d 138; Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579; Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513.

In interpreting this statutory provision, this court has said: "An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res adjudicata." Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617. See, also, Griess v. Griess, *supra;* Morris v. Morris, 137 Neb. 660, 290 N. W. 720.

It is true that in this quotation care and custody are not mentioned, but the three, insofar as parental duty and obligation are concerned, are not severable. What therefore has been said as to support and maintenance should have application to care and custody.

As to the facts there is no information in the bill of exceptions from which any reasonable inference may be drawn as to the ability of the plaintiff at that time to care for, support, and maintain the three children. Since however she was awarded their custody it must be true that the award made in this respect was in the best interests of the children.

There is no evidence of changed conditions as to the plaintiff except that she moved from Omaha, Nebraska, to Fort Worth, Texas. Incident to that change is evidence of the conditions under which she was caring for the children in Texas. The substance of the evidence in this connection is that she and the children were living in an apartment over a garage where the area for recreation was limited; that the children were not well clothed; that the boy was nervous; and that the plaintiff spent time away from them at work.

There is no evidence whatever that the surroundings were objectionable other than that the apartment was

over a garage and that the recreational area was limited. There is no evidence from which an inference of neglect may be attributed to plaintiff unless it may be said that she, without good cause, failed to properly clothe the children and unless it may be said that necessity to work by a mother of three small children be regarded as neglect. The character of plaintiff and her qualities as a mother have not been in any wise brought into question.

There is evidence of a changed condition insofar as the defendant is concerned. It is reasonably apparent that at the time the divorce decree was rendered the defendant was in financial distress and had a heavy burden of debt. At the time of the present hearing he still had at least a part of his burden of debt but he had a net income from his business as a plumber of about $110 a week, which business he was operating at Fontana, California. He has remarried and has under lease with option to purchase a five-room house in Fontana, California. At the time of trial he was not living in the house but was living in a 36-foot trailer to which had been built a room. Assurance is held out that if the custody of the children is granted to the defendant the house will be occupied as a home. The present wife of defendant has expressed a desire to have and to care for the three children.

With the consent of the plaintiff the defendant took the children from Texas to California on June 15, 1955. He promised to return them in 6 or 8 weeks. This he failed to do. At the time he took them he was in arrears of support in excess of $100. Incidentally it is not unreasonable to infer that this delinquency was the reason for the children being ill clad, if they were ill clad, as charged by the defendant. It is to be remembered that at the trial the plaintiff was not permitted to give her entire story.

This we think is a fair reflection of the factual situa-

tion as disclosed by the record from the economic viewpoint.

There is another viewpoint which deserves careful consideration in determining the disposition of these minor children and each of them.

The evidence is that defendant left Omaha en route to California on March 6, 1955. He stopped for a time in Las Vegas, Nevada, and arrived in Fontana, California, on March 20, 1955. The divorce decree had not become final. However his present wife who was at the time the wife of another man left with him as his wife. She later obtained a divorce in Tia Juana, Mexico, and was married to the defendant on June 9, 1955.

The record contains no evidentiary background for this woman prior to coming to Omaha except that she came from Illinois, and none while she was in Omaha. Likewise the record contains no evidence as to qualities for the care of children except her testimony and that of the defendant. The limit of this is that she cared for the children while they were in California, that they were happy and contented, and that provision was made for their physical requirements, their education, and religious training. In this connection it is to be observed that it was but 6 days after the expiration of the meretricious relationship between the defendant and his present wife that the defendant took his first step to secure custody of these children. It was but 2 months later when he filed the petition herein.

In the light of this record some things are made quite clear. There is no evidence of any change insofar as plaintiff is concerned since the decree was rendered except as has been noted. There is no evidence that the plaintiff because of any personal qualities or proclivities is unfit to have the care and custody of these children. If the needs of the children were not sufficiently provided for, it is reasonably inferable that this was brought about at least in part by the failure of the defendant to comply with his obligation under the divorce decree.

On the other side, without further comment, it does not appear that to place these children or either of them with the defendant would be in their best interest.

The order of the district court modifying the decree granting the custody of Robert W. Harder to the defendant and reducing the payment for support and maintenance from $35 a week to $25 a week is reversed.

REVERSED.

DELORES ANN LOCKMAN, APPELLEE, V. ROBERT FULTON, APPELLANT.
76 N. W. 2d 452

Filed April 20, 1956. No. 33875.

1. **Children Born Out of Wedlock.** In the absence of statutory permission, the statements or declarations of complainant in a filiation proceeding made by her to third persons out of court and not in the presence of defendant, in which she recited or claimed that defendant was the father of her child, are incompetent and inadmissible as corroboration in her behalf.
2. ———. The uncorroborated testimony of the mother of a child conceived out of wedlock but yet unborn or of a child born out of wedlock is not sufficient to support a verdict or finding that the alleged father is the actual father.
3. ———. In an action to establish the paternity of a child conceived out of wedlock but yet unborn or of a child born out of wedlock, it is not essential to a verdict or finding of guilty that the testimony of the mother shall be corroborated by the testimony of other witnesses as to the act producing conception, but only that she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
4. ———. In an action to establish the paternity of a child conceived out of wedlock but yet unborn or of a child born out of wedlock, only a preponderance of evidence is necessary to sustain a conviction.
5. ———. However, the character and quality of proof of corroboration is the same in filiation proceedings as in criminal cases wherein corroboration of the testimony of the prosecutrix is required.

6. ———. Circumstances, if material and competent, may corroborate complainant's testimony, and opportunity, disposition, or inclination are circumstances which may be considered together with other material and competent facts and circumstances which tend to corroborate her testimony, but mere opportunity alone is insufficient corroboration to support a finding or verdict and judgment that defendant is actually the father of complainant's child.
7. ———. If the testimony of complainant with regard to the principal fact is so inconsistent, contradictory, improbable, or incredible as to be self-destructive, or if the corroborative evidence is of a like doubtful character or wholly lacking in probative force or value, a finding or verdict and judgment of guilty will be respectively set aside and reversed.

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

Herman & Van Steenberg, for appellant.

Leo F. Bolin, for appellee.

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

CHAPPELL, J.

Complainant, Delores Ann Lockman, hereinafter called plaintiff, brought this filiation proceeding against defendant, Robert Fulton, under the provisions of sections 13-111 and 13-112, R. R. S. 1943, seeking an adjudication that defendant was the father of her unborn child as alleged, and to recover a judgment against defendant for the amount of plaintiff's medical and other expenses of her pregnancy and confinement together with such other relief as might be just and equitable. Defendant's answer denied that he ever had any sexual intercourse with plaintiff, denied that he was the father of her unborn child, and prayed for dismissal of plaintiff's action. The issues were tried to the court without a jury in conformity with section 13-112, R. R. S. 1943, whereupon a judgment was rendered finding generally in favor of plaintiff and against defendant, and adjudging that defendant was the father of plaintiff's

unborn child. Further findings pertinent to the issues were taken under advisement. In such respect, section 13-112, R. R. S. 1943, provides in part: "Should it be determined in this proceeding that the alleged father is actually the father of the child, a judgment shall be entered declaring such to be the case. In the event that such a judgment is entered, the court shall retain jurisdiction of the cause, and enter such order of support as may be proper under the procedure and in the manner specified in section 13-106." Thereafter, defendant's motion for new trial was overruled and he appealed, assigning in effect that: (1) The trial court erred in the admission of certain evidence over objections of defendant; and (2) that the findings and judgment were not sustained by the evidence but were contrary thereto and contrary to law. We sustain the assignments.

After plaintiff had rested her case, defendant moved to direct a verdict for the reason that plaintiff's testimony lacked sufficient corroboration. In that connection, section 13-112, R. R. S. 1943, provides in part: "The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father." Thereupon plaintiff was permitted, over objection of defendant, to withdraw her rest and recall her mother for further examination in an effort to establish sufficient corroboration. Thereat, over objection by defendant, plaintiff's mother was permitted to testify that right after September 9, 1954, she had a conversation with plaintiff in defendant's absence whereat plaintiff made statements and declarations telling her the particulars about plaintiff's sexual intercourse with defendant on the night of August 14, 1954, when conception allegedly occurred. Subsequently, plaintiff rested again and defendant's motion to direct a verdict was renewed but overruled. Such a motion was not made or renewed at conclusion of all the evidence. Defendant argued here that the

admission of such testimony was erroneous. We sustain that contention.

In Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382, this court concluded that in the absence of statutory permission, the statements or declarations of complainant in a filiation proceeding made by her to third persons out of court and not in the presence of defendant, in which she recited or claimed that defendant was the father of her child, are incompetent and inadmissible as corroboration in her behalf. The rule is controlling here.

However, as held in Western Smelting & Refining Co. v. First National Bank, 150 Neb. 477, 35 N. W. 2d 116: "In a case tried to the court, whether at law or in equity, the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." Therefore, such testimony of plaintiff's mother will not be considered here, and the sole question remaining for decision is whether or not plaintiff's testimony was otherwise sufficiently corroborated as required by law. We conclude that it was not.

Recently, in State ex rel. Klostermeier v. Klostermeier, 161 Neb. 247, 72 N. W. 2d 848, this court held: "The uncorroborated testimony of the mother of a child born out of wedlock is not sufficient to support a verdict or finding that the alleged father is the actual father.

"In an action to establish the paternity of a child born out of wedlock it is not essential to a verdict or finding of guilty that the testimony of the mother shall be corroborated by the testimony of other witnesses as to the act producing conception, but only that she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

"In an action to establish the paternity of a child born out of wedlock, only a preponderance of the evidence is necessary to sustain a conviction.

"In an action to establish the paternity of a child born out of wedlock, a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong." By analogy, such rules have application in a proceeding where the child is conceived out of wedlock but yet unborn.

While a filiation proceeding is penal in some aspects, it is ordinarily considered as civil in character. It seems clear, however, that the Legislature enacted section 13-112, R. R. S. 1943, requiring corroboration of complainant in order to protect innocent persons wrongfully accused. Hence, we again conclude, as was done in State ex rel. Klostermeier v. Klostermeier, *supra,* that the character and quality of proof of corroboration required is the same in filiation proceedings as in criminal cases, such as rape or assault with intent to commit rape, wherein corroboration of the testimony of the prosecutrix is required.

In Mott v. State, 83 Neb. 226, 119 N. W. 461, this court held: "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testified positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." In that opinion it is said, citing authorities: "As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accomplished by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. * * * Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit;

and it is self-evident that the main fact in this case cannot be strengthened by a collateral fact, the existence of which is dependent upon the same class of testimony.

"Again, if it be admitted that the defendant was in the company of the prosecutrix, as testified to by the Grieves girls, and if it be further admitted that the defendant on one occasion at or about June 1, 1907, brought the prosecutrix home in the evening, as stated by the mother, these facts of themselves alone are not corroborative, because they simply mean opportunity, and opportunity is not of itself corroboration." See, also, Boling v. State, 91 Neb. 599, 136 N. W. 1078; Blue v. State, 86 Neb. 189, 125 N. W. 136.

In Roberts v. State, 106 Neb. 362, 183 N. W. 555, this court held: "In a prosecution under an information charging statutory rape, where the prosecuting witness has testified positively to the offense having been committed and the defendant has positively denied committing the offense, testimony of a brother-in-law of the complaining witness that he saw the defendant near the building in which the complaining witness claims said act was committed is not sufficient corroboration of the testimony of the complaining witness to sustain a conviction." In that opinion it is said: "Mere opportunity is not in itself sufficient to corroborate the otherwise unsupported evidence of the complaining witness."

Also, in Robbins v. State, 106 Neb. 423, 184 N. W. 53, this court held: "In a prosecution charging rape, other direct testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential to make a corroboration of her story, but corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and as will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. The conduct and demeanor of the accused may furnish such corroboration." Also, as said in that opinion: "It is

necessary that there be some evidence of an incriminating character, more than such mere opportunity to commit the crime, which, aside from the statements of the prosecuting witness, must point to its commission and to the identity of the accused as the person who has committed it."

As stated in Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380: "'* * * corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. Nabower v. State, 105 Neb. 848; Koutouc v. State, 104 Neb. 580; Day v. State, 102 Neb. 707; Hammond v. State, 39 Neb. 252.' Robbins v. State, 106 Neb. 423, 184 N. W. 53.

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

In other words, circumstances, if material and competent, may corroborate plaintiff's testimony, and opportunity, disposition, or inclination are circumstances which may be considered together with other material and competent facts and circumstances which tend to corroborate her testimony, but mere opportunity alone is insufficient corroboration to support a finding or verdict and judgment that defendant is actually the father of complainant's child. Further, if the testimony of plaintiff with regard to the principal fact is so inconsistent, contradictory, improbable, or incredible as to be self-destructive, or if the corroborative evidence is of a like doubtful character or wholly lacking in pro-

bative force or value, a finding or verdict and judgment of guilty will be respectively set aside and reversed.

In the light of such rules we have examined the record which substantially discloses as follows: Plaintiff was 19 years old and lived with her father, mother, and seven other children at Minatare. Her father was not employed. Plaintiff was taken out of school in the seventh grade because she was unable to advance. She had known defendant 2 or 3 years and claimed to have gone out with him 5 or 6 times. Defendant, who lived at Minatare but worked up in Banner County and came home only on week ends, had been a chum of her older brother since about 1948, and such brother testified as a witness for plaintiff that he had never seen plaintiff out with defendant during all of their acquaintance. Further, defendant positively denied that he ever was out with plaintiff or ever talked to her except when other members of plaintiff's family were present or nearby.

Plaintiff testified that on Saturday night, August 14, 1954, while she was at home with her three younger brothers, defendant came to their house and she then voluntarily had sexual intercourse with him out behind the barn. Her parents were not then at home and when they returned about 9:30 or 10 p. m. and went in the house, plaintiff followed them right in and defendant left for town. Plaintiff claimed that she never had sexual intercourse with any other man before and that upon such occasion it was the only time she had ever had such relations with defendant. In that regard, defendant denied positively that he ever had sexual intercourse with plaintiff.

Defendant also testified that sometime in June 1954 plaintiff had asked him if he wanted to take her out sometime, and upon his refusal, telling her that he wanted nothing to do with her because she was dumb, she replied that it would not be the first time she did because she had such affairs with all of her brothers. Also, on one occasion in the latter part of June 1954

defendant testified that he heard one of plaintiff's sisters teasing plaintiff about what she and her two brothers had been doing over at the sugar factory and out at the end of the beet row. Further, on another occasion one Sunday sometime in June 1954, when plaintiff's parents were gone, plaintiff's brother and others got in defendant's car and defendant drove his car out to plaintiff's home where they saw plaintiff come out of the house with a strange white man. At that time also an Indian was there sitting in a car in their yard. Such latter occasion was corroborated by a disinterested witness who twice the same day there observed such two men. He first saw plaintiff and such white stranger come out of the barn together and upon returning later he also saw plaintiff and such stranger come out of the house together. Such evidence heretofore recited in this paragraph stands undenied in this record.

Plaintiff testified that after August 14, 1954, she did not know that she was pregnant until she was taken to her doctor in November, at which time she learned that she was 2½ months pregnant. Such date could coincide with her claim of conception August 14, 1954. However, plaintiff also inconsistently testified that she had talked with defendant about her pregnancy on the 10th or 11th of September 1954, at which time she had confirmed that she was pregnant. Be that as it may, plaintiff's doctor testified that he actually first examined plaintiff on October 15, 1954, and then found that she was 2½ months pregnant, which would make the date of conception about the latter part of July or the first of August 1954. Her doctor also testified that he examined plaintiff again on December 17, 1954, and estimated that she was then 6 months pregnant, farther advanced than he had anticipated, which would make the date of conception about the middle of June 1954. He also examined plaintiff on March 22, 1955, and found her pregnancy more advanced than he had thought. He thought she was then within 3 or 4 weeks of what ap-

peared to be a full normal term of 280 days, which if true would make the date of conception about the middle of July 1954. He also testified that if the date of conception was August 14, 1954, the date of birth would be about May 17, 1955, but that the birth of what looked like a full-term baby would actually occur before that date. In that connection, the rule is that where in a filiation proceeding, in order for defendant to be guilty, the birth of the child would be or must have been premature, the burden is upon plaintiff to establish by a preponderance of the evidence that the child alleged to have been conceived by such intercourse will be or was a premature birth. Souchek v. Karr, 78 Neb. 488, 111 N. W. 150, cited with approval in Hudson v. Hudson, 151 Neb. 210, 36 N. W. 2d 851. We find no competent evidence in this record which could support a finding that the birth of plaintiff's unborn child would be premature.

Plaintiff's mother also testified that their doctor examined plaintiff the first time in November and that they then learned she was 2½ months pregnant. The mother testified that defendant was frequently with the family; that he frequently visited the family home; that she had seen defendant's car there on numerous occasions and could identify it; that on August 14, 1954, between 9:30 and 10 p. m., when she and her husband came home, she saw defendant's car in their yard; and that the yard lights were on and she saw plaintiff and defendant come from behind the barn nearby, whereupon plaintiff came in the house and defendant got in his car and left. She had no conversation with defendant at that time, but she claimed that he came back again and she saw him asleep in his car in their yard about 2 a. m. and again about 5 a. m., after which time she had a conversation with defendant in their house about a car wreck which her son had that night. Admittedly, however, nothing was then said by her to defendant about the activities of plaintiff and defendant the eve-

ning before. She also testified that about 2 a. m. that same morning her son, plaintiff's brother, came home with someone else, because defendant had ditched or left him, and that her son then got the family car to take his girl home, at which time defendant was in their yard asleep in his own car; and that her son later that night had a wreck with the family car and when he came home at 5 a. m. defendant was still there asleep in his car. In such respect, her son's testimony was entirely different from that given by plaintiff's mother.

Her son testified that he and defendant were together often and sometimes double dated; that on August 14, 1954, he was with defendant in a tavern at Minatare from about 7:30 to about 9 p. m., when defendant left, saying that he had to go home, and the son took it for granted that defendant was at home until he came back to the tavern about 11:30 p. m. Thereafter, driving defendant's car and accompanied by an unnamed girl, such son and defendant drove to Melbeta together where they stayed until about 1 a. m. when the taverns closed. Thereafter, they drove to Scottsbluff together in defendant's car, and returned to Minatare about 3 a. m. where they took the girl home, and thereafter defendant took the son home, where defendant let him out of his car and defendant left the place. The son testified that defendant did not stay at their place at all on the night of August 14, 1954; and that when he got home he went to bed and defendant left in his own car at that time. In other words, they used defendant's car all evening and the son made no mention whatever of using or wrecking the family car. In that respect, defendant also denied that he ever was out behind the barn with plaintiff or slept in his car in plaintiff's yard on the night of August 14, 1954, and testified that he was with the son at all times during that night and never left him at any time and went to plaintiff's home.

It will be observed that plaintiff's own testimony was

inconsistent and contradictory in material respects, as also was the testimony of plaintiff's doctor, her mother, and her brother, whose corroborative testimony at most established plaintiff's pregnancy and mere opportunity for defendant to be the child's father. There was no competent evidence whatever showing any disposition or inclination by defendant to have sexual relations with plaintiff at any time. Under the evidence and authorities, plaintiff's testimony was corroborated only by opportunity, which of itself is not sufficient corroboration.

We conclude that the evidence was insufficient to sustain the findings and judgment, which were clearly wrong. Therefore, the judgment should be and hereby is reversed. All costs are taxed to plaintiff.

REVERSED.

WAUNETA V. GREER, APPELLANT, V. EDWARD CHELEWSKI ET AL., APPELLEES.
76 N. W. 2d 438

Filed April 20, 1956. No. 33879.

1. **Schools and School Districts.** A school board is a public body empowered by law to transact the business of the school district for school purposes. The members act in a representative capacity, not as individuals.
2. ———. The general duties of such officers require them to look after the interests of the district, and they should defend suits if it appears that the interests of the district demand it.
3. ———. A contract to teach in the common or free schools is one of employment, and the relative positions occupied by the district represented by the board and the teacher are those of employer and employee.
4. **Schools and School Districts: Contracts.** Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally.
5. **Contracts.** A contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable.

APPEAL from the district court for Valley County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

John R. Sullivan, for appellant.

Ralph W. Norman, for appellees.

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

WENKE, J.

Wauneta V. Greer brought this action in the district court for Valley County under the Uniform Declaratory Judgments Act. It involves the rights, duties, and liabilities of the parties to a contract of employment to teach entered into by plaintiff, a qualified teacher, with the School Board of School District No. 37 of Valley County, Nebraska. The trial court dismissed the action. Plaintiff thereupon filed a motion for new trial and, from the overruling thereof, took this appeal.

Appellant was, on August 10, 1953, employed to teach school for school district No. 37 for a term of 9 school months beginning August 31, 1953. She taught until February 15, 1954, when she was discharged. The notice given her by the district stated the action was being taken "* * * because of your incompetency, insubordination, failure to meet with the Board and discuss your problems, failure to hold school at proper times without good cause, failure to be present and open school at the proper time, and for general improper conduct both during school and outside of school hours." Thereafter she continued to report at the school for the purpose of teaching until the sheriff ordered her to stay away.

The School Board of School District No. 37 of Valley County, Nebraska, hereinafter referred to as the school district, consisted of Edward Chelewski, president; Ralph H. Lybarger, secretary; and Wester L. Jones, treasurer.

Appellant filed a motion for summary judgment. This was made under and pursuant to the authority provided

therefor by sections 25-1330 and 25-1332, R. S. Supp., 1953. The court overruled the motion and thereafter decided the case on its merits. In presenting the motion appellant's counsel stated: "* * * there is no genuine issue here because the Reply to Request for Admissions was not filed and served within the specified time in the Request and because it does not comply with the statutory requirements that it be sworn to by the defendants and the matters therein are deemed admitted thereby establishing for the plaintiff a prima facie case; * * *."

This action was commenced on February 27, 1954, by appellant filing her petition. Thereafter, on December 13, 1954, appellant filed with the clerk and served on appellees a request for admissions which contained the following: "* * * requests that the defendants answer separately and fully in writing, under oath, the following interrogatories within ten (10) days after the date of the service of these interrogatories." This was done under and pursuant to the provisions of section 25-1267.41, R. S. Supp., 1953. On December 31, 1954, Edward Chelewski, Ralph H. Lybarger, and Wester L. Jones, by their attorney, filed a reply thereto, which was served on appellant on January 3, 1955. This reply was not under oath. However, the trial court permitted an oath to be filed thereto verifying the reply. This was done on May 17, 1955.

Section 25-1267.41, R. S. Supp., 1953, provides, insofar as here material, as follows: "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in de-

tail the reasons why he cannot truthfully admit or deny those matters, * * *."

In this respect appellant contends the trial court prejudicially erred by permitting the reply and oath to be filed out of time when no good cause was shown for doing so. It would appear that none of the alleged defects in the proceedings in any way affected the rights of appellant. We think the court, under the statutes hereinafter cited and in the furtherance of justice, was justified, in its judicial discretion, to do what it did. See, §§ 25-852, 25-853, R. R. S. 1943.

Appellant further complains of the fact that the reply was never signed on behalf of the school district. The reply to the request for admission was made in behalf of all appellees, which included the school district, and signed by their attorney, although it listed the members of the school board by their individual names.

We said in Arehart v. School Dist. No. 8, 137 Neb. 369, 289 N. W. 2d 540: "The school board is a public body empowered by law to transact the business of the school district for school purposes. The members act in a representative capacity, not as individuals."

And in Bishop v. Fuller, 78 Neb. 259, 110 N. W. 715, we said: "The general duties of such officers require them to look after the interests of the district, and they should defend suits if it appears that the interests of the district demand it." See, also, §§ 79-102, 79-401, 79-441, and 79-455, R. R. S. 1943, as they apply to the powers of the school board and the members thereof. Here the members of the school board were appearing for and in behalf of the school district and not for themselves as individuals. This contention has no merit.

The contract provided that: "* * * said teacher agrees to teach in the school of the said district in a faithful and efficient manner * * *."

In this respect appellees pleaded: "* * * that the plaintiff did not teach school in a proper and efficient manner; that she did not hold school at regular hours;

that on numberous (numerous) occasions she did not open school in the morning and would fail to notify patrons of the school in advance that she would not hold school on that day; that on at least one occasion she stayed in the schoolhouse late at night in the company of a male friend; that she did not properly conduct herself either in or out of school; that she did not properly care for the school property and on numberous (numerous) occasions would leave the thermostat so high that there was danger of the schoolhouse catching fire."

There was sufficient relevant evidence adduced to justify the discharge of appellant for good cause based on the foregoing provisions of the contract, provided the school district had not estopped itself from doing so by the following provision contained in the contract. Therein it is provided: "IT IS UNDERSTOOD, That this contract may be terminated *only* by mutual agreement, or by operation of law, * * *." (Italics ours.)

Appellant contends: "By their * * * agreement the defendants have estopped themselves from terminating this contract by any means other than those called for in the contract and likewise have estopped themselves to plead any other method of termination of the contract but those contained therein."

"In a broad sense 'estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, in pais.' 31 C. J. S., sec. 1, p. 191." May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

"Recitals in a contract, which are consistent and certain in their terms, relevant to the subject-matter of the contract, and with reference to which the contract was made, estop the parties thereto to deny the facts recited." City of Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80.

In this respect we have held: " 'A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom.' City Nat. Bank of Hastings v. Thomas, 46 Neb. 861, 65 N. W. 895." U. S. Tire Dealers Mutual Corp. v. Laune, 139 Neb. 26, 296 N. W. 333. See, also, McDowell v. Metropolitan Life Ins. Co., 129 Neb. 764, 263 N. W. 145; 21 C. J., Estoppel, § 254, p. 1245.

As to teachers' contracts, we have said: "The contract to teach in the common or free schools of the grade of the one in the district in which this controversy arose is one of employment, and the relative positions occupied by the district represented by the board and the teacher are those of employer and employe. A teacher in the schools of the ordinary district is not a public officer, nor is his position an office." State ex rel. Lewellen v. Smith, 49 Neb. 755, 69 N. W. 114.

"Except in so far as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally." Spence v. School District, 121 Neb. 64, 236 N. W. 145.

Generally this court has said: "This language is somewhat general, but we think the authority is clearly implied for the board to discharge a teacher who, for any reason, is found to be incompetent. The authority to terminate the employment of a teacher must rest somewhere, and *in the absence of an express provision on this subject* it should, we think, be governed by the general rule of the common law applicable in analogous cases, and be held to reside with those whose duty it is to represent the district in making the contract, and who are also directly responsible for the successful management of the school. By the common law, if a servant neglect the duties of his employment, or is incompetent to perform them with reasonable skill, he

may be discharged at once, although hired for a definite time which has not yet elapsed." Bays v. State, 6 Neb. 167. (Italics ours.) See, also, Wallace v. School District, 50 Neb. 171, 69 N. W. 772.

Section 79-1248, R. R. S. 1943, provides, insofar as here material, that: "A contract for the employment of a teacher, * * * for a public school in the State of Nebraska shall be in writing. The contract form or forms to be used shall be recommended by the Superintendent of Public Instruction."

The contract here used was one "authorized by State Supt. of Public Instruction."

"The rule that a clear expression of one thing is the exclusion of another applies to the construction of contracts as well as statutes." Thos. Beck & Sons v. Economy Coal Co., 149 Iowa 24, 127 N. W. 1109. See, also, Coad v. London Assur. Corp., 119 Neb. 188, 227 N. W. 925.

"According to Webster 'only' means exclusively, solely, merely, for no other purpose, at no other time, in no other wise." In re Salhus, 63 N. D. 238, 247 N. W. 401.

"A contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable." 56 C. J. S., Master and Servant, § 6, p. 68.

If the effect of the provision hereinbefore quoted removed entirely from school authorities the right to dismiss a teacher for good cause, we think it would be unreasonable as against public policy and therefore without force or effect. But such is not the case. The laws of Nebraska provide methods whereby a Nebraska teacher's certificate may be either suspended or revoked for good cause. See, §§ 79-1234, 79-1252, R. R. S. 1943. It placed such authority in the then state Superintendent of Public Instruction.

Section 79-1233, R. R. S. 1943, provides: "No person shall be employed to teach in any public, private, denominational, or parochial school in this state who

does not hold a valid Nebraska certificate legalizing him to teach the grade or subjects to which elected."

We said in Zevin v. School District, 144 Neb. 100, 12 N. W. 2d 634: "' * * * the possession of the certificate is a necessary prerequisite to appointment or employment and that any contract made with a teacher not having such certificate is void so as not even to be susceptible of ratification, * * *.' (24 R. C. L. 616, sec. 73.)"

Since a certificate was an absolute prerequisite to appellant's continued employment, had the then state Superintendent of Public Instruction either suspended or revoked her certificate by proceeding under the statutory authority hereinbefore referred to appellant's contract would have thereupon terminated by operation of law. In view of the authority so granted by the Legislature, which has full authority to deal with the subject, we find nothing illegal or unreasonable in the school district having contractually delegated its right to discharge appellant for good cause to the state Superintendent of Public Instruction.

We think appellant sufficiently offered to perform her part of the contract but was prevented from doing so by the school district without any right on its part to do so. In view thereof we find appellant has a right to recover for the unpaid balance of her wages. See Wallace v. School District, *supra*. We therefore reverse the judgment of the trial court and remand the cause with directions to enter a judgment in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. On the basis of the facts as disclosed in the majority opinion and the application of what I deem to be controlling legal principles I am convinced that the defendants had the right to discharge the plaintiff and be relieved from any further liability on the contract of employment.

The majority opinion discloses, as I view the situation, that the plaintiff was guilty of a substantial breach of the contract. This, again as I view the situation, gave the defendants the right to rescind the contract. See 12 Am. Jur., Contracts, § 440, p. 1020, et seq.

In legal contemplation the right of defendants to rescind for substantial breach by the plaintiff is not barred by the provision of the employment agreement that "this contract may be terminated only by mutual agreement, or by the operation of law."

SIMMONS, C. J., dissenting.

The majority recite that the plaintiff agreed to teach "in a faithful and efficient manner." Plaintiff also contracted "to accept all properly assigned school duties and to abide by all reasonable and lawful regulations of the School Board * * *." The court holds that there was sufficient evidence to justify the discharge of the plaintiff for good cause based on her contract to teach in a faithful and efficient manner. In other words, the court holds that there was evidence to sustain the trial court's finding that plaintiff had breached her contract. Based on that breach, plaintiff was discharged.

Nevertheless the court holds that plaintiff offered to perform and is entitled to recover the unpaid balance of her wages. The offer to perform came after the breach had occurred and after defendants had discharged the plaintiff because of the breach. Certainly an offer to perform under those circumstances at that time cannot be held to reinstate the breached contract, or to affect the rights of the defendant, the innocent party. To so hold puts a premium on a breach of a contract, and allows the plaintiff to take advantage of her own wrong, collect pay for services not performed in accord with the contract, and to profit by a mere offer to perform subsequent to the breach.

The court holds that the district is estopped to discharge the teacher. The court reaches that result based on the fact that the district used a form of contract

recommended by the state Superintendent of Public Instruction containing a provision for the termination of the contract, and the conclusion that the district had delegated its right to discharge for good cause to the state Superintendent of Public Instruction.

The contract provision does not sustain the court's construction.

The court does not quote the full contract provision that is held to control here and to save the plaintiff harmless from the result of the breach.

In full it is: "IT IS UNDERSTOOD, That this contract may be terminated only by mutual agreement, or by the operation of law, *and that there shall be no penalty for such release from this contract.*" (The part not quoted by the court is italicized.)

Where the full covenant is considered it becomes quite apparent that the provision relates solely to the manner in which *both* parties may be released from the obligation of performance of the contract without penalty.

The provision is now used not to "release" both parties from the obligation of performance, but to deny one party the right to rely on a breach of contract by the other.

Such an intent is utterly foreign to the purposes of the provision, is contrary to its terms, and is without support in this record as the intent of the parties. It is negatived by that part of the provision omitted by the court and here quoted.

The sole act of the district upon which the delegation holding rests was the use of the recommended contract under the statutory provision that: "The contract form or forms to be used shall be recommended by the Superintendent of Public Instruction." § 79-1248, R. R. S. 1943. The legislative mandate required the provision "that there shall be no penalty for release" from such contract. § 79-1250, R. R. S. 1943.

Obviously the Legislature intended a standard form

of teacher contracts and intended that they should be used. The result, then, of the court's holding is not that the district "contractually delegated its right to discharge appellant for good cause" to the state Superintendent of Public Instruction, but that the Legislature intended to and by the cited acts did take that right from the district. It did not lodge the right to discharge in anyone. The opinion holds that the state Superintendent of Public Instruction may revoke or suspend the teacher's license. He cannot discharge the teacher. The district cannot discharge for breach of the contract. No one can discharge a teacher holding one of these contracts no matter how serious the breach.

The court so holds, for it finds that revocation or suspension would terminate the contract by operation of law. There is in that act of the state Superintendent of Public Instruction no exercise of a delegated power to discharge for good cause.

Section 79-1234, R. R. S. 1943, provides that a teacher's certificate "may be revoked" by the state Superintendent of Public Instruction "for just cause"; that the revocation of the certificate shall terminate the employment; and that the teacher must be paid up to the time of receiving notice of revocation. Under that provision the contract terminates not by discharge but by operation of law. The court now makes that the exclusive and only method of termination except by mutual agreement.

Section 79-1233, R. R. S. 1943, makes a certificate a prerequisite to a valid contract of employment as a teacher. It does not follow that the possession of a certificate prevents discharge for breach of the employment contract—and yet that is the effect of the court's decision. The power of the state Superintendent of Public Instruction is only to determine whether or not the certificate shall be revoked. If he fails or refuses to revoke, the district is helpless.

We may properly assume that school districts generally have used this standard form of contract. By this

decision, then, the holding is that the Legislature intended to make the state Superintendent of Public Instruction (and he now is) the arbiter of the standard of performance of each individual teacher holding such a contract; that the state Superintendent of Public Instruction has been made an administrative officer with power to determine all questions of contract obligation of a teacher; and that the district officials no longer have an independent effective power of discipline, to wit the power to discharge for substantial breach of a teaching contract.

I find no support in the act for such a conclusion with its radical departure in the administration of school affairs in this state.

I would affirm the judgment of the trial court.

LEON A. M. HICKMAN, APPELLEE, V. PARKS CONSTRUCTION COMPANY, A CORPORATION, APPELLANT.
76 N. W. 2d 403

Filed April 20, 1956. No. 33890.

1. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. ———. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.
3. **Negligence: Trial.** In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed.

4. **Negligence.** The general rule which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity is that he is charged with the duty of taking suitable precautions to avoid injury or damage to such persons or property, and his failure to take such precautions is negligence.
5. ———. A contractor making an excavation on property of another is under a duty to provide such protection as would guard persons rightfully on the property against any contingency reasonably to be anticipated.
6. ———. A contractor making an excavation on property of another is not relieved of his duty to provide such protection as would guard persons rightfully on the property against contingencies reasonably to be anticipated by reliance upon others to take the necessary precautions.
7. **Trial.** If there is any evidence which will sustain a finding for a litigant having the burden of proof the trial court may not disregard it and decide the case as a matter of law.
8. **Negligence: Trial.** The following are elements of application of the comparative negligence rule: If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover. If a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover. If a defendant has been guilty of negligence but which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover.
9. ———: ———. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence.
10. ———: ———. Likewise ordinarily the comparison of negligence is for the jury.
11. ———: ———. If, however, on a comparison the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight it is the duty of the court to determine the question as a matter of law in favor of the defendant.
12. **Negligence.** Where the master and servant relation does not exist, the rule is that one who voluntarily assumes the risk of injury from a known danger is barred from a recovery in a negligence case. The rule has no application in the case of exposure to unknown and hidden danger.

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

Kennedy, Holland, DeLacy & Svoboda and *W. P. Mueller,* for appellant.

Brown, Crossman, West, Barton & Quinlan and *John R. Barton,* for appellee.

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

YEAGER, J.

This is an action at law by Leon A. M. Hickman, plaintiff and appellee, against Parks Construction Company, a corporation, defendant and appellant, to recover damages for personal injuries and medical expenses, occasioned by alleged negligence on the part of the defendant.

The case was tried to a jury. A verdict was returned in favor of the plaintiff and against the defendant for $18,500. Judgment was rendered on the verdict. The defendant filed an alternative motion for judgment notwithstanding the verdict or for a new trial. This motion was overruled. From the judgment and the order overruling the alternative motion the defendant has appealed. By the appeal a reversal of the judgment is sought.

The brief of appellant contains 14 assignments of error as grounds for reversal. Only six however have been argued. These alone will be given consideration herein.

The assignments of error in substance are: (1) That the court erred in overruling the motion of the defendant to direct a verdict in favor of the defendant or in the alternative to dismiss plaintiff's action with prejudice; (2) that the court erred in overruling the defendant's motion after verdict and judgment for a judgment notwithstanding the verdict in favor of the defendant; (3) that the court erred in overruling the defendant's motion for a new trial; (4) that the court erred, if the case required submission at all, in re-

fusing to submit the defense of assumption of risk; (5) that the court erred in refusing to give instruction No. 13 requested by the defendant; and (6) that the court erred in giving instruction No. 6 upon its own motion.

A determination of the questions presented requires an examination of the factual situation as disclosed by the record, the contentions of plaintiff by his pleadings, and the pleaded defense or defenses to these contentions of the plaintiff.

On June 1, 1952, prior thereto, and since, the United States has maintained an Air Force Base in Sarpy County, Nebraska, known as Offutt Air Force Base. On the base is a building or joined buildings. Hereinafter the arrangement will be referred to as one building or structure. The building has two separated wings which extend north and south. The separation is of about 69 feet. The two wings are joined at the north end by what is referred to as the north wing. The west wing extends southward about 70 feet. The east wing extends southward at least 120 feet and possibly farther. In the east wing, at all times of concern here an Air Force Officers Club was housed and maintained. In the west wall of the east wing and about 11 feet from where that wing is joined by the north wing of the building is a door from the outside area into the club. This was referred to as the door to the foyer of the club. About 33 feet farther south is another door referred to as the lounge door. About 37 feet south of this door is another referred to as the Bear Pit door. About 20 feet farther south is another door referred to as the kitchen door. About 20 feet farther south is still another door referred to as the service entrance. This west wall appears to be on a practically straight or even line from the north to the south for a distance of about 95 feet. Farther south it is uneven.

Immediately prior to May 27, 1952, the area bounded on three sides by the building and a line running west-

ward from a point not exactly determinable but somewhere in the vicinity of the Bear Pit door was not devoted to any particular use. Precisely to what use it had been put before has not been described. It appears however to have been sort of a patio. South of this line and some short distance west of the east wing are facilities for the disposal of garbage from the Officers Club and for the cleaning of large utensils. In this area are some trees. South of this is a parking lot to take care of automobiles of people coming to the club. The width of the parking area from east to west appears to be as much as the distance between the two wings of the building.

Some time prior to May 27, 1952, the Officers Club entered into a contract with the defendant to improve the area bounded generally on the west by the west wing, on the north by the north wing, on the east by that portion of the east wing starting at the north wing and extending to about 5 feet south of the Bear Pit door, and on the south from the point mentioned south of the Bear Pit door on a curved line to the northwest for a distance of about 20 feet, the direct distance between the ends of the curve being 17.8 feet, thence directly west about 45 feet. The contract was for the construction of a patio within the area and a wall on the line from the point south of the Bear Pit door across the south boundary of the area.

The construction of the wall required the digging or excavating of a ditch or trench the length of this south boundary line the purpose of which was to contain the footing and a base for the wall. Accordingly, starting on May 27, 1952, the necessary excavating was done. The excavation started at the wall south of the Bear Pit door and extended westward. The excavation was about 4 feet wide and about 4½ feet deep. In the excavation were placed forms for the pouring of a concrete base for the wall 8 inches thick with a footing of about 1 foot 8 inches. The concrete was poured and the forms re-

moved. The portion of the excavation to the north of the concrete base was backfilled so that the area north from the concrete was relatively even or level. The portion to the south was not backfilled completely if at all. This condition obtained on June 1, 1952.

On the night of June 1, 1952, which was Sunday, a party was held at the Officers Club. From about 5:30 p. m. on that date the plaintiff was in general supervisory charge of the operations of the club. This was a function which was divided by shifts among three officers, the other two being senior to plaintiff. Among his functions was that of checking the cash receipts at the close of operations.

After checking the cash registers with the persons in charge of the registers, which was about 11:30 p. m., the plaintiff left through the Bear Pit door to go to his automobile which was parked in the parking lot. He stepped down to the ground a distance of from 12 to 16 inches and started to walk south or southwest. After two or three steps he stepped into the portion of the excavation south of the concrete base which had been placed in the excavation and was precipitated thereinto. In consequence of this he was seriously injured.

By his petition the plaintiff charges that his injuries were the result of negligence on the part of the defendant. The negligence charged is set forth in six separate specifications. The substance however of all of them is that the defendant was negligent in creating the condition described and, under the circumstances in the light of what it knew or in the exercise of ordinary care should have known, in leaving the excavation unguarded and without protection or protective signs.

To the petition the defendant filed a general denial. Further answering the defendant charged that the plaintiff sustained his injuries as the result of his own negligence. Also the defense of assumption of risk by the plaintiff was pleaded by the defendant.

The general charge of negligence against the plain-

tiff was that he failed to exercise the care required of him in the light of conditions of which he knew.

The three assignments of error first noted herein present first the question of whether or not the evidence was sufficient to sustain a finding that the defendant was guilty of actionable negligence. If this question is decided favorably to the defendant then no further question remains for decision. If however this question is decided favorably to plaintiff then the question of whether or not the evidence discloses as a matter of law that because of his own negligence the plaintiff is not entitled to recover must be decided.

The controlling principles are the following: "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622.

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed." Rogers v. Shepherd, 159 Neb. 292, 66 N. W. 2d 815.

The statement that if the evidence in a case discloses beyond reasonable dispute that a plaintiff's negligence

was the sole and proximate cause of his injury it is the duty of the court to direct a verdict against him or dismiss his action requires no citation for support.

As already indicated the basic contention of the plaintiff is that the defendant was, under the circumstances, under a duty to in some manner guard against the eventuality of persons properly in attendance at this Officers Club passing out through the doors on the west side of the east wing in the nighttime and unwittingly falling into the excavation.

The substance of the evidence in support of plaintiff's petition discloses the following: That on June 1, 1952, plaintiff came to the club, parked his car in the parking lot, and proceeded directly east to the service entrance where he entered to engage in the performance of his duties; that this was about 5:30 p. m.; that about 11:30 p. m. the Bear Pit door was opened and he passed out to go to his car; that the door was closed; that the night was dark and no part of the area outside was lighted; that there was no barricade or other instrument of warning in the vicinity of the east wing; that there was a barricade over at the southwest corner of the patio area; that plaintiff knew that some work was going on in the patio area but had never examined it and had no knowledge concerning it; that he had not observed and did not know of the excavation or the cement construction in it; that he had never used the Bear Pit door before for departure from the club; that there was an open and unobstructed area extending westward from the west side of the east wing except the obstruction caused by the excavation and the structure therein; that in the vicinity of the foyer door there was a sign warning against use of that door during construction but that there were no warning signs at any other door; that the main entrance to the club was a door at or near the northeast corner of the building; and that there was frequent crossing of

the patio area from the west side of the club to the parking lot.

The defendant contends that this evidence was insufficient as a basis for a verdict of the jury in favor of plaintiff. We think this contention should not be accepted. The general rule, which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, is that he is charged with the duty of taking due and suitable precautions to avoid injury or damage to such persons or property, and his failure to take such precautions constitutes negligence. 65 C. J. S., Negligence, § 84, p. 592; Sullivan v. Alabama Power Co., 246 Ala. 262, 20 So. 2d 224; Neal v. Twelfth & Grand Ave. Bldg. Co., 228 Mo. App. 536, 70 S. W. 2d 136; Havens v. Strayer, 326 Pa. 563, 193 A. 13; Cox v. Greenfield, 50 Ga. App. 699, 179 S. E. 178; Torok v. Stambaugh-Thompson Co., 36 Ohio L. Abs. 193, 43 N. E. 2d 653; Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853; McKee v. Iowa Ry. & L. Co., 204 Iowa 44, 214 N. W. 564; Ruehl v. Lidgerwood Rural Tel. Co., 23 N. D. 6, 135 N. W. 793, L. R. A. 1918C 1063, Ann. Cas. 1914C 680.

This rule applied to excavations requires a contractor making an excavation on property of another to provide such protection as would guard persons rightfully on the property against any contingency that was reasonably to be anticipated. 65 C. J. S., Negligence, § 85, p. 593; Pate v. Parker, 180 Or. 330, 177 P. 2d 250; McKee v. Iowa Ry. & L. Co., *supra;* Ruehl v. Lidgerwood Rural Tel. Co., *supra.*

In the light of these rules the conclusion appears inescapable that the evidence was sufficient to sustain the finding of a jury that the defendant was guilty of negligence as charged against it.

This conclusion gains added force with a consideration and application of certain evidence of the defendant to the rule. Two witnesses for the defendant testified

in effect that persons from the club and in its vicinity frequently passed across the patio going to and from the parking area and that for that reason the barricade which has been mentioned was erected, which barricade was not effective as a preventive of crossing. A witness who was in charge of the work of the defendant testified substantially that he did not take any steps to protect the east portion of the excavation but that he left that matter to Major Morrow who was in general charge of the operation of the club. There was no evidence however that Major Morrow had or exercised any directory or supervisory control over the performance of the defendant under its contract or of anything in relation thereto.

The defendant could not be relieved from its responsibility to protect against the danger from the open excavation by reliance upon Major Morrow to protect against that danger. The person on whom the duty devolves is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures. See, 65 C. J. S., Negligence, § 84, p. 592; Ainsworth v. Lakin, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. S. R. 314; Lauer v. Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67.

It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law. See, Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444; Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252; Fick v. Herman, *supra*.

Under the legal principles stated and the evidence which has been briefly summarized it becomes apparent, as has been stated, that there was sufficient evidence upon which to submit the question of negligence of the defendant to a jury.

The trial court therefore did not err in its refusal to sustain the defendant's motion for judgment notwith-

standing the verdict or for a new trial to the extent that it was based on the contention that plaintiff's evidence was insufficient to sustain the charge that defendant was guilty of negligence.

The substance of the further contention of the first three noted assignments of error is that the court erred in refusing to hold that the plaintiff was guilty of such negligence himself as would as a matter of law defeat any right of recovery from the defendant.

In the light of the conclusion reached that there was evidence sufficient upon which to submit to the jury the question of whether or not the defendant was guilty of negligence causing the injury to the plaintiff, the question of whether or not the plaintiff was guilty of negligence which, *as a matter of law,* was the *sole and proximate cause* of his own injuries is eliminated from consideration.

It becomes necessary however to ascertain whether or not under the application of the comparative negligence rule the plaintiff is precluded from the benefit of the verdict in his favor.

The following are elements of application of the comparative negligence rule: If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover. If a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover. If a defendant has been guilty of negligence but which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover. See, Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N. W. 258; Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Krepcik v. Interstate Transit lines, *supra;* Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207; Rogers v. Shepherd, *supra.*

Ordinarily the question of the existence of negligence

or contributory negligence is for a jury. The question is one for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence. Likewise ordinarily the comparison of negligence and contributory negligence is a question for the jury. Krepcik v. Interstate Transit Lines, *supra.*

If however on a comparison the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight it is the duty of the court to determine the question as a matter of law and to direct a verdict in favor of the defendant. Krepcik v. Interstate Transit Lines, *supra;* Rogers v. Shepherd, *supra.*

It is this comparative phase of the defendant's assignments of error that is now being considered. The determination of it must turn upon the question of whether or not it may be said as a matter of law that the plaintiff was guilty of more than slight negligence in passing out of the Bear Pit door and walking into the excavation.

On the plaintiff's side it may be said that a jury could reasonably find that in the absence of the excavation no danger would be involved in a departure such as was attempted by the plaintiff. The evidence of plaintiff is to the effect that he knew that work was going on in the patio area; that he did not know of its kind or character; that he had never been out there; that he had no knowledge of the excavation; that nothing connected with his duties required of him that he become informed of the condition; that it was customary for people to cross the patio area in going to and from the parking area; that there was no warning as to danger of the use of the area except a sign at the foyer door which directed that the door should not be used during construction; that he had never used the Bear Pit door to go to and from the club before; that when he went out and the door was closed he was in complete darkness; that he employed no means to light his way; and that

nothing occurred prior to the time he fell into the excavation to indicate that he was confronted with danger.

The pertinent evidence of the defendant is to the effect that plaintiff at some time was seen in the patio area; that there were warning signs at all doors; that the defendant knew that people crossed the patio area going to and from the parking lot; that in an effort to prevent this it erected barriers to the west but not in the area immediately adjacent to the east wing; that the matter had been discussed with Major Morrow and the defendant relied upon him to take steps to protect against danger; and that the plaintiff had matches in his pocket but did not use them to light his way on his movement from the door in the direction of the parking lot.

Under the facts as summarized and the rules of law set forth it appears that the question of whether or not the plaintiff was guilty of contributory negligence, and if so, the degree thereof, was one to be determined by the jury.

The determination upon the three assignments of error first noted herein must be resolved in favor of the plaintiff and against the defendant.

By the next noted assignment of error the defendant contends that the plaintiff assumed the risk of the condition into which he moved and in consequence he may not be allowed to recover. The trial court refused to submit this defense as an issue to the jury. The defendant insists that this was error. With this contention we do not agree.

Where the master and servant relation does not exist, the rule is that one who voluntarily assumes the risk of injury from a known danger is barred from a recovery in a negligence case. This rule is reviewed at length in Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

In this instance the evidence discloses that the plaintiff had no previous knowledge of the danger—the excavation.

The determination upon this assignment of error effectually disposes of the next one. By this assignment the defendant urges that the court should have instructed the jury in substance that in view of the fact that the plaintiff walked upon ground with which he was unfamiliar and that since he did not use artificial means to light his way he assumed the danger of so walking without lights.

The apparent effort was to have applied to these facts the doctrine of assumed risk. The doctrine may not be so extended. It applies to *known dangers* and not to those things from which, in possibility, danger may flow.

It is of course true that what plaintiff did or failed to do in these respects was a matter properly for the consideration of the jury in determining whether or not the plaintiff was guilty of contributory negligence.

The next and last assignment of error argued relates to a part of instruction No. 6 given by the court. The part of the instruction of concern is the following:

"If you find from a preponderance of the evidence that the defendant could reasonably have anticipated that some travel might be expected over the area in the nighttime, and that the place was not properly lighted so that the trenches could have been discovered by one exercising ordinary care and not properly barricaded against anyone who might reasonably be expected to proceed over such area, then you are warranted in finding the defendant negligent on such occasion. In this connection, the defendant as a matter of law was not entitled to rely upon the promise of anyone to keep the side doors locked, if you find such promise was made, but was required to exercise ordinary care in seeing that the place was properly lighted and barricaded so that dangers in proceeding across such area could reasonably have been discovered by one exercising ordinary care or such person prevented from proceeding over such area."

The particular objection is that it was error to tell

the jury that "the defendant as a matter of law was not entitled to rely upon the promise of anyone to keep the side doors locked, if you find such promise was made, but was required to exercise ordinary care in seeing that the place was properly lighted and barricaded so that dangers in proceeding across such area could reasonably have been discovered by one exercising ordinary care * * *."

The giving of this instruction was not error. As already pointed out herein the responsibility of the defendant to protect against danger from the open excavation could not be relieved by reliance upon someone else to protect against the danger.

Finding no reversible error the judgment of the district court is affirmed.

AFFIRMED.

SCOTTSBLUFF NATIONAL BANK, A CORPORATION, APPELLANT, V. FIRST STATE BANK, GOTHENBURG, NEBRASKA, A CORPORATION, APPELLEE.
76 N. W. 2d 445

Filed April 20, 1956. No. 33901.

1. **Negligence: Pleading.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery.
2. **Negligence: Trial.** When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination.
3. **Trial.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
4. **Trial: Appeal and Error.** Findings of a court in a law action

in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong.

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

Mothersead, Wright & Simmons and *Robert M. Harris,* for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

CHAPPELL, J.

Plaintiff, Scottsbluff National Bank, brought this action against defendant, First State Bank, Gothenburg, Nebraska, seeking to recover damages allegedly caused by defendant's negligence in failing to collect or timely comply with instructions to wire nonpayment of a check drawn on defendant. The material issues were traversed by defendant's answer and plaintiff's reply, whereupon a jury was waived and the cause was tried to the court. Subsequently a judgment was rendered which found and adjudged the issues generally against plaintiff and in favor of defendant and dismissed the action at plaintiff's cost. Plaintiff's motion for new trial was overruled and it appealed, assigning in effect that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We conclude that the assignment should not be sustained.

The parties incidentally involved will be designated as follows: Oscar Linker, drawer of the check, as Linker; his wife, Armina Linker, as Mrs. Linker; Jack E. Mack, doing business as Western Construction Co., payee of the check, as Mack; First National Bank of Lincoln, plaintiff's correspondent, as Lincoln; the Omaha branch of the Federal Reserve Bank, as Omaha; and John B. Cook, Sr., as Cook.

The material evidence may be summarized as follows: On May 16, 1952, Linker gave Mack a check

payable to Western Construction Co. and drawn on defendant for $4,233. Then there was only $193.87 in Linker's account, a fact well known by both Linker and Mack. The word "Hold" was written in bold letters across the lower left-hand corner of the check at the time it was issued, and Mack then agreed with Linker that Mack would hold the check and could not cash it until he had proved that a steel building then being constructed by Mack under a written contract with the Linkers was clear of all liens upon which "people were slapping liens * * * right and left." Subsequently, the Linkers were required to pay off all such liens in an amount equal to or greater than the check, so that it was without any consideration

Nevertheless, on May 27, 1952, 11 days after the date on which the check had been drawn, Mack endorsed it, "Western Construction Co. Jack E Mack" and presented it to plaintiff for payment or deposit. When so presented Mack or some other person had drawn several lines with a pencil and two different colors of ink through the word "Hold" but such word and the alteration thereof were at all times entirely legible. Mack then had a small account in his own name and one in the name of Western Construction Co. with plaintiff, who well knew that both such depositors were financially irresponsible. Therefore, plaintiff refused to give either one or the other absolute unconditional credit for the check involved or any other out-of-town check, a fact well known to Mack at all times. Thus, plaintiff issued a deposit slip to "Jack E. Mack * * * May 27, 1952 * * * Checks as follows: Oscar Linker $4,233.00." Such deposit slip also conditionally provided that Mack's deposit of such sum was dependent upon final payment of items received for deposit or collection at plaintiff's own office, and reserved plaintiff's right to timely charge back any item "drawn against insufficient funds or otherwise not good or payable." Further, such $4,233 item was encircled on Mack's original ledger account

and a notation "Hold $4,233 A. A. H." was made thereon by A. A. Hulse, plaintiff's vice president.

Prior to presentation of the Linker check to plaintiff, Mack owed Cook a past-due debt of about $10,000. Cook was attempting to collect the debt, so Mack showed him the Linker check. However, Cook testified that he did not remember seeing the word "Hold" on the check, although by casual inspection it was clearly observable, and denied that he had anything to do with attempting to strike it out. In that regard, Cook was a borrower from and substantial depositor in plaintiff bank, having on deposit at all times here involved substantially more than $4,000.

After Mack delivered the Linker check to plaintiff on May 27, 1952, it was mistakenly sent by plaintiff to the First State Bank of Scottsbluff instead of to defendant. It was then returned to plaintiff on May 28, 1952, and on that same date Mack gave Cook a check drawn upon plaintiff for $4,000, purportedly to apply on Mack's past-due indebtedness to Cook, who then took such check to plaintiff and presented it for payment. Thereupon plaintiff refused payment, telling Cook that payment "would depend on whether we would have a wire by Monday night, or Tuesday night," about the Linker check telling plaintiff "whether the check was dishonored." Plaintiff thus refused to give Cook "unconditional credit for the $4,000" because "We were waiting to find whether" the Linker "check had been paid." Monday night was June 2, 1952, and Tuesday night was June 3, 1952. Plaintiff's evidence was that it normally allowed 5 days for such checks to clear, although it realized that defendant might make mistakes as sometimes happened in banks, and that defendant might also have difficulty and delay in collecting the Linker check. However, plaintiff claimed that defendant should have wired Omaha within 5 days from May 28, 1952, if it had not been paid. In that regard, June 2, 1952, was the fourth banking day, and June 3, 1952, was the fifth banking day.

In that situation, plaintiff wanted to help its good customer Cook get in ahead of and have a preference in order to deceive and defeat the rights of any other creditors to whom Mack might in the meantime give checks on his account. Thus, on May 28, 1952, cooperating with Cook in order to accomplish that result, plaintiff wrote up a cashier's check for $4,000 payable to Cook. However, plaintiff refused to deliver such check to Cook but held that check in its own hands and under its control, telling Cook that plaintiff would deliver and pay the cashier's check only if the Linker check was first paid. In other words, it was distinctly understood and agreed between plaintiff and Cook, both when Cook presented Mack's $4,000 check to plaintiff which it refused to pay and when plaintiff wrote up the $4,000 cashier's check payable to Cook which plaintiff refused to deliver to him, that Cook was not to be paid the $4,000 unless plaintiff first received $4,233 on the Linker check.

Also, on May 28, 1952, plaintiff endorsed the Linker check "Pay to the order of any bank, banker or trust co." and forwarded it, together with other items, to Lincoln for collection and clearance, with instructions "Wire non-payment of all items, $1,000.00 or over giving endorser." Lincoln received the check May 29, 1952, and forwarded it to Omaha where, Decoration Day intervening, it was received May 31, 1952. Omaha then forwarded it, together with other items, to defendant with instructions "Wire advice of nonpayment of all items of $1,000 or over."

Sunday intervened, and defendant received the check on Monday, June 2, 1952. Defendant then mistakenly remitted the amount thereof, included in the total of other items, to Omaha by draft. Plaintiff, and defendant as well, concededly operated under a delayed posting system whereby items received for deposit or paid on one date were posted on the ledger accounts the next day. Thus, on June 3, 1952, it was discovered that de-

fendant's employees had mistakenly charged the Linker check against the Linker Super Service account instead of against the Oscar Linker account upon which the check had been drawn. The former account contained ample funds with which to have paid the check, but the latter account had only $193.87 on deposit therein. Thereupon, defendant immediately corrected its records by crediting back the amount of the check to the proper account. Defendant then deducted that sum from its remittance of other items to Omaha, about which no complaint is here made.

In the meantime, the Linker check was never marked or cancelled "Paid" and on June 3, 1952, immediately upon discovering its mistake and the insufficiency of the Oscar Linker account, defendant attempted to contact the Linkers. However, they were out of town and could not be found or contacted until after closing hours on June 4, 1952. At that time defendant was informed by Mrs. Linker that the Linker check had been conditionally delivered to Mack, that it was without any consideration, and had been materially altered, whereupon defendant was ordered to stop payment. Thereupon, after defendant's closing hours and after Omaha's closing hours on June 4, 1952, defendant wrote "Payment stopped" across the face of the check and returned it to Omaha by regular mail, where it was received the morning of June 5, 1952, at the opening of Omaha's next business day. On that date at 12:25 p. m. Lincoln received a code wire from Omaha reading as translated "Returning unpaid check on First State Bank, Gothenburg, Nebr. $4,233.00 — Your letter of May 29, 1952 — reason 'Payment Stopped', endorsed by Scottsbluff National Bank, Scottsbluff, Nebr." Likewise, on that same date at 1:47 p. m. plaintiff received a code wire from Lincoln reading as translated "We are advised returning unpaid check on ———— Payment Stopped."

In the meantime, notwithstanding the fact that plaintiff had told Cook at the time it wrote out the cashier's

check May 28, 1952, that it would deliver and pay it only when plaintiff received the money on the Linker check, Cook's secretary came to plaintiff on June 2, 1952, to get the money on the cashier's check. There is evidence that plaintiff then told her to wait until after banking hours on June 3, 1952, which was the next day after defendant received the Linker check, when plaintiff would probably have a wire with regard to its payment, and that Cook's secretary came back as instructed. Thereupon, notwithstanding the fact that plaintiff had not yet received any return of or remittance or wire or other information about the Linker check, Cook's secretary endorsed the cashier's check "Deposit only John B. Cook," followed by her initials. Clearly such check was perforated "Paid 6-2-52 76-157," but plaintiff explained that such date was erroneous and should have been June 3, 1952, because the bookkeeper had neglected to set up the date on the canceller machine. Be that as it may, the $4,000 item was posted on Cook's ledger account as of June 3, 1952, although plaintiff, under its delayed posting practice, would have posted it as of June 4, 1952, if, as claimed by it, the check had been cancelled as paid or deposited on June 3, 1952.

After the endorsement "deposit only," plaintiff gave Cook's secretary a deposit slip which read "John B. Cook, Sr. * * * 6-3-1952 * * * Checks as follows: cashier's ck. $4,000 for Jack Mack payment of 5/28/52." That deposit slip also conditionally provided that Cook's deposit of such sum was dependent upon final payment of items received for deposit or collection at plaintiff's own office and reserved plaintiff's right to timely charge back any item "drawn against insufficient funds or otherwise not good or payable." In that regard, the evidence is that plaintiff deposited the cashier's check with the mistaken idea that the Linker check had been paid, and if plaintiff had known otherwise it would not have given Cook credit for it. When plaintiff found out that

the Linker check had not been paid, Cook then and thereafter always had more than ample funds against which plaintiff could have charged back the $4,000 item, but plaintiff did not do so and has never yet even made any demand upon Cook for payment of it. It is clear, however, that since June 5, 1952, plaintiff has partially reimbursed itself in the amount of $1,603.32 by the application of credits belonging to Mack. Whether or not plaintiff could have recharged or might yet recharge Cook's account or recover from him any loss it allegedly sustained is not an issue for decision here and we express no opinion upon it. It is sufficient for us to say, as concluded by the trial court, that plaintiff cannot recover its alleged loss or any part thereof from defendant.

It should be noted that this is not an action based upon the Linker check, or one to establish the liability of any party thereon, or one for liability on account of the release of any parties to the Linker check. Rather, this action was to recover damages allegedly caused by negligence of defendant in failing to collect the Linker check or timely wire nonpayment thereof.

In that regard, as held in Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery." See, also, Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489.

As held in Henefin v. Live Stock Nat. Bank, 116 Neb. 331, 217 N. W. 91, 58 A. L. R. 758: "In an action for negligence in the routing and presentment of a check indorsed to a bank for collection, the burden is upon the plaintiff to show that the negligence proved was the proximate cause of his loss."

Also, as held in Omaha Nat. Bank v. Kiper, 60 Neb. 33, 82 N. W. 102: "In case a debt is lost through the negligence of a collecting agent, the measure of damages is the actual loss resulting from such agent's omission of duty." Further, such case is authority for the rule that it is necessary for a plaintiff to show a reasonable probability that with due care the collection would have resulted.

Several statutes have relation to the issues presented here. See, §§ 62-202 to 62-218, R. R. S. 1943. In that connection, plaintiff concedes that defendant was under no obligation or duty whatever when it received the Linker check to undertake to collect same, since at that time it had no existing agreement with plaintiff, or Mack, or Lincoln, or Omaha. Plaintiff concedes that defendant then had a right to return the check to Omaha on the day of its receipt in the exercise of its right to make payment thereof only at its own counter and thus avoid any liability. In that respect also, plaintiff at its election, exercised with reasonable diligence, had a right to treat the Linker check as dishonored by nonpayment when defendant retained the check without return or remittance on the day of its receipt.

However, plaintiff argued that defendant did not exercise its right to make payment only at its counter but instead undertook to collect the Linker check for plaintiff and in making such choice entered into a new relationship with plaintiff which, under the facts and circumstances, required defendant to exercise ordinary care and follow instructions in attempting to make the collection despite the want of any contractual relationship or statutory duty except that stated in section 62-207, R. R. S. 1943, which provides: "It shall be the duty of the initial or any subsequent agent collecting bank to exercise ordinary care in the collection of an item, and, when such duty is performed, such agent bank shall not be responsible if for any cause payment is not received in money or an unconditional credit given

on the books of another bank, which such agent bank has requested or accepted. An initial or subsequent agent collecting bank shall be liable for its own lack of exercise of ordinary care but shall not be liable for the neglect, misconduct, mistakes or defaults of any other agent bank or of the drawee or payer bank."

In such respect, plaintiff also relied upon 38 Am. Jur., Negligence, § 14, p. 655, § 21, p. 662; Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682; Fahrenbruch v. Peter Kiewit Sons' Co., 148 Neb. 460, 27 N. W. 2d 680; 9 C. J. S., Banks and Banking, § 235, p. 488; 7 Am. Jur., Banks, § 659, p. 478, § 660, p. 479, § 663, p. 481, § 668, p. 483, § 669, p. 484.

Be that as it may, concededly defendant received the Linker check on June 2, 1952, and it could not have been collected over defendant's counter or otherwise. However, either on June 2, 1952, the day defendant received the check, which was the fourth banking day, or on June 3, 1952, the fifth banking day, plaintiff accepted the Cook cashier's check for "deposit only" and cancelled it as paid. It could reasonably be inferred that such step was taken on June 2, 1952. Clearly, on June 3, 1952, under plaintiff's concededly delayed posting practice, credit therefor was posted on Cook's ledger account by plaintiff, well knowing that defendant had not returned or remitted for the Linker check upon which payment of the cashier's check depended, and having notice not only that the Linker check had been materially altered, but also that Mack was financially irresponsible and had not presented the check for deposit or payment within a reasonable time after its issuance.

This is not a case where other persons in the meantime had drawn checks on Linker's account and thereby made collection impossible and caused plaintiff to suffer a loss. There is no evidence that defendant did not in all good faith attempt to collect the check, which was concededly impossible. To have wired Omaha on June 4, 1952, when payment was stopped, would have

served no purpose since Omaha had already closed for its business day and plaintiff's questionable collaboration with Cook had already been consummated, either on the day defendant received the check or on the day thereafter. Do the facts and circumstances heretofore set forth justify or require reversal? We believe not.

Defendant's answer denied generally and among other things alleged that it was not guilty of any wrongful or negligent act in handling the check as alleged by plaintiff, and defendant alleged that plaintiff suffered no damage or injury on account of any act or omission of defendant, but rather if plaintiff suffered any loss it was caused by its own negligence and wrongful acts. Plaintiff's reply generally and specifically denied such allegations and realleged that defendant was negligent as alleged in its petition, which pleaded that negligence of defendant caused plaintiff to suffer a loss.

The trial court, upon consideration of the pleadings and evidence, found and adjudged the issues generally against plaintiff and in favor of defendant, and dismissed plaintiff's action. True, the trial court also found that under the circumstances defendant owed no duty to plaintiff, but such reason could not change the result if the judgment in favor of defendant was correct and should be affirmed in any event. Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

Recently, in Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293, this court held: "When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination.

"In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it."

It is also elementary that: "Findings of a court in a

law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong." Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392.

Such rules are applicable and controlling here, since, in the light of the evidence, the trial court could reasonably have found that defendant was not guilty of any negligence which was the proximate cause of any damage to plaintiff. Rather, it was more reasonable to conclude that plaintiff's loss, if any, was caused by its own negligence and wrongful acts.

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

AFFIRMED.

CONNIE SECHSER, APPELLEE AND CROSS-APPELLANT, V. JAMES SECHSER, APPELLANT AND CROSS-APPELLEE.
76 N. W. 2d 412

Filed April 20, 1956. No. 33906.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Divorce.** Ordinarily in divorce actions under authority of section 42-308, R. R. S. 1943, attorney's fees and costs are granted to the wife.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Joseph T. Votava, for appellant.

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellee.

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

SIMMONS, C. J.

This is an action for divorce. Trial was had resulting in a decree granting plaintiff, Connie Sechser, an absolute divorce, the custody of an infant child, the title to two pieces of real estate, dividing personal property, awarding child support to plaintiff, and taxing costs and attorneys' fees for both plaintiff and defendant to plaintiff.

Defendant appeals, claiming an inequitable division of property and making claim that the child support award is inequitable.

Plaintiff cross-appeals asking for alimony, a more equitable division of personal property, and a disallowance of attorneys' fees and costs awarded to the defendant.

We affirm the judgment of the trial court except as to attorneys' fees and court costs allowed defendant.

Both parties here rely on the rule as to alimony and the division of property stated in full in Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279. The rule will not be repeated here. Under it the ultimate task is to make an award that is equitable and just.

This case is for trial de novo here, subject to the oft-stated rule: " 'Actions in equity, on appeal to this court, are triable de novo * * * subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.' " Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

This rule has particular application here as to the questions we are called upon to determine in view of the direct conflict in the evidence and also defendant's

often equivocal and evasive answers given on direct and cross-examination.

The parties were married October 13, 1952. At that time plaintiff was 34 years of age and defendant was 35 years of age. One child was born to the marriage on February 6, 1954. The parties separated during the summer of 1954 and this action was started in August 1954. Trial was concluded in February 1955. Decree was rendered, insofar as it relates to a division of property, on August 22, 1955.

Plaintiff alleged extreme cruelty as a ground for divorce. Although not presented in this appeal, we have examined the record and find that it amply sustains the judgment of the trial court as to that issue.

Two pieces of real estate were awarded to the plaintiff.

The record shows without dispute that prior to and subsequent to the marriage plaintiff was gainfully employed. At the time of her marriage plaintiff had on deposit in a savings account in Omaha the sum of $4,548.12. Defendant claimed that $1,000 of this amount was a gift from him to the plaintiff prior to the marriage. He testified he took it out of a safety-deposit box where he had some $4,000 in cash. He said that he deposited it in plaintiff's account on June 3, 1952. Defendant testified that he remembered the approximate amount in dollars that plaintiff had in her account at that time, although he was not at all certain as to the amount he had in the safety-deposit box at that time. Plaintiff testified that the $1,000 deposit was a repayment of a loan made to a brother. In any event, concededly it was plaintiff's money at the time of the marriage.

Subsequent to her marriage plaintiff deposited in this savings account from her earnings the sum of $3,162.90.

On March 28, 1953, the parties purchased by contract a duplex rental property in the city of Omaha. The sum of $2,000 was paid at the time. The balance of $8,950 was to be paid in monthly installments. The

contract title to this property was taken in the names of the plaintiff and the defendant. The $2,000 payment was taken from the plaintiff's savings account. Subsequent thereto a real estate agency handled the property, collected the rents, made the deductions for the monthly payments, and paid defendant the balance. The payments so received by defendant averaged from $25 to $40 a month. Defendant paid the real estate taxes up to the time of this litigation. The real estate agency withheld the payments beginning some 2 months before the trial. The trial court decreed that this property should be the property of the plaintiff together with the withheld rentals. Defendant here states that this property "should have been awarded to the plaintiff because it brings a small income over and above the expenditures." A better reason would be that the property should have been awarded to the plaintiff because it was purchased with her money. The trial court did not err in its decree as to this property.

Also on April 24, 1953, the parties purchased an acreage west of Omaha for $12,000. The sum of $4,500 was paid when the property was purchased. That sum was paid with money taken from plaintiff's savings account. The title was taken in joint tenancy with right of survivorship. A mortgage indebtedness of about $5,350 was assumed. A second mortgage was placed on the property for the balance of less than $2,000. Defendant testified that he paid the second mortgage in May of 1954. The exact amount paid and the source of the funds is not shown. The parties maintained this property as a home up until the separation. The trial court decreed that this property should be the separate property of the plaintiff. Defendant claims that was error, and here asserts that it should have been awarded to the defendant "because the plaintiff does not want to live there." It appears also that the defendant does not want to live there. The reason is without merit.

Considering the above facts and other facts herein-

after appearing, we affirm that finding and decree of the trial court awarding this property to the plaintiff.

At the time of the marriage defendant owned the furniture in an apartment which he occupied. The parties received many wedding gifts. After the marriage other furniture and furnishings were purchased. The furniture, furnishings, and gifts were in the home on the acreage when the parties separated.

Plaintiff went to the house and took out some bedding, dishes, and kitchen equipment. Defendant learned about it and next morning about 1:30 a. m., with a truck and help, removed everything from the house except a piano, gas stove, and picnic table. These he stored in Omaha and later moved part, if not all of it, into an apartment which he occupied at the time of the trial. Plaintiff claimed that defendant took the wedding gifts. Defendant both denied and admitted taking some of the wedding gifts. Neither party sought permission to examine the living quarters of the other to determine who had what. The trial court decreed that the parties should retain the personal property which they had in their possession except that individually owned personal property belonging to the one in the possession of the other should be returned to the individual owner. The form of the decree is not assailed. We affirm that disposition of the property involved in that part of the decree.

The defendant seems to have had an ability to acquire diamonds in old settings. He had quite a number at the time of the engagement of the parties. In new mountings, he gave plaintiff an engagement ring and a cocktail ring, each set with diamonds, and a watch set with many diamonds. Plaintiff testified that all of these, except the wedding ring, were in a dresser which defendant removed from the home. Defendant denied that they were there or that he had them. At the trial he testified that he had only the diamond ring which he was wearing and a "loose diamond" which he had car-

ried in his back pocket for a number of years, and he guessed it was still there.

Other than as covered by the portion of the decree above stated, the trial court made no decree as to the diamonds. We can do no more under this record.

Defendant had a penchant for new automobiles. From 1950 to 1953, he had five new cars. The last one was a Cadillac acquired in 1953. The purchase price was paid in part by a trade-in of a Chrysler car, in part by cash, and in part by a loan. The sum of $1,150 paid in cash was taken from plaintiff's savings account. A Chevrolet truck was purchased after the purchase of the acreage. Title was taken in the name of the plaintiff. The purchase price was about $1,300. The sum of $900 of the purchase price came from the sale of savings bonds of plaintiff. The balance was paid by defendant in installments. The trial court decreed that the Cadillac should be the separate property of the defendant and the Chevrolet should be the separate property of the plaintiff. We affirm that division.

By its decree the trial court undertook to award to plaintiff that which this record shows was hers and to make an equitable division of the revealed property of the parties.

It is reasonably clear that plaintiff has disclosed all property which she owned at the time of the marriage and that which she personally acquired thereafter.

It is also reasonably clear that defendant did not make a like disclosure. He makes no disclosure of what was done with the several thousand dollars which he claimed he had in a safety-deposit box at the bank.

We think it patent that he did not disclose all of his income.

Defendant at all times mentioned herein was an employee of the Diamond Bar, Incorporated. Plaintiff testified that he was manager, owned stock in the corporation, and was its president. Defendant denied that he owned stock in the corporation. He revealed only his in-

come from the Diamond Bar in 1954. After withholdings were taken out, by calculation, his monthly income was $377.33. By calculation according to defendant's testimony, he was paying $105 a month child support for the children of a former marriage; $25 a month to his mother for care of one of the children; $132 a month payments on the Cadillac; in excess of $30 a month for gasoline for the Cadillac and other cars; and $75 a month apartment rent. These items total $367 a month, or $10 less than defendant's disclosed income. The above tabulation does not include service charges and new tires for the Cadillac; the partial payments made on the temporary child support award; doctor bills shown to have been paid for plaintiff; living expenses; and vacation trips, etc. Defendant in his brief claims that these payments came from former savings and earnings. The record does not disclose the source of the funds.

In the light of this record we see no reason for reducing in any way the property awards made by the trial court to the plaintiff. There is not here a foundation for an alimony award which the plaintiff seeks by cross-petition.

Defendant seeks a reduction in the $50 a month child support award to the plaintiff. It is not claimed that the amount is excessive. It is the amount that the parties agreed upon as the sum to be paid for child support pending the litigation. Defendant suggests that in the future circumstances may "become such that the defendant cannot or will not pay the support order." He asks that the acreage be awarded to him as assurance that that contingency may not arise. The trial court has full authority to meet that contingency under the provisions of the decree and section 42-324, R. R. S. 1943.

The trial court ordered the plaintiff to pay the sum of $750 to defendant's attorney and all court costs except those then paid by defendant. Plaintiff assigns this as error on cross-appeal. The trial court ordered plaintiff

to pay her own attorney's fees. This is not assigned as error in the cross-appeal.

Ordinarily in divorce actions under authority of section 42-308, R. R. S. 1943, attorney's fees and costs are granted to the wife. Where there is no reasonable justification for an appeal, we have denied attorney's fees here. See, Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808; Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877. We see no reasonable justification here for requiring the plaintiff, the successful litigant, to pay attorney's fees for her husband, the unsuccessful litigant.

The decree of the trial court is affirmed as to all matters herein discussed except the allowance of attorney's fees to the defendant, and the taxing of costs to the plaintiff. As to that the decree is reversed. Attorney's fees to the defendant are denied.

All costs in the district court and in this court are taxed to the defendant.

The cause is remanded to the district court with directions to render a decree in accord with this opinion.

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

ROY BOWEN, APPELLEE, V. GEORGE FARRENS ET AL., APPELLANTS.
76 N. W. 2d 417

Filed April 20, 1956. No. 33922.

1. **Bills and Notes: Evidence.** Evidence of a parol agreement entered into by the makers and the payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its terms, is incompetent as tending to vary or contradict the terms of a written instrument by parol.
2. **Bills and Notes.** An oral agreement, made after a promissory note was executed, to extend the maturity date thereof, is not enforcible where there is no consideration for such agreement.
3. **Evidence.** The parol evidence rule is not merely one of evi-

dence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all.

4. **Fraud.** Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.

5. ———. It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.

APPEAL from the district court for Burt County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Don S. Farrens and *Fred S. Jack,* for appellants.

Spear & Lamme, Ron K. Samuelson, and *Keith Hopewell,* for appellee.

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

CARTER, J.

This is a replevin action brought by the plaintiff, as mortgagee, against the defendants, as mortgagors, for possession of certain farm machinery, livestock, grain, and seed. The trial court directed a verdict for the plaintiff at the close of all the evidence, and the defendants appeal.

The defendants entered into a farm lease with the plaintiff on December 23, 1950, which provided that defendants were to farm certain lands of the plaintiff and raise livestock thereon on a "fifty-fifty" arrangement for the farm-lease year commencing March 1, 1951. The evidence shows that defendants were lacking in finances at the time the lease was entered into. The plaintiff knew this at the time the lease was made. The defendants testified that plaintiff stated he would finance them and see them through for the lease period. Plaintiff denied that any such statement was ever made by him.

The evidence shows that defendants had to have a lease before they could obtain any credit. It was on

this basis that the lease was entered into. Defendants, after obtaining the lease, sought a loan with a government loan agency and at the Burt County State Bank. They were unsuccessful in obtaining credit from either source for the farm operation. Thereafter, plaintiff did arrange for credit to be extended to the defendants. This was accomplished by plaintiff and defendants going to the Farmers and Merchants National Bank, Oakland, Nebraska, where a loan of $5,000 was negotiated by the defendants on the basis of plaintiff's credit. A note was made out for the $5,000, which was signed by the defendants and the plaintiff. At the same time plaintiff sold certain livestock, machinery, and grain to the defendants and received a note for $9,034.75 secured by a chattel mortgage for such amount on the livestock, machinery, grain, and seed then owned by the defendants, such lien being subject to the bank's mortgage for $5,000. It is the note and mortgage for $9,034.75, bearing date of March 5, 1951, which is the subject of the present action. The $5,000 note to the bank and the $9,034.75 note given the plaintiff each matured on December 31, 1951. The note to the bank had been reduced to $2,164 at the time this action was commenced. No payments had been made on plaintiff's note.

At the trial plaintiff offered in evidence his note and mortgage. Defendants admitted their signatures thereto. They also testified that they read the note and mortgage before they signed them and that they fully understood the contents, including the date of maturity.

The defendants contend that plaintiff stated before the execution of the note and mortgage that he would finance them and see that they got plenty of money, and that he would not foreclose. It is clear, we think, that these statements made prior to the making of the note and mortgage are merged in those instruments and cannot be construed as a condition to the execution of the note and mortgage. The statements, even if made, were too general as to their terms to constitute an en-

forceable agreement. In any event, such statements being in parol, cannot have the effect of varying the maturity date of the instruments. As early as Van Etten v. Howell, 40 Neb. 850, 59 N. W. 389, this court has held: "The trial court properly ruled that no evidence was admissible when offered, and instructed the jury that none should be considered which tended to vary or contradict the terms of the several notes by showing that contemporaneously with making each an oral agreement was entered into by the makers and payee contradictory of the terms of such note." See, also, Lefferdink v. Schmutte, 149 Neb. 695, 32 N. W. 2d 194; Marmet v. Marmet, 160 Neb. 366, 70 N. W. 2d 301.

There is evidence on the part of the defendants that plaintiff orally agreed, after the execution of the note and mortgage, to extend the time of payment beyond the maturity date stated therein. There is no evidence of any consideration for any such agreement. In Apking v. Hoefer, 74 Neb. 325, 104 N. W. 177, this court said: "Even if the defendant agreed orally, after the contract was executed, that the plaintiffs might have a few days after July 10 to meet the payment maturing on that date, it was a naked promise, without consideration, and could not be enforced." See, also, Roden v. Williams, 100 Neb. 46, 158 N. W. 360, L. R. A. 1917A 415.

Defendants assert fraud on the part of the plaintiff in that the latter made representations that he would finance the defendants and not foreclose. Defendants further assert that the making of the lease on December 23, 1950, and the execution of the notes and mortgages on March 5, 1951, were all a part of a carefully designed fraud upon the defendants. They tendered evidence, which the trial court refused, to the effect that plaintiff had followed a similar plan the previous year with a different tenant.

The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that

certain kinds of facts are legally ineffective, and forbids such facts to be proved at all. Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375. It is also a fundamental rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises, or statements as to future events. Theno v. National Assurance Corp., *supra*. The evidence in this case shows that the lease agreement was entered into on December 23, 1950. Thereafter defendants sought credit to carry on their operations at two financial institutions without success. Plaintiff did then agree to finance the defendants. He signed the defendants' note at the bank for $5,000 and sold them livestock, machinery, and grain, taking their note and mortgage for $9,034.75 therefor, which was subject to the $5,000 bank loan. It cannot be said that plaintiff did not provide substantial finances to these defendants. The claim that plaintiff agreed not to foreclose was clearly without consideration and unenforcible, even if made. Such contentions are unenforcible under the parol evidence rule. They are not sufficient to establish fraud. The fact that plaintiff had a similar experience with another tenant the previous year is not competent evidence of a design to defraud the defendants at the inception of the transaction. It could have been a coincidence, if true, having no bearing whatever on the intentions of the plaintiff in his dealings with these defendants. The elements of fraud are lacking, elements which the defendants must establish to sustain fraud as a defense. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. There is no competent evidence in this record of any representations made by the plaintiff upon which defendants had a right to and did rely. The defense of fraud was not proved.

The trial court found that the note and mortgage were entitled to be enforced according to their terms as a matter of law, and directed a verdict for the plaintiff.

The ruling was in all respects correct, and the judgment of the district court is affirmed.

AFFIRMED.

LLOYD M. PETERSON, APPELLANT, V. GERALD M. VASAK ET AL., APPELLEES, FLOYD PAYNTER ET AL., INTERVENERS-APPELLEES.

76 N. W. 2d 420

Filed April 20, 1956. No. 33927.

1. **Municipal Corporations.** A city is a political subdivision of the state, created as a convenient agency for the exercise of the governmental powers of the state that are entrusted to it by constitutional provision or legislative enactment.
2. **Municipal Corporations: Zoning.** A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization.
3. **Constitutional Law: Municipal Corporations.** The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental subdivisions when and as conferred by the state by its Constitution or legislation.
4. **Constitutional Law: Statutes.** If an act as originally passed was unconstitutional because it contained matter different from that expressed in the title, or referred to more than one subject matter, it becomes valid law, if otherwise constitutional, on adoption by the Legislature and incorporation of it into a general revision without reference to the title as originally enacted.
5. ———: ———. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality.
6. **Municipal Corporations: Zoning.** The words of a municipal zoning ordinance are interpreted according to their natural import in common and accepted usage.
7. ———: ———. If the operation and effect of a zoning ordinance deprive the owner of the value and use of real estate, it creates a specific instance of unnecessary hardship within the meaning of section 14-411, R. R. S. 1943.
8. ———: ———. A board of appeals authorized by section 14-408, R. R. S. 1943, is vested with discretion in the determination of matters within its province to decide but its acts are judicial

in their nature and they are subject to review and reversal if they constitute an abuse of discretion and are arbitrary.

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

Arthur J. Whalen, for appellant.

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, and *Frost, Peasinger, Meyers & Farnham,* for appellees.

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

BOSLAUGH, J.

The subject of this controversy is an application of appellant to the building department of the city of Omaha for a certificate of occupancy authorizing him to improve real estate in the 1st residence district as designated by the zoning ordinance of the city for residential purposes. The description of the land involved is the north 169 feet of Block 10, Ridgewood Addition, in Douglas County. It is outside of but within 3 miles of the city and is unimproved. An ordinance of the city prohibits vacant land within the reach of the ordinance to be occupied or used or a building to be erected thereon until a certificate of occupancy is issued by the building department.

Appellant bound himself to purchase the land from the owner thereof subject however to the ability of appellant to secure a certificate of occupancy, hereafter designated a certificate, permitting him to erect a house of not less than 12,000 square feet upon the premises. He applied to the building department of the city for a certificate in manner and form as the ordinance required. The application was rejected and a certificate was denied him. He timely and in legal manner prosecuted an appeal from the refusal and denial of the building department to the board of appeals of the city. § 14-410,

R. R. S. 1943; Roncka v. Fogarty, 152 Neb. 467, 41 N. W. 2d 745. The board heard the matter and approved the action and decision of the building department. Appellant within the time granted by law filed a petition in the district court setting forth that the decision of the board of appeals was illegal because it or the city had no authority over building beyond the limits of the city; that the real estate was not within the provisions of the zoning ordinance; that the land was owned by the vendor, who had contracted to sell and convey it to appellant, prior to the passage of the ordinance; that the land was prior to the time the ordinance was passed owned of record by Adah E. Ward and had been since in the same and identical situation, location, and condition; that the refusal to issue a certificate sought by him was the taking of property without compensation, contrary to the Constitution of Nebraska; that section 14-418, R. R. S. 1943, attempts to confer upon the city power to regulate all building within 3 miles of its limits; that the statute is unconstitutional; and that it violates the provisions of the Constitution of Nebraska that no bill shall contain more than one subject and the same shall be clearly expressed in the title. Appellant implored the district court to decree that the action of the building department was illegal and that it be required to issue to him a certificate for the erection of a dwelling on the real estate.

The members of the board of appeals and the chief engineer of the building department were named by appellant as defendants in the district court. They by answer admitted that appellant had made application for a certificate for the premises; that it was refused by the building department and the board of appeals; and that the action of the former and the decision of the latter were each reasonable and in accordance with the charter and ordinances of the city. The owners of real property adjacent to or near the real estate concerned in these proceedings intervened and asserted that appellant

did not have a valid contract for the purchase of the real estate for which he sought a certificate; that his application was denied because said real estate had less than 20,000 square feet as the ordinance required; that the building appellant proposed to construct thereon did not and could not conform to the setback requirements of the ordinance; and that the decision of the board of appeals was regular, legal, and a valid exercise of the authority vested in it. The district court found that it had not been shown that the board of appeals acted illegally in sustaining the action of the building department in refusing to issue the certificate sought by appellant and it rendered a judgment of dismissal of the cause. The defendants and interveners will be collectively spoken of herein as appellees.

The property for which appellant seeks a certificate is without the city of Omaha but it is within 3 miles of the limits of the city. Appellant asserts that the part of the act of the Legislature intended to authorize the city to restrict the use of the property concerned in this case is invalid. The act referred to was passed in 1925. Laws 1925, c. 45, p. 178; §§ 14-401 through 14-418, R. R. S. 1943. The section of the act upon which the authority of the city to zone the property involved in this cause rests provides that the powers granted by the act may be exercised over all territory not over 3 miles beyond the limits of the city. Laws 1925, c. 45, § 12, p. 186; § 14-418, R. R. S. 1943. The specific claim of invalidity of this part of the act is that the subject matter thereof had no proper designation or suggestion in the title of the bill and that it contained more than one subject when it was passed and therefore violated the constitutional prohibition that no bill shall contain more than one subject and the same shall be clearly expressed in the title. Art. III, § 14, Constitution of Nebraska.

If the hypothesis of appellant in this respect is correct the ordinance of the city cannot limit or restrain the use of the property. A city is a political subdivision

of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act. Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622, supplemental opinion, 157 Neb. 768, 61 N. W. 2d 556; State v. Kubik, 159 Neb. 509, 67 N. W. 2d 755. A municipality has no inherent power to enact a zoning ordinance. The power to do so results from statutory or constitutional authorization. The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental divisions when and as conferred by the state either through its Constitution or by valid legislation. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835; City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828; Clements v. McCabe, 210 Mich. 207, 177 N. W. 722; Krajenke Buick Sales v. Hamtramck City Engineer, 322 Mich. 250, 33 N. W. 2d 781; Annotations, 86 A. L. R. 659, 117 A. L. R. 1117; 58 Am. Jur., Zoning, § 7, p. 943; 37 Am. Jur., Municipal Corporations, § 277, p. 902.

The statute to which the objection of appellant is made was passed in 1925. The title did not mention the subject matter of the section assailed. In 1943 the act without the title was a part of the authorized revision of the statutes of the state. The revision was legally adopted by an act of the Legislature. This fact prevents any reference to or consideration of the title of the original bill in a present determination of the constitutionality of the act. In McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608, it is said: "If an act as originally passed was unconstitutional because it contained matter different from that expressed in the title, or referred to more than one subject matter, it becomes valid law, if otherwise constitutional, on adoption by the Legislature and incorpo-

ration into a general revision without reference to title as originally enacted."

Appellant is barred by his acts from asserting that the statute referred to above or any part of it is invalid. The ordinance of the city could have no effectiveness or validity in the absence of the statute. Appellant has invoked the provisions of the ordinance in these proceedings and by his solicitation of this court to order the city to issue the permit he seeks to erect a dwelling on the land. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality. State ex rel. Sorensen v. Southern Nebraska Power Co., 131 Neb. 472, 268 N. W. 284; Federal Farm Mortgage Corp. v. Hughes, 137 Neb. 454, 289 N. W. 866; Fremont Joint Stock Land Bank v. Morse, 137 Neb. 659, 290 N. W. 907; Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N. W. 2d 576.

The land with which this cause is concerned is generally triangular in shape. The width of it at its south boundary is 141 feet. Each of its side lines is 169 feet and they converge at the north of the tract not in a point but in a rounded portion which forms a circular terminus with a 14-foot 6-inch radius where Loveland Drive, which is west of the land, and Ridgewood Avenue, which is east thereof, merge and form an intersection, the south part of which is adjacent to the north part of the land. Immediately south and adjoining it is a residential property.

The parties disagree as to whether or not the land involved herein is a lot within the meaning of the ordinance. The relevant part of the definition of a lot as stated therein is: "Land occupied or to be occupied by a building and its accessory buildings together with such open spaces as are required under this ordinance and having its principal frontage upon a public street or officially approved place." The land is not a platted

lot but it is the remainder of a platted block after the other parts of the block were sold and conveyed during or before August 1939. Appellees say that a lot within the meaning of the ordinance means a platted lot. This is contrary to its terms. Its language is that a lot is land occupied or to be occupied by a building with open spaces required by the ordinance and with the principal frontage upon a public street or officially approved place. The location concerned in these proceedings is land substantially surrounded by public streets and it is all open space. Whether or not a residence building can be constructed on it with the open spaces required by the ordinance is a problem presented by this cause. The words of a municipal zoning ordinance are interpreted according to their natural import in common and accepted usage. Commissioners of Public Works v. Cities Service Oil Co., 308 Mass. 349, 32 N. E. 2d 277; Foster v. Mayor of Beverly, 315 Mass. 567, 53 N. E. 2d 693, 151 A. L. R. 737; City of St. Paul v. Haugbro, 93 Minn. 59, 100 N. W. 470, 66 L. R. A. 441, 106 Am. S. R. 427, 2 Ann. Cas. 580; 37 Am. Jur., Municipal Corporations, § 187, p. 826. The ordinance was not intended to be restricted in its operation to land that had been formally platted as a lot or lots.

The ordinance requires a minimum lot area of 20,000 square feet per family except a lot having less than the minimum area of record at the time of the effective date of the ordinance may be occupied by a single family dwelling if all the applicable yard regulations are observed. The land concerned in this cause has existed in all respects as it is now since August 1939. It is and has been owned by and of record in the name of Adah E. Ward subject only to the contract for the sale of it to appellant. The ordinance became effective March 1, 1945. The area of the land is 13,619 square feet. Appellant desires and seeks permission to build thereon a single-family dwelling. It is clear therefore that if appellant can comply with applicable yard require-

ments he should be issued a certificate allowing him to occupy this land by a single-family dwelling. The regulations of the ordinance in this respect are generally that there should be a front yard with a minimum depth of 75 feet, a rear yard of not less than 25 feet, and "* * * there shall be a side yard of not less than 25 feet in width on each side of the building; Provided, However, that a lot having a width of 110 feet, or less, and of record at the time of the effective date of (the) Ordinance * * *, there shall be a side yard on each side of the building equal to not less than 15 per cent of the average width of the lot, but in no case less than ten feet." The part of the quoted provision following the semicolon has no relevancy to this cause.

The record exhibits a drawing by an architect depicting an area of the land 63 feet wide at the south, 63 feet in length from south to north, and 21 feet wide at the north. It is 75 feet from the north terminus of the land to the north line of the area, 25 feet from its east line to the east property line, 25 feet from its west line to the west property line of the land, and 35 feet from the south line of the area to the south line of the land. The drawing shows the floor plan for a single-family dwelling and a garage within the area depicted on the drawing and described above.

Appellees argue that if the north terminus of the land in question is considered its north boundary it does not have its principal frontage upon a street or an officially approved place; that the rounded portion of the triangular tract of land though it is bounded by an intersection of streets cannot be said to be fronting on a street or an officially approved place; neither can it be considered the principal frontage since either side of the land is greater in length than the portion of the land at its north terminus. This argument is not convincing. The front of the property or the principal frontage thereof is not required to be the north part of it. The principal frontage spoken of in the ordinance

is related to the land and has no application to the front of any building placed thereon. The ordinance speaks of the land to be occupied by a building "having its principal frontage upon a public street or officially approved place." The land has all of its frontage on streets or an intersection of streets, except the south boundary. This property has an east frontage on Ridgewood Avenue of 169 feet and a west frontage of equal distance on Loveland Drive. It has principal frontage on two streets. The ordinance recognizes that the provision concerning principal frontage of a lot has no relation to the front of a building thereon by the provision of the ordinance, in another connection, that the front yard shall be adjacent to the street upon which the front of the building faces. The ordinance makes no requirement that the front of the building shall face the principal street frontage of the lot.

It is insisted by appellees that the land is on the intersection of two streets and is therefore a corner lot; that the requirements of the ordinance are applicable thereto that when a corner lot is used for residence purposes, without regard to the way the dwelling faces, one street side yard shall comply with the front yard setback requirements of the district and the other street side yard shall be not less than one-half of the front requirement for residences fronting upon such street; that one street side yard would have to be not less than 37½ feet; and that it is impossible for appellant to satisfy this requirement. The foregoing is contrary to what was produced at the trial. The record was made by the appellees to say that the land involved in this cause is not strictly a corner lot but that it is a sort of hybrid; that the ordinance was written with an eye to lots of regular shape and that is quadrilateral and not triangular; that the situation presented by this lot is a typical one for which the law provides a board of appeals to treat the peculiar problems that arise on a lot which is not quadrilateral; and that it is proper to have equal

side yards in a case like this. The ordinance does not describe or define a corner lot. It is a permissible conclusion that the land is not, within the meaning of the provisions of the ordinance, a corner lot.

If the limitations and requirements of the ordinance are applicable to the land involved and have the effect ascribed to them by appellees, the land is rendered by the ordinance unusable, is deprived of any practical economic use, and has no value. Appellees do not dispute this result but they comment "* * * that the situation is not very pleasant * * *"; that Adah E. Ward, the vendor of appellant, owned this and other land in the block; that she sold and conveyed all of it but the land involved in this cause which she retained for speculative purposes; that she thereby caused the situation; and that neither she nor her vendee has any escape from the disaster. This is not quite the situation. This land was separated from the other land in 1939. It was then owned of record by Adah E. Ward and has since been in identical condition and ownership, except for the contract of sale. The ordinance became effective March 1, 1945. The predecessor in title of appellant did not take and hold the title with notice, constructive or otherwise, that an ordinance would be passed thereafter that would render her land without value or use. It may not be said that appellant or his predecessor in title acquired a tract of land and thereafter made such use of a part thereof as left the remainder unavailable for economic use under the then effective zoning ordinance. Appellant and his vendor, as the situation now exists, are deprived of any practical use or value of the land. This is an unnecessary hardship, not of their making, and the deprivation does not bring to other properties a commensurate advantage. It does not necessarily follow that the ordinance should be for that reason adjudged invalid. The statute makes provision for appropriate relief in such a specific case. § 14-411, R. R. S. 1943. Permission for the proposed

use of the land will not be contrary to the public interest or welfare. It will be in harmony with the intent of the ordinance and it will not alter the essential character of the neighborhood. The record is not made to proclaim that the value of the other property will be prejudiced by the proposed use of the land or that the rights or interests of other persons will be injuriously affected.

The criterion of unnecessary hardship is that the use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property; or that there is convincing proof that it is impossible to use the property for a conforming purpose; or that there are factors sufficient to constitute such a hardship that would in effect deprive the owner of his property without compensation. An unnecessary hardship exists when all the relevant factors taken together convince that the plight of the location concerned is unique in that it cannot be put to a conforming use because of the limitations imposed upon the property by reason of its classification in a specific zone. Annotation, 168 A. L. R. 13; 58 Am. Jur., Zoning, § 203, p. 1050.

The purpose of a provision authorizing the granting of relief in a specific case of hardship is to permit the amelioration of the rigors of necessarily general regulations by eliminating the necessity of a slavish adherence to the precise letter of the limitations where in a given case little or no good on the one side and undue hardship on the other would result from a literal enforcement and to protect the ordinance against attack on the ground of unreasonable interference with private rights. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. 2d 128, 168 L. R. A. 1; Annotation, 168 A. L. R. 13.

Schaible v. Board of Adjustment, 134 N. J. Law 473, 49 A. 2d 50, was concerned with the situation that the owners of real estate made application for and were refused a permit under a zoning ordinance to construct

a building on their premises for office and storage purposes to be used in the conduct of their business. The real estate without the permit was unusable, had no practical economic use, and was substantially without value. The refusal of the permit by the board of adjustment was determined by the court to have been arbitrary and capricious and it directed that a permit be issued to the applicants. The opinion of the court contains the following: "Prosecutors acquired title to the property on January 6th, 1945, for the purpose of doing that which they now ask permission to do. They took with constructive knowledge of the ordinance restrictions as amended in 1936, but their predecessors in title who acquired the rear lands in 1926 did not so take. It may not be said that prosecutors, or any of their predecessors in title, acquired a tract of land and thereafter made such use of a part thereof as left the remainder unavailable for economic use under the then effective zoning ordinance. * * * It is prosecutors' contention that the zoning provisions enacted in November of 1936 so restrict the lands as to amount to a practical confiscation. * * * As things now are, prosecutors are deprived of any practical economic use of their property—an unnecessary hardship because the deprivation does not bring to other properties a commensurate advantage. It does not necessarily follow that the ordinance is, for that reason, void. Provision is made for such a specific case by R. S. 40:55-39d * * *. That authority is discretionary, but the Board sits in quasi-judicial capacity and its acts or omissions are subject to review when they so violate the demands of right and justice as to constitute an abuse of discretion. Brandon v. Montclair, 124 N. J. L. 135; affirmed, 125 Id. 367. We think that the moving of prosecutors' business a distance of 200 feet to a structure built in accordance with the submitted plans and to be used as forecasted by the proofs will not be contrary to the public interest and will not seriously impair the pleasurable and

profitable use of the neighborhood residence properties; that, on the contrary, owing to the special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and that the spirit of the ordinance will be observed and substantial justice done by allowing the variance."

The circumstances of this case showing a deprivation of the value and use of valuable real property establish a specific instance of unnecessary hardship within the meaning of the statute. § 14-411, R. R. S. 1943.

The appeal in this court is tried de novo upon the record. This court must reach an independent conclusion. The board of appeals is vested with discretion in the disposition of matters within its province to decide but the acts of the board are in their nature judicial and they are subject to review and reversal when they constitute an abuse of discretion and are arbitrary. § 14-414, R. R. S. 1943; Roncka v. Fogarty, *supra;* Schaible v. Board of Adjustment, *supra;* Lee v. Board of Adjustment, *supra;* 58 Am. Jur., Zoning, § 229, p. 1061. The action of the board of appeals in this case was an abuse of discretion, arbitrary, and illegal.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Douglas County to render a judgment reversing the decision of the board of appeals of the city of Omaha in this cause and ordering it to grant and issue to appellant a certificate of occupancy of the land involved herein, authorizing appellant to construct a single-family dwelling on the part of the land designated on the drawing of the architect in evidence in this cause as exhibit 3 and described thereon as 63 feet wide at the south, 63 feet long from south to north, and 21 feet wide at the north, except, if appellant desires, he may construct the south part of the dwelling 25 feet north of the south boundary line of the land instead of 35 feet north of said boundary line as it is indicated on the drawing.

REVERSED AND REMANDED WITH DIRECTIONS.

C. E. RICE, APPELLANT, V. JOHN J. MCGRATH, APPELLEE.
76 N. W. 2d 428

Filed April 20, 1956. No. 33955.

1. **Courts: Appeal and Error.** By statute, either party may appeal from the judgment of the county court in the same manner as provided by law in cases tried and determined by justices of the peace.
2. ———: ———. By statute, in all cases of appeal from the county court, the plaintiff shall, within 50 days from and after the rendition of the judgment in the said court, file his petition as required in civil cases in the district court.
3. ———: ———. By statute the plaintiff in the county court on appeal to the district court shall be the plaintiff therein and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court.
4. **Courts.** The term "discretion" denotes the absence of a hard and fast rule.
5. ———. When the term "discretion" is invoked as a guide to judicial action it means a sound discretion, not exercised arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.
6. **Replevin.** There is no distinction between an appeal in a replevin action and any other civil case from the county court to the district court within the contemplation of section 27-1306, R. R. S. 1943.
7. ———. In a replevin action the failure of the plaintiff to prosecute his action to final judgment can in no sense deprive the defendant of his right to have the possession of the property determined. It is the final judgment that determines the rights of the parties.
8. ———. If the plaintiff fails to prosecute his action to final judgment, the court should permit the defendant to proceed with the trial on his part, and thereupon to render judgment according to the testimony.
9. ———. Where a plaintiff has failed to prosecute his action to final judgment, the defendant has the right under sections 25-10,102 and 25-10,104, R. R. S. 1943, to have his title and the right of possession of the property replevied adjudicated and determined.
10. ———. The failure of the plaintiff to prosecute his action to final judgment in replevin will not oust the court of jurisdiction to retain the cause and render the proper judgment upon the proofs taken.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Dredla & Dredla, Van Pelt, Marti & O'Gara, and *Bernard L. Packett,* for appellant.

Philip F. Nestor, Jr., and *Ginsburg, Rosenberg & Ginsburg,* for appellee.

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

MESSMORE, J.

This is an action in replevin commenced in the county court of Johnson County by C. E. Rice, plaintiff, to recover possession of a certain polled Hereford bull, against John J. McGrath, defendant, for wrongfully detaining said bull in his possession, or for the value of the bull if the same was not returned, and for damages and costs expended by the plaintiff. The property was taken under the writ of replevin and delivered to the plaintiff. Issues were joined, the parties waived a jury, and the case was tried to the court. The court entered judgment that the plaintiff have possession of the polled Hereford bull, defendant to pay all costs of the action.

The defendant appealed to the district court and filed a transcript of the proceedings of the county court in the district court on September 10, 1954. There were proceedings had with reference to the appeal bond and a new appeal bond was furnished and approved by the clerk of the district court as ordered by the trial judge.

The defendant filed a motion for judgment on March 31, 1955. The motion requested the court to order returned to the defendant the polled Hereford bull, the subject matter of the action, and alleged that the plaintiff had failed to file a petition on appeal or to make any showing of cause which would warrant the court in ex-

tending or granting the plaintiff additional time within which to file his petition.

On April 6, 1955, the plaintiff filed an application setting forth the reasons why he did not file his petition within 50 days from the date of the rendition of the judgment in the county court, alleging that the plaintiff was a nonresident of Johnson County, a practicing physician and surgeon, and operating extensive livestock and farming operations, interested in other matters, difficult to contact, and could not be interviewed; that the plaintiff's lawyer was unable, by reason of extensive business commitments away from home, to give the matter attention; that he was sick during the time; that after the appeal was filed by the defendant, objection to the appeal bond filed by the defendant was made and the trial court ordered the defendant to file a new bond; that on December 13, 1954, pursuant to a motion made by defendant, the defendant was allowed to have access to the bull involved in this action and to inspect the animal; and that plaintiff's counsel was of the opinion that such trial would be had on the pleadings from the court below and that it was not necessary for the plaintiff in the court below to file a petition in the district court within 50 days of the rendition of the judgment or at any other time unless he desired to do so to supplement or amplify the allegations in the petition filed in the court below. The plaintiff tendered with this application his petition and asked leave to file the same forthwith.

On May 9, 1955, the trial court sustained the motion of the defendant for judgment, denied the application of the plaintiff for leave to file petition out of time, ordered the plaintiff to return the subject matter of this action to the defendant, and taxed the costs of the action against the plaintiff.

The plaintiff filed a motion for new trial. The motion for new trial was overruled, and the plaintiff appeals.

The principal question for determination is whether or not the trial court abused its judicial discretion in denying the application of the plaintiff for leave to file his petition out of time. In addition the plaintiff assigns as error that there was error in the proceedings, by which the plaintiff was prevented from having a fair trial.

In determining this appeal it is necessary to consider the following statutory provisions.

Section 24-544, R. R. S. 1943, provides in part: "* * * either party may appeal from the judgment of the county court, in the manner as provided by law in cases tried and determined by justices of the peace."

Section 27-1306, R. R. S. 1943, provides: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court."

Section 27-1305, R. R. S. 1943, provides: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court."

The judgment in the instant case was rendered in the county court on September 2, 1954. The 50-day period allotted the plaintiff by section 27-1306, R. R. S. 1943, after the date of the rendition of the judgment in the county court to file his petition as required in the district court, would expire on October 22, 1954. The plaintiff's application to file his petition in the district court was made on April 6, 1955, or 166 days from and after the time he was required to file said petition in the district court under the provisions of section 27-1306, R. R. S. 1943.

This brings us to the plaintiff's contention that the

trial court abused its judicial discretion in denying the plaintiff's application for leave to file his petition out of time. We have previously set forth the grounds on which the plaintiff claims he was prevented from filing his petition in time.

The term "discretion" denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. See, Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520; Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287; First Trust Co. v. Thompson, 147 Neb. 366, 23 N. W. 2d 339.

As we review the application of the plaintiff for leave to file his petition out of time and the reasons set forth therein, we conclude that the trial court did not abuse its judicial discretion and the plaintiff's contention is without merit.

As to whether or not section 27-1306, R. R. S. 1943, applies to replevin actions, we conclude that it does.

In Scott v. Burrill, 44 Neb. 755, 62 N. W. 1093, what is now section 27-1307, R. R. S. 1943, which appears in the same article in the statutes under "Appeals" as section 27-1306, R. R. S. 1943, was under consideration. It was said: "The above rule applies to actions of replevin before a justice of the peace, as well as to all other civil causes determined in justice courts." The same thing would be true with reference to the county court where a replevin action is tried.

And as stated in 2 Fisher, Courts of Limited Jurisdiction, § 391, p. 720, referring to replevin actions: "The procedure for appeal is the same as in other civil cases." So, there is no distinction between an appeal in a replevin action and any other civil case from the justice court or the county court to the district court within the

contemplation of section 27-1306, R. R. S. 1943.

The trial court in its decree sustained the motion of the defendant for judgment, and did not nonsuit the plaintiff as contended for by him in his brief, but denied his application to file his petition out of time in a replevin action. We deem the following applicable in determining this appeal.

In Moore & Cozine v. Herron, 17 Neb. 697, 24 N. W. 425, it is said: "Where property has been taken under a writ of replevin, either party may have the right to the possession determined, and a dismissal of the action by the other will not deprive him of that right." It can safely be stated that the failure of the plaintiff to prosecute his action to final judgment can in no sense deprive the defendant of his right to have the possession of the property determined. See § 25-10,102, R. R. S. 1943. The court further said: "It is the final judgment that determines the rights of the parties and not the mere delivery of the property under the writ." In this connection, appeal having been taken by the defendant in the instant case, there is no final judgment that determines the rights of the parties. The court further stated: "If the plaintiff fails to prosecute, the court should permit the defendant to proceed with the trial on his part, and thereupon to render judgment according to the testimony."

As held in Garber v. Palmer, Blanchard & Co., 47 Neb. 699, 66 N. W. 656: "When a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, the defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages." In the opinion the court said: "In case the plaintiff, by failure of evidence, or by failure to prosecute his case, fails to establish such affirmative right in himself the defendant is entitled to the procedure accorded by section 190, not for the purpose of establishing his right, but for the purpose of assessing his damages."

We make reference to section 25-10,102, R. R. S. 1943, which provides as follows: "If the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, *or if he otherwise fail to prosecute his action to final judgment,* the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant." (Emphasis supplied.)

Section 25-10,103, R. R. S. 1943, provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which with costs of suit, the court shall render judgment for the defendant."

Section 25-10,104, R. R. S. 1943, provides in part: "The judgment in the cases mentioned in sections 25-10,102, 25-10,103 * * * shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit."

The above sections of the statutes are applicable under the circumstances as presented on this appeal.

In Vose v. Muller, 48 Neb. 602, 67 N. W. 598, the court said: "The dismissal of an action by a plaintiff is manifestly a failure to prosecute the same to final judgment, within the meaning of said section 190, and in such

case, if the possession of the property has been delivered to the plaintiff by virtue of the order of replevin, the defendant has the undoubted right, under said sections 190 and 191a, to have his title and the right of possession of the property replevied adjudicated and determined in that action. The filing of a dismissal by the plaintiff in replevin will not oust the court of jurisdiction to retain the cause and render the proper judgment upon the proofs taken."

Sections 190, 191, and 191a mentioned in the foregoing-cited cases are contained in the Code of Civil Procedure and now are referred to as sections 25-10,102, 25-10,103, and 25-10,104, R. R. S. 1943.

In view of the foregoing authorities we affirm the trial court's judgment in denying the application of the plaintiff to file his petition out of time. We reverse the judgment of the trial court in ordering the return of the property to the defendant, and remand the cause with directions to proceed in conformity with this opinion.

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

CARTER, J., participating on briefs.

JOHN L. HIPSLEY, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF CAROLINE E. HIPSLEY, DECEASED, APPELLANT, V. SUSIE HIPSLEY, APPELLEE.
76 N. W. 2d 462

Filed April 27, 1956. No. 33876.

1. **Appeal and Error.** It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite.
2. **Deeds.** Whether or not a deed has been delivered is largely

a question of intent to be determined by the facts and circumstances of the particular case.

3. ———. 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.
4. ———. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption.
5. ———. 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.
6. ———. In a suit to set aside deed to defendant for want of delivery, plaintiff has the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed.
7. ———. This presumption is not conclusive, but raises a strong implication, which can only be overcome by clear and satisfactory proof.

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

Evans & Evans and *L. H. Henderson,* for appellant.

Johnson & Des Jardien, for appellee.

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

MESSMORE, J.

This is an action brought in the district court for Custer County by John L. Hipsley, administrator with the will annexed of the estate of Caroline E. Hipsley, deceased, as plaintiff, against Susie Hipsley, defendant. The purpose of the action is to obtain a declaratory judgment to the effect that the bequest and devise to Harry Hipsley, deceased, in the last will and testament of Caroline E. Hipsley, deceased, are invalid; that the real estate therein devised should descend under the intestate laws of this state to the heirs at law of Caroline E. Hipsley, deceased; that the deeds of conveyance referred to in paragraph 7 of said last will and

testament fail for lack of delivery; and that the title to the real estate set forth in paragraph 4 of the will be quieted and confirmed as against any claim of Susie Hipsley, in John L. Hipsley and Emma L. Henderson the only heirs at law of Caroline E. Hipsley, deceased.

The trial court entered judgment dismissing the plaintiff's amended petition; quieted title in Susie Hipsley, defendant, to the lands described in the deeds, holding that there had been a delivery of said deeds to the defendant's husband, Harry Hipsley, by Caroline E. Hipsley during her lifetime; and granted the defendant Susie Hipsley a homestead in certain land. The plaintiff filed a motion for new trial. Upon the overruling of this motion, the plaintiff appeals.

The following facts are admitted in the pleadings and are not in dispute in the record: That John L. Hipsley is the administrator with the will annexed of the estate of Caroline E. Hipsley; that under the terms of the last will of Caroline E. Hipsley, deceased, the following described real estate situated in Custer County was devised and bequeathed to Harry Hipsley, deceased, a son of Caroline E. Hipsley: The northwest quarter of Section 21, and the east half of Section 21, Township 19 North, Range 20, and Lots 3 and 4 and the south half of the northwest quarter of Section 4, Township 15 North, Range 23 West of the 6th P. M., in Custer County, and all of the southeast quarter of Block 1 in the original town of Broken Bow; that Harry Hipsley died on December 17, 1951, his sole and only heirs at law being his widow, Susie Hipsley, and his mother, Caroline E. Hipsley; that the only heirs at law of Caroline E. Hipsley, deceased, were John L. Hipsley, a son, and Emma L. Henderson, a daughter; that Caroline E. Hipsley, deceased, during her lifetime, executed deeds conveying the following real estate to Harry Hipsley, deceased: The east half of the southeast quarter of Block 1 of the original town of Broken Bow, the northwest quarter of Section 21, Township 19 North, Range

20 West of the 6th P. M., in Custer County, the east half of Section 21, Township 19 North, Range 20, Lots 3 and 4, and the south half of the northwest quarter of Section 4, Township 15 North, Range 23 West of the 6th P. M., and the west half of the southeast quarter of Block 1 in the original town of Broken Bow; and that paragraph 7 of the last will of Caroline E. Hipsley, deceased, states: "I have heretofore executed and delivered the deeds conveying to each of my children the lands I want each of them to have and receive."

The plaintiff's amended petition alleged that Caroline E. Hipsley, deceased, at no time during her lifetime made delivery of said deeds to her son Harry Hipsley, but at all times exercised absolute and exclusive control over said deeds of conveyance and over said real estate; that said deeds were in her possession on the day of her death, and were null and void for lack of delivery; that paragraph 7 of the will of Caroline E. Hipsley, deceased, in the language as stated previously, cast a cloud upon the title to the above described real estate; and that Susie Hipsley now claims an interest in and to said real estate by virtue of said deeds to Harry Hipsley and paragraph 7 of the last will of Caroline E. Hipsley, deceased.

The defendant's answer to the plaintiff's amended petition specifically denies the above as set forth therein. In addition, the answer alleges that Caroline E. Hipsley died on June 22, 1953, a resident of Custer County; that she left a last will which was duly admitted to probate in the county court of Custer County; that on September 26, 1940, Caroline E. Hipsley conveyed the east half of the southeast quarter of Block 1 of the original town of Broken Bow to Harry Hipsley; that on September 27, 1940, she conveyed the northwest quarter of Section 21, Township 19 North, Range 20 West of the 6th P. M., in Custer County to Harry Hipsley; that on June 20, 1947, she conveyed the east half of Section 21, Township 19 North, Range 20, Lots 3 and

4, and the south half of the northwest quarter of Section 4, Township 15 North, Range 23 West of the 6th P. M., and the west half of the southeast quarter of Block 1, in the original town of Broken Bow, to Harry Hipsley; that said deeds were delivered, and constituted a conveyance of the lands described therein; that the last will and testament of Caroline E. Hipsley acknowledges and verifies the execution and delivery of the said deeds and the conveyance of the said real estate to Harry Hipsley; that upon his death, the real estate hereinbefore described and previously conveyed to him by Caroline E. Hipsley, descended to and vested in his widow, Susie Hipsley, and his mother Caroline E. Hipsley in equal shares and proportion; that this answering defendant is entitled to have her share, interest, and title confirmed in her as the owner of an undivided half share and proportion thereof, and in addition is entitled to have set aside to her as a homestead and her right to the use, benefit, and income of the property described as follows: All of the southeast quarter of Block 1 in the original town of Broken Bow, set aside for her use, benefit, and control; and that this answering defendant is entitled to a partition of said real estate in the manner provided for by law. The prayer of the answer was in accordance with the allegations thereof.

The will of Caroline E. Hipsley, deceased, insofar as necessary to consider on this appeal, provides as follows: The second paragraph provided that after the payment of such funeral expenses and debts, she gave and devised to her son, John L. Hipsley, the following described real estate: The southeast quarter of Section 34, Township 18 North, Range 23, the northwest quarter of Section 9, and the north half of the southeast quarter and the northeast quarter of Section 16, Township 17 North, Range 22, except a parcel previously deeded to said John L. Hipsley and described as follows: Commencing at the northwest corner of

the northeast quarter of Section 16, Township 17 North, Range 22, thence running east 40 rods on north line of said Section 16, thence south 80 rods, thence west 40 rods, thence north 80 rods to the place of beginning, containing about 20 acres, and the south half of the southwest quarter of Section 17, Township 17 North, Range 22, all west of the 6th P. M., in Custer County.

The third paragraph of the will gave and devised to her daughter, Emma Henderson, the following described real estate: The northeast quarter of Section 33, Township 17 North, Range 18, and the north half of the southwest quarter of Section 17, Township 17 North, Range 22, the southeast quarter of Section 8, and the northwest quarter and the west half of the northeast quarter, and west half of the southeast quarter of Section 17, Township 17 North, Range 22, all west of the 6th P. M., in Custer County, Nebraska, and the east half of the northeast quarter of Block 1 in the original town of Broken Bow.

The fourth paragraph of the will gave and devised to her son, Harry Hipsley, the following described real estate: The northwest quarter of Section 21, and the east half of Section 21, Township 19 North, Range 20, and Lots 3 and 4, and the south half of the northwest quarter of Section 4, Township 15 North, Range 23 West of the 6th P. M., in Custer County, and all of the southeast quarter of Block 1 in the original town of Broken Bow.

The fifth paragraph of the will relates to an intended devise of certain land to John L. Hipsley which was sold. The terms of the sale were stated therein and the amount received, and then John L. Hipsley was to receive the full purchase price received from the sale of the land by turning over to him certain War Savings Bonds and $800 evidenced by a note, or the proceeds therefrom if said note had been paid, in lieu of said land as described in this paragraph.

The sixth paragraph of the will provided that the

rest, remainder, and residue of the property owned by the testatrix at the time of her death was devised and bequeathed to her children, John L. Hipsley, Emma Henderson, and Harry Hipsley, share and share alike.

The seventh paragraph of the will provided: "I have heretofore executed and delivered deeds conveying to each of my children the lands I want each of them to have and receive."

This instrument was signed on July 21, 1949, witnessed by six witnesses, and was filed in the county court on March 31, 1954.

With reference to the deeds previously mentioned, the record discloses that J. G. Leonard, a bonded abstracter and notary public, on July 1, 1936, prepared and acknowledged for Caroline E. Hipsley a deed wherein John L. Hipsley was grantee. This land is described in exhibit 6, and was devised to John L. Hipsley in the second paragraph of the will of Caroline E. Hipsley.

On September 26, 1940, he prepared and acknowledged three deeds for Caroline E. Hipsley, referred to as exhibit 1, exhibit 4, and exhibit 8. In exhibit 1, Emma Henderson was named grantee, and the description of the land appears in paragraph 3 of the will of Caroline E. Hipsley wherein Emma Henderson is named devisee. John L. Hipsley is named grantee in exhibit 4, and the land described in that deed is devised to him under paragraph 2 of the will of Caroline E. Hipsley. Harry Hipsley was named grantee in the deed, exhibit 8, and by paragraph 4 of the will of Caroline E. Hipsley, was devised the same land which is described in such paragraph.

On September 27, 1940, Leonard prepared and acknowledged three more deeds for Caroline E. Hipsley, referred to as exhibit 2, exhibit 5, and exhibit 7. The grantee named in exhibit 2, a deed, was Emma Henderson. This land was devised to her by the third paragraph of the will of Caroline E. Hipsley. In exhibit 5, a deed, John L. Hipsley was named grantee. The land

described therein was devised to him by paragraph 2 of the will of Caroline E. Hipsley. In exhibit 7, a deed, Harry Hipsley was named grantee. This land was devised to him by paragraph 4 of the will of Caroline E. Hipsley.

Leonard's best recollection was that he went to the home of Caroline E. Hipsley and received from her the information necessary to draw the deeds made in 1940, and at a later date returned to her home where the deeds were signed and acknowledged by her. He believed that Harry Hipsley was present when Caroline E. Hipsley executed the deeds in 1940. John L. Hipsley and Emma Henderson were never present at any time when Caroline E. Hipsley executed the deeds.

On June 20, 1947, Leonard prepared and acknowledged two deeds for Caroline E. Hipsley, exhibit 3 and exhibit 9. The grantee named in exhibit 3 was Emma Henderson. The land described therein was devised to her by paragraph 3 of the will of Caroline E. Hipsley. In the other deed, exhibit 9, Harry Hipsley was named the grantee. The land described therein was devised to him by paragraph 4 of the will of Caroline E. Hipsley. When these two deeds were executed, Caroline E. Hipsley was a patient in the Broken Bow hospital under the care of Dr. Carothers. Leonard went to the hospital to obtain Caroline E. Hipsley's signature and acknowledgment of the deeds. He thought Harry Hipsley was present when these deeds were signed by Caroline E. Hipsley. He had no instructions or directions as to what to do with any of the deeds when they were executed. He left the deeds with Caroline E. Hipsley and had not seen any of the deeds since, until he was called as a witness. None of these deeds were ever filed for record in the office of the register of deeds.

The record further discloses that Caroline E. Hipsley was a resident of Broken Bow. Of her four children, only two outlived their parents, John L. Hipsley who has lived at Merna since 1917, and Emma Henderson who

resides in South Euclid, Ohio. After the death of her husband in 1929, Caroline E. Hipsley took over the management of the family property with the assistance of her daughter Bessie who lived with her. Bessie died on September 1, 1940. Harry Hipsley was a bachelor at the time of Bessie's death, and also lived in his mother's home. After Bessie's death, Harry Hipsley took over the management of the family property. On April 29, 1941, Harry Hipsley and Susie, the defendant, were married and he brought her to his mother's home where they lived when Harry Hipsley died on December 17, 1951. Susie continued to live in the same home and was living there at the time of trial. After Harry and Susie were married, Caroline E. Hipsley lived with them and paid $4 a week for board and room, occupying a first-floor room until she went to the hospital after breaking her hip on July 23, 1946. She was confined in the hospital until her death on June 22, 1953. Shortly after Bessie's death, Caroline E. Hipsley and her remaining children, John L. Hipsley, Emma L. Henderson, and Harry Hipsley, went to John L. Hipsley's home in Merna for a family conference with reference to a division of the property by the mother to her children. At that time the mother was 89 years of age. Conversation was had as to what should be done, resulting in Harry Hipsley being charged to attend to a great deal of the property, collecting the rents, accounting therefor, etc. Later on, deeds were made with reference to the property owned by Caroline E. Hipsley. Caroline E. Hipsley was desirous of having her children satisfied with reference to the division of the property. John L. Hipsley knew about his mother making out deeds shortly after it was done in 1940. Caroline E. Hipsley, during her lifetime, did not personally deliver the deeds evidenced by exhibits 1, 2, and 3 to Emma Henderson. The first time Emma Henderson saw the deeds was the night before her deposition was taken at her home in Ohio, on April 7, 1954. However, she did know that

some deeds were made out in 1940. Emma Henderson testified that the deeds evidenced by exhibits 1 to 9 were made in accordance with the conversation and agreement had at the family conference where plans were agreed upon with reference to the handling of the affairs or property of Caroline E. Hipsley. In accordance with this agreement, the accounts were to be kept in the names of Caroline E. Hipsley or Harry Hipsley, and Caroline E. Hipsley or John L. Hipsley. The income from the farms and mortgages was to be administered by John and Harry Hipsley. Pursuant to the plans so made, Harry Hipsley took care of the farms and property with the assistance of John Hipsley and Emma Henderson. Emma helped until December 1940. Both she and Harry deposited the money that came in for rent of the property to Caroline E. Hipsley's account.

The children agreed at the family conference that their mother, Caroline E. Hipsley, was to be taken care of during her lifetime and that the bills for her care and comfort were to be paid from the income of the property. It might be said at this time that the children of Caroline E. Hipsley never neglected her at any time, and she received the best of care and devotion that they could give her. The children saw their mother and visited her frequently, attending to her desires and wants. In other words, the family was a very substantial one.

John L. Hipsley testified that Harry Hipsley had been acting as agent and looking after the affairs of his mother until his death. His mother told him, after the family conference: "Now, I have got all the deeds made out and we made them out just the way you folks agreed."

The record discloses that from the accumulation of funds derived from the rents of the property and other sources, bonds were purchased in the names of Caroline E. Hipsley or John L. Hipsley, Caroline E. Hipsley or Emma Henderson, and Caroline E. Hipsley or Harry Hipsley. Suffice it is to say that all of these bonds were ac-

counted for and each of the children received the bonds allotted to them. This might also be said of the books of account kept by Harry Hipsley during his lifetime, wherein credits were made and shares shown of each of the children of Caroline E. Hipsley.

Some question arose with reference to the admissibility of certain accounts in evidence. We consider this of little importance in the light of the evidence relating to the important issues in this case.

After Harry Hipsley's death, Susie Hipsley filed a petition in the county court of Custer County praying for the appointment of John L. Hipsley as guardian of Caroline E. Hipsley, due to the fact that at that time she was 100 years of age, confined in a hospital, and unable to tend to her business affairs. Letters of guardianship were issued to John L. Hipsley on January 9, 1952. The inventory filed in the guardianship proceedings on April 9, 1952, shows the lands and the deeds to Harry Hipsley were listed therein as real estate in the possession of the guardian, belonging to the ward. After the death of Caroline E. Hipsley, the guardian filed his final report which shows the collection of rents from the lands, together with other income, amounting to $17,946.05, and payment of federal income tax in the amount of $1,570.94 on the rents collected by the guardian on the lands described in the deeds to Harry Hipsley, deceased. On June 30, 1953, a petition for final settlement was filed in the guardianship proceedings. On July 20, 1953, an order was entered by the county court approving the final report and petition for final settlement and discharging the guardian. Concurrently with the guardianship, the estate of Harry Hipsley, deceased, was being probated and administered by his widow, Susie Hipsley, and was fully concluded before the death of Caroline E. Hipsley. The inventory filed May 20, 1952, in this estate listed the real estate owned by Harry Hipsley at the time of his death. This exhibit lists the west half of the northeast quarter of Block 1, original

town of Broken Bow. It does not list the west half of the southeast quarter of Block 1, original town of Broken Bow described in the deed, where the widow and administratrix of the estate was then living. The inventory does not list the lands described in exhibit 7, exhibit 8, or exhibit 9. Final decree was entered in the Harry Hipsley estate on September 11, 1952. The county court did not find that Harry Hipsley died seized and possessed of the real estate described in the deeds, exhibits 7, 8, and 9. The court did not assess state inheritance tax against Susie Hipsley based on the value of the lands described in exhibits 7, 8, and 9, as shown by the decree. The court found that Caroline E. Hipsley inherited an undivided one-half interest in the real estate owned by her deceased son, Harry Hipsley.

Susie Hipsley filed a partition action against Caroline E. Hipsley on March 10, 1953, in the district court for Custer County, in which she alleged that Harry Hipsley died seized and possessed of the described real estate in her petition which did not include lands described in deeds exhibits 7, 8, and 9. Process was served on both Caroline E. Hipsley and John L. Hipsley, her guardian. On April 21, 1953, a judgment in partition was entered which did not include the lands described in exhibits 7, 8, and 9, and found Susie Hipsley, widow, and Caroline E. Hipsley, mother of Harry Hipsley, deceased, to be the owners of an undivided one-half interest each in and to the real estate holdings of the decedent, and appointed a referee to make partition. Confirmation of the sale of this real estate was entered June 3, 1953, prior to the death of Caroline E. Hipsley. Distribution of $24,280, proceeds of the sale, was not ordered until October 8, 1953, after the death of Caroline E. Hipsley. The administrator with will annexed of her estate received $11,135.50 as the distributive share due her estate after her death.

On June 23, 1953, petition for the appointment of an administrator of the estate of Caroline E. Hipsley

was filed in the county court of Custer County, and later when her last will was produced, petition to probate her will was filed July 14, 1953. The will was admitted to probate on August 3, 1953. On September 29, 1953, an inventory was filed, and supplemental inventory was filed on October 26, 1953, in this estate. All of the real estate described in the deeds, exhibits 1 to 9, was listed in the inventory.

An inheritance tax appraiser was appointed by the court, who found the value of this real estate to be $89,420, and the personal property of the estate to be $97,808.62. The total value of the estate amounted to $187,228.62. The Nebraska state inheritance tax and federal estate tax were determined and paid on the basis of this appraisement made of the estate.

Susie Hipsley testified that when she and Harry lived in Caroline E. Hipsley's home, Caroline E. Hipsley always kept a metal box, which is identified as exhibit 36, in a chest of drawers in her bedroom, and it remained in the same place for about a year after Caroline E. Hipsley went to the hospital. Harry Hipsley put this metal box in his trunk in the upstairs northeast bedroom of the house, and locked the trunk. Susie had never looked into this box during her husband's lifetime and did not know what papers were kept therein. The next morning after Harry Hipsley's death, she took the metal box from his trunk, brought it downstairs, put it in a cedar chest, and locked it up. On the evening of December 23, 1953, she called A. Paul Johnson, her attorney. He came to her home and she gave him this metal box. While her attorney was there, they looked into the box, and the bonds were in the box. The box had been locked and the key was tied on to its handle when she gave it to her attorney. She did not believe that there was anything in the box except the bonds. She further testified with reference to another metal box identified as exhibit 53, and that she saw this box after her husband's death in the closet

under the stairway. She was handed the deeds, exhibits 1 to 9, and was asked if she had ever seen them. She said: "I have." She had also seen the envelope in which they were contained, and had seen the same on Sunday night, December 23, 1951, when she and her attorney were conferring at her residence. These deeds were either in the box, exhibit 53, which belonged to her husband, or in another box which belonged to him and was in a vault at the bank. However, she believed exhibit 53 was the box where the deeds were contained, but she was not positive. The deeds were in the envelope designated exhibit 35 when she saw them. After she took the deeds out of either the box, exhibit 53, or the box at the bank, she gave the deeds, exhibits 1 to 9, and the envelope, exhibit 35, to her attorney. She never saw the metal box, exhibit 36, after she gave it to her attorney, until the time of the trial. When she gave the deeds, exhibits 1 to 9, and the envelope, exhibit 35, to her attorney, he placed the deeds and the envelope in which they were contained in his pocket, and left her place with the deeds in his pocket and the bonds in the metal box, exhibit 36. Her attorney delivered the bonds in the metal box, exhibit 36, and the deeds, exhibits 1 to 9, in the envelope, exhibit 35, to the Security State Bank of Broken Bow to be subject to the orders and direction of the court. The deeds and the box containing the bonds were delivered to John L. Hipsley upon presentation of letters of guardianship to the Security State Bank.

The vice president of the Security State Bank testified that a few days after Harry Hipsley's death, A. Paul Johnson, attorney, brought a box to the bank and requested the bank to keep it and turn it over only to a duly authorized person appointed by the court after guardianship proceedings had been instituted for that purpose. This witness put a tape on the box, exhibit 36, reading, "Mrs. Caroline Hipsley" to identify the box. The deeds were in the metal box, exhibit 36, when

Johnson brought the box to the bank for safekeeping. Johnson said on that morning, which was December 24, 1951, that he had notified John L. Hipsley that there were bonds and papers in the box for which Susie Hipsley did not want to be responsible, that they were being placed in the care of the Security State Bank, and that Susie Hipsley was filing a petition asking that John L. Hipsley be appointed his mother's guardian. All of these papers were in just one box, exhibit 36. This witness did not know what the box contained, but all that he delivered to John L. Hipsley was just the one box identified by the tape which the banker had put on it, reading "Mrs. Caroline Hipsley." He turned the box over to John L. Hipsley upon the presentation of the letters of guardianship. After John L. Hipsley received the box, exhibit 36, from the bank, he examined the contents and found the deeds contained therein.

Mrs. Anna McCormick, a practical nurse and a witness to the will of Caroline E. Hipsley, testified that she was employed to care for Caroline E. Hipsley on April 18, 1948, when she was in the hospital. A few days prior to the time Caroline E. Hipsley made her will, which was on July 21, 1949, this witness had a conversation with her. A. P. Johnson, Caroline E. Hipsley, and this witness were the only persons present at that time. She related the conversation as follows: "A. P. Johnson came in, and she said she wanted to make out a will, - that she had her deeds made out and delivered, - to be delivered, - delivered over to be delivered to her children, as she wanted them. So then she made out her will." On cross-examination she testified that she did not see the deeds, nor was she told by Caroline E. Hipsley to whom the deeds were to be delivered, or who was to deliver them. Caroline E. Hipsley said she had made out the deeds and delivered them. She did not say how they were to be delivered.

A granddaughter of Caroline E. Hipsley testified that she talked to her grandmother in 1940; and that her

grandmother told her: "She was going to make deeds to her property so that it would be divided up the way she wanted it. So that then, after her death, the deeds were to be delivered to the person to whom they were to go." She again talked to her grandmother in 1947, when she visited her in the hospital. At that time her grandmother told her she felt her property had been divided as equally as possible. The deeds had been made out to be delivered after she died, and she felt very relieved that it was done, as far as she was concerned. Her grandmother spoke of various pieces of property that different ones would have after her death. On cross-examination she testified that she could not state that her grandmother said exactly how the deeds were to be delivered after her death, that that would be her impression only.

There is other evidence in the record disclosing the manner in which Harry Hipsley handled the affairs of his mother's property until his death, and also the manner in which John L. Hipsley handled the property as guardian of his mother and in relation to his mother's estate. The evidence discloses that John L. Hipsley and his wife Lelah had visited Caroline E. Hipsley on numerous occasions, knew about the metal box, exhibit 36, had seen it on numerous occasions, and that Caroline E. Hipsley had showed them notes and other papers contained in the box in connection with her business that would require attention. There were no instructions with reference to delivery of the deeds on the envelop, exhibit 35, nor in the box, exhibit 36, when John L. Hipsley obtained possession of it.

We deem it unnecessary to summarize the evidence further, except that we may have occasion to refer to the evidence later in the opinion.

The plaintiff sets forth some 20 assignments of error. The assignments of error concerned in this appeal may be summarized as follows: That the trial court erred in holding that the deeds, exhibits 7, 8, and 9, had ever

been delivered to Harry Hipsley during the lifetime of the grantor, Caroline E. Hipsley; that the trial court erred in finding that the real estate here involved did not descend under the intestate laws of this state to the heirs at law of Caroline E. Hipsley, deceased; and that the judgment of the trial court is contrary to the evidence and the law.

The first proposition to determine is raised by the defendant who contends that the court should dismiss the action for declaratory judgment.

Section 25-21,152, R. R. S. 1943, provides in part: "Any person interested as or through an executor, administrator, trustee, guardian or * * * devisee, legatee, heir, next of kin, * * * of the estate of a decedent, * * * may have a declaration of rights or legal relation in respect thereto: * * * (c) To determine any question arising in the adminstration of the estate or trust, including questions of construction of wills and other writings."

We hold that the plaintiff was within his rights in bringing the type of action which he did.

There are certain well-established rules of law pertinent to this appeal which are as follows:

"It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite." Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. Black v. Romig, 151 Neb. 61, 36 N. W. 2d 772; Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. S. R. 532; Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183; Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74.

No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it it apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. Brown v. Westerfield, *supra*; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

It is said in Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632: " 'The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption.' Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

" '* * * 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, 149 Neb. 749, 32 N. W. 2d 500."

The prayer of the plaintiff's amended petition attacked the validity of the deeds for lack of delivery, but did not specifically pray that the deeds should be set aside. This is tantamount to a prayer to set aside the deeds.

In suit to set aside deed to defendant for want of delivery, plaintiff has the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed. See, Kellner v. Whaley, *supra;* Colbert v. Miller, *supra.* This presumption is not conclusive, but it raises a strong implication, which can only be overcome by clear and satisfactory proof. Such a rule is necessary to the security of titles. Any other would render all holdings uncertain, and would be disastrous in the extreme. See, Cerveny v. Cerveny, *supra;* McGee v. Allison, 94 Iowa 527, 63 N. W. 322; Kellner v. Whaley, *supra;* Cain v. Killian, 156 Neb. 132, 54 N. W. 2d 368; Clark v. Holmes, 109 Neb. 213, 190 N. W. 493.

The fact that the deeds involved in the instant case were not recorded at the time of the death of the grantee, Harry Hipsley, is not of itself sufficient to show

nondelivery. See, Cain v. Killian, *supra;* Kellner v. Whaley, *supra.*

In the instant case the plaintiff asserts that the burden of proof is upon the defendant to establish the delivery of the deeds. The deeds were in the possession of Harry Hipsley. The presumption is that they were delivered, and such presumption continues until disproved by the plaintiff. Cerveny v. Cerveny, *supra;* Kellner v. Whaley, *supra;* Colbert v. Miller, *supra.* We are convinced that the burden of proof is upon the plaintiff to prove the nondelivery of the deeds in question.

In the light of the foregoing authorities, and without repeating the evidence heretofore set out, the record does show that the execution of the deeds in question is undisputed. The evidence shows that the deeds were found in a safe deposit box belonging to Harry Hipsley after his death by his wife, Susie Hipsley. The evidence discloses that neither John L. Hipsley, Emma L. Henderson, nor any other person ever saw the deeds when they visited Caroline E. Hipsley and she called for her metal box, exhibit 36, and took papers therefrom. This box held her personal papers. The evidence is undisputed that Caroline E. Hipsley told Anna McCormick, the practical nurse, that she made out and delivered the deeds. We refer to the evidence heretofore mentioned, paragraph 7 of the will of Caroline E. Hipsley, which reads as follows: "I have heretofore executed and delivered deeds conveying to each of my children the lands I want each of them to have and receive." This confirms the fact that Caroline E. Hipsley had executed and delivered the deeds in question. The fact that she did not give the deeds personally to John L. Hipsley and Emma L. Henderson does not warrant the conclusion that there was no delivery of the deeds in question.

It is evident from the record that the primary interest of the children of Caroline E. Hipsley was to provide for her, care for her, and see that she had every comfort.

So much of the income of the estate as was necessary was used for that purpose.

The evidence clearly indicates that the remaining children of Caroline E. Hipsley knew of the facts with reference to the lands they were to receive. The evidence indicates that Emma Henderson and John L. Hipsley were well acquainted with all matters relating to the estate, and with reference to the lands in question. John L. Hipsley testified on direct examination: "Q Now, just tell the Court in substance what the conversation and meeting was about, and what was the substance of the talks and conversation you had there at that time. * * * A Well, mother wanted to divide this land up, and we met there that day to divide it; and we all agreed to everything, and that was all there was to it." The will of Caroline E. Hipsley, by its terms, confirms this conception. The record shows that John L. Hipsley elected to and did accept the proceeds of the sale of land as evidenced by paragraph 5 of the will of Caroline E. Hipsley.

There is no evidence in the record that Caroline E. Hipsley, during her lifetime, ever exercised any dominion or control over the deeds after they were executed. We are convinced that under the state of the facts Caroline E. Hipsley absolutely conveyed her property evidenced by exhibits 7, 8, and 9, to Harry Hipsley. She had divested herself of all dominion and control over the deeds and shown an intent to convey the title to the lands in question without reservation.

Upon a trial de novo, we arrive at the same conclusion as the trial court, and the judgment of the trial court should be and is affirmed in all particulars, the plaintiff to pay all costs on appeal.

AFFIRMED.

JACOB W. EILTS, APPELLANT, V. RUSSELL F. BENDT ET AL., APPELLEES.

76 N. W. 2d 623

Filed April 27, 1956. No. 33900.

1. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without giving compensation therefor.
2. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.
3. **Negligence.** Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. ———. The existence of gross negligence must be determined from the facts and circumstances in each case.
5. **Automobiles: Negligence.** The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence.
6. ———: ———. A guest to recover damages for injuries received by the guest while riding in a motor vehicle against the owner or operator of such vehicle must prove by the greater weight of the evidence in the case the gross negligence of the host or operator of the vehicle relied upon by the guest and that it was the proximate cause of the accident and injuries.
7. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.
8. **Negligence.** Record examined and held to be insufficient to support a finding of gross negligence on the part of the driver of the defendant's car.

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

Carstens & Pickett, Davis, Healey, Davies & Wilson, Kenneth Cobb, and *Robert Berkshire,* for appellant.

Chambers, Holland & Groth, for appellees.

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

MESSMORE, J.

The plaintiff, Jacob W. Eilts, brought this action at law in the district court for Lancaster County against Darrell Glissendorf and Russell F. Bendt as defendants to recover damages for personal injuries sustained by him due to a collision between an automobile in which he was riding as a guest driven by Russell F. Bendt, and another automobile operated by Nora Dowling. The collision occurred on U. S. Highway No. 81 in Madison County. The cause was tried to a jury, resulting in a verdict in favor of the defendants. The plaintiff filed a motion for new trial. From the order overruling the motion for new trial, the plaintiff appeals.

The plaintiff's petition alleged in substance that on or about September 25, 1951, the plaintiff was riding as a passenger in a 1949 2-door Ford which was in the possession of Darrell Glissendorf who exercised control over the operation of said vehicle which was driven by Russell F. Bendt in a southerly direction on U. S. Highway No. 81 at a point approximately 1½ miles south of Norfolk, Nebraska, when, as a proximate result of the grossly and willfully negligent acts of omission and commission of the defendants and each of them, the 1949 2-door Ford collided head-on with a 1934 Ford operated by Nora Dowling. The petition alleged grossly negligent acts on the part of the defendants which need not be set out.

The defendants' answer admitted the occurrence of the accident and that plaintiff sustained injuries. The answer then alleged that the plaintiff, at the time of the accident, was a guest passenger in said automobile; that at the time of the accident the defendant Russell F. Bendt was driving said automobile in a careful and prudent manner and at a time when the headlights were operating on the automobile he was driving and on other

automobiles using said highway at that time and place; and further alleged that suddenly and without any negligence on his part he met with an emergency in that an oncoming car approached the point on the highway where this accident occurred without operating headlights so that the defendant was unable to see said automobile until it was so close to him that an accident was unavoidable and a collision occurred. Further answering, the defendants specifically denied each allegation of negligence on their part alleged by the plaintiff, and denied each and every other allegation contained in the plaintiff's petition not specifically admitted.

The reply was in effect a general denial of the allegations of the defendants' answer, with the exception of certain admissions contained therein.

The plaintiff assigns as error that the trial court erred in failing to instruct the jury that if it found the defendants or either of them were guilty of gross negligence, then the negligence, if any, of the driver of the 1934 Ford would not constitute a defense in favor of the defendants unless it found that the negligence of the driver of the 1934 Ford was the sole and proximate cause of the plaintiff's injuries and damage; or, in other words, that the defendants would be liable notwithstanding the negligence, if any, of the driver of the 1934 Ford if it found the defendants, or either of them, guilty of gross negligence.

The record discloses that Darrell Glissendorf, Russell F. Bendt, and Jacob W. Eilts were soldiers in the United States Army stationed at Fort Riley, Kansas. They were in the same company and had a casual acquaintance with each other. Glissendorf lived near White Lake, South Dakota; Bendt lived at Sherman, South Dakota; and Eilts lived at Ree Heights, South Dakota. At or about noon on September 22, 1951, those in authority announced that week-end passes would be issued. As soon as Glissendorf found out that passes were to be issued, he decided to go home. He went into the bar-

racks and announced that he was going to South Dakota, and if there was anybody that would like to go along, they could. Bendt and Eilts said they would like to go. The three of them talked the matter over and finally decided they would go together. Glissendorf had possession of a 1949 2-door Ford, the title of which was in the name of Glissendorf and Sons. The car was in Junction City. They went to Junction City, and something was said about sharing expenses. Glissendorf said that it would not be necessary as he was going home anyway and it would not cost him anything to take them along. On the way to South Dakota, Bendt and Eilts were delivered at certain places to enable them to get to their respective homes. On the return trip to Fort Riley, Glissendorf picked up Eilts and Bendt at the places agreed upon, and the three of them proceeded toward Fort Riley. They took U. S. Highway No. 81, south. This was on Sunday, September 23, 1951. Eilts testified that he thought it was approximately 580 miles from South Dakota to Fort Riley. He also thought that on one occasion while he was on the trip he purchased gas. Glissendorf and Bendt testified to the contrary. Eilts got into the back seat of the car and went to sleep, and was asleep at the time of the accident. He had no knowledge of what occurred. He saw Glissendorf and Bendt drive, and thought they both drove carefully.

Bendt testified that when they arrived at Wausa, Nebraska, they all went into the rest room. When they came out, Glissendorf paid for the gas. There was a car behind their car that wanted to get to the gas pump, so he got into the driver's seat to move the car out of the way. Glissendorf got in next to him and told him he could drive for awhile. Wausa is about 40 miles north of Norfolk. About 20 miles out of Wausa, Glissendorf turned on the car lights because it was getting dark, the clouds were low, and it was misting a little. After that Glissendorf went to sleep and knew nothing about the occurrence of the accident.

Bendt testified that the headlights on the car continued to burn at all times; that just south of Norfolk there is an airport; that U. S. Highway No. 81 is blacktop and at the place of the accident the highway was level; that he drove up behind a south-bound car going in the same direction as the car he was driving; that it was going slower than he was, and he overtook it; that when he got right up behind this car he pulled out a little ways to see if anything was coming from the opposite direction; and that he did not see any car approaching from the south, so he blinked his lights and proceeded to pass the car ahead of him. When he was about even with it, a 1934 Ford coach appeared at a distance of 100 or 150 feet ahead of him. It was coming from the south, going north. He was unable to get back onto his own side of the highway. There were no headlights burning on the car coming from the south toward him. The first thing he saw was the headlights of the car he was driving reflecting on the oncoming car and showing somewhat of a beam on the pavement. When he pulled out to go around the car in front of him, he was going 45 or 50 miles an hour. He was not asleep at the time of the accident, and there is no evidence that he was. He believed the oncoming car was traveling at a speed of 20 to 25 miles an hour, and the car ahead of him was traveling at a speed of 40 to 45 miles an hour.

A Mr. Evans testified that on the day of the accident he was driving a 1949 Fraser automobile from his home in Neligh to Lincoln with some young ladies that he knew who were employed at St. Elizabeth Hospital in Lincoln; and that when he left Neligh, which is about 35 miles from Norfolk, it was raining intermittently, and misting. It was a murky, dark, dreary day. He had his headlights on. When he arrived at Norfolk it had more or less quit raining. When he was in the vicinity of the airport on U. S. Highway No. 81, he was aware that a car was following him. His attention was

called to this fact when he was a mile or so north on the highway, by watching through his rear-view mirror. The car behind him blinked its lights to pass. The headlights on his car were on. As the car started to pass him, he was looking south, paying attention to his driving. He observed no car approaching from the south. When the car attempting to pass was alongside and about even with Evans' car, Evans was watching to the south and saw a car coming from that direction at a distance of from 100 to 150 feet from him. The headlights on this car were not burning. Just seconds elapsed from the time he saw the oncoming car until the accident occurred. The car endeavoring to pass him tried to turn back into its own right-hand lane. At that time it was not raining, it was murky and dark, and visibility was not good. He further testified that he had passed other cars and cars had passed him in that vicinity, all of which had their headlights on. He believed that both he and the driver of the car endeavoring to pass him saw the oncoming car at the same time. He knew it was going to be awfully close. He applied his brakes as the car attempting to pass him tried to turn in, and the crash occurred at that moment. When the crash occurred, both cars involved in the collision came to a stop. The 1949 Ford cut across in front of him and went into the west ditch. He went between the two cars.

On cross-examination he testified he first saw the car behind him a quarter of a mile back; and that he was driving 45, 50, or 55 miles an hour when the car behind him started to pass him. At that time the car attempting to pass him was going at a speed of from 50 to 60 miles an hour.

A student nurse riding with Evans testified that she sat on the left-hand side in the back seat. Shortly before the accident she was watching a plane that was landing at the airport on the right side of the highway, and she saw nothing of the north-bound car

before the accident. The first thing she noticed was the lights on the south-bound car attempting to pass them as the lights blinked. It was dark enough for her to see the beam of the lights. Evans called attention to the north-bound car. She looked up momentarily. The headlights on the north-bound car were not on. She thought they were traveling at 50 to 60 miles an hour. She did not see the actual collision. She rendered first aid to the persons in the north-bound car who were injured.

There were six people in the Evans car, and a witness who sat in the front seat next to Evans, the driver, testified that the parking lights and the headlights on the car were on when they left Neligh. She knew there was a car behind them, and remembered it coming up beside their car to pass on the left side. When that car was even with their car, she noticed a car coming from the south with no headlights lit. The driver endeavoring to pass them tried to turn to the right in front of them. The two cars collided. The pavement was dark as it had been raining. The car coming from the south was black. In a statement made shortly after the accident, she said the car coming from the south was probably a block or two away when she first saw it.

An employee of the United States Weather Bureau at Norfolk testified by deposition that he was in charge of the weather bureau office. He explained the method of observing the weather and the making of reports relating to weather conditions. He testified that the office is located at the Norfolk airport; that the observations were recorded at 6:30 p. m., on September 23, 1951; and that the sky was overcast, the ceiling 3,000 feet, visibility more than 15 miles, and the surface wind north-northwest at 9 miles per hour. He further testified that "overcast" means that the sky "was completely covered by clouds, the lower portion of which was at 3,000 feet. And the remarks, 'few scud,' indicated there were a few lower clouds under the 3,000-

foot layer." "Visibility" relates to the clearness of the atmosphere at the particular time. Visibility of 15 miles would show the air was clear of any obstructions such as fog, dust, smoke, or anything of that nature. On September 23, 1951, the sunset occurred at 6:26 p. m. The last precipitation recorded on that date was at 5:10 p. m. He was not at the airport on the day of the accident, and these observations were not made by him. Such observations are taken from the surface of the ground. From his own knowledge, he could not make any statement as to how far a man could see an unlighted object on the ground level of U. S. Highway No. 81 in front of the airport. These observations were made with reference to fixed objects such as the horizon, mountains, trees, etc.

A pilot-instructor, who landed at the airport about 6:20 that evening, testified that the ceiling was about 800 feet, and that the airport is 200 to 300 feet west of U. S. Highway No. 81. After he had stopped, he heard a crash and could discern the Fraser car and the 1949 green Ford which was about the center of the highway, cutting across in front of the Fraser car. He estimated it was traveling 30 miles an hour.

A sergeant of the Nebraska Safety Patrol was working with a lieutenant of the patrol the evening the accident occurred, and arrived at the scene of the accident about 5 minutes after it occurred. They received the call at 6:27 p. m. When they arrived at the scene of the accident they found that two cars had been involved in the accident, a 1933 Ford coach and a 1949 Ford coach. The 1949 Ford coach, in relation to the highway, was in the west grader ditch headed in a southwesterly direction. The 1933 Ford was in a grader ditch on the opposite side of the road, headed in a northwesterly direction. The left front of the 1949 Ford was damaged the most, and the damage to the 1933 Ford was practically the same. There was a gouge in the pavement caused by a part of the 1949 Ford. The front end

was badly damaged, the front wheels were out from under it, at least the left one and part of the axle, which perhaps accounted for the gouge in the pavement. It was possible to follow from the gouge up to where the car left the pavement and on across the shoulder of the highway to its position in the ditch. The 1933 Ford was in the east grader ditch headed in a northwesterly direction. The ditch was rather deep, and the back of the car was tight against the back of the ditch. When the 1933 Ford came to a stop, it was east of the gouge mark, and south of the north point of the gouge mark, about 35 feet to the front of the car. He had a conversation with Bendt at the Norfolk Lutheran Hospital, and Bendt told him he was driving 60 miles an hour. He further testified that the speed limit was posted north of where the accident happened, and also south of that point. It was a 45-mile-an-hour speed zone. The occupants of the 1949 Ford were injured, and also those in the 1933 Ford.

The lieutenant of the Nebraska Safety Patrol testified that he was driving a patrol car at the time of the accident, was using artificial lights as a precaution, had the parking lights on, and had used them a couple of hours that afternoon. The morning after the accident he went with his partner and the county attorney again to the scene of the accident. Where the cars hit, there were no skid marks. The 1933 Ford was driven backward by the impact and went off the east side of the highway at an angle and into the ditch. It had been driven backwards 25 or 30 feet. The ditch on the east was about 4 feet deep, and narrow, and the car went off the bank, with the front end of the car up on the shoulder of the highway. The left front parts of both cars were badly damaged. They did not hit squarely. It was sort of a "scissor." It looked like one was attempting to avoid the other. On cross-examination he testified that the clouds were hanging low, and the ground was damp.

The defendants moved for dismissal of plaintiff's case at the close of the plaintiff's evidence and also at the close of all of the evidence.

The plaintiff cites McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682; and Welstead v. Ryan Construction Co., 160 Neb. 87, 69 N. W. 2d 308; and contends the rule set forth in said cases is applicable to the case at bar. The rule is announced in the last-cited case as follows: "When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone would not have caused the result."

We deem it unnecessary to analyze the foregoing-cited cases in this opinion. They have been considered in connection with the contention made by the plaintiff. Suffice it is to say that the rule heretofore set out in said cases is not applicable to the instant case.

In the instant case the plaintiff sued the defendants alleging that the plaintiff was a guest, and his host driver was guilty of gross negligence. The statute here involved is section 39-740, R. R. S. 1943, which provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

There is no evidence of the use of intoxicating liquor in this case by either of the defendants during the course of the trip to and from Fort Riley and South Dakota.

A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. See, Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

Under the factual situation presented in this case, there is no question but that the plaintiff was a guest passenger in the car being driven by the defendant Bendt.

Another rule applicable in the instant case is as follows: "A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury." Born v. Estate of Matzner, *supra.*

"Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." Born v. Estate of Matzner, *supra.* See, also, Morris v. Erskine, 124 Neb. 754, 248 N. W. 96.

"The existence of gross negligence must be determined from the facts and circumstances in each case." Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214. See, also, Morris v. Erskine, *supra.*

Under the foregoing statute, the rule with reference to tort-feasors contended for by the plaintiff has no applicability for the reason that the test of the liability of the host to a guest passenger is whether the host or the driver of the car in which the plaintiff was a guest passenger was guilty of gross negligence and not simply whether his negligence contributed to cause the accident. See, § 39-740, R. R. S. 1943; Born v. Estate of Matzner, *supra;* James v. Krebek, 142 Neb. 757, 7 N. W. 2d 637.

With the foregoing rules in mind, which we deem applicable to the case at bar, the question presented is whether or not the record in the instant case shows sufficient facts to constitute gross negligence on the part of the defendant driver of the 1949 Ford, or on the part of defendant Glissendorf.

Without repeating the evidence in detail, the record discloses that there were no continuous acts of negligence during the return trip on the part of either defendant. There is no evidence of excessive speed at any time prior to the accident. Glissendorf and the plaintiff had sufficient confidence in the driving of Bendt that they went to sleep and placed the full responsibility of the operation of the car in him. He was probably as tired as they were after a rather strenuous weekend, however, there is no evidence that he was asleep at the time of the accident. The evidence discloses the weather conditions at the time as raining at intermittent periods, and murky to the extent that as a matter of precaution most motorists had their lights on. The operator and a passenger of the Fraser car directly ahead of the 1949 Ford going in the same direction were unable to see the approaching car without its headlights on and which was dark in color. In addition, the black-top paving was dark under the prevailing circumstances at the time of the occurrence of the accident. The fact that there may or may not have been signs north and south of the point of the accident indicating that it was a 45-mile-per-hour zone and the failure of the driver of the 1949 Ford to observe such signs, or whether he did or not, would not in and of itself constitute gross negligence on the part of such driver.

As stated in Born v. Estate of Matzner, *supra:* "The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be con-

sidered with the other evidence in the case in deciding an issue of negligence."

At most, in analyzing all the facts pertinent to the accident as hereinbefore set forth, the defendant Bendt may have been guilty of negligence, that is, doing something that a reasonable and prudent person would not ordinarily have done in the situation and under such circumstances, yet he was not guilty of gross negligence as such term has been defined by this court.

In the light of the record, the following is applicable: "A case will not be reversed for errors against a party not entitled to succeed in any event." Holberg v. McDonald, 137 Neb. 405, 289 N. W. 542. The cited case was controlled by section 39-1129, C. S. Supp., 1937, now section 39-740, R. R. S. 1943. The defendant made a motion for a directed verdict at the close of the plaintiff's evidence on the ground that the evidence failed to show gross negligence on the part of the driver of the defendant's car. This motion was overruled, and at the close of all of the evidence the case was submitted to a jury which returned a verdict for the defendant. From the overruling of plaintiff's motion for new trial and dismissal of plaintiff's cause of action, appeal was taken. This court concluded that the verdict of the jury was the only one that could be sustained on the evidence adduced, and affirmed the judgment of the trial court.

In the instant case, at the close of the plaintiff's evidence, the defendants moved for a dismissal of the plaintiff's case on the ground that the evidence was insufficient to show gross negligence on the part of either or both of the defendants, and again at the close of all of the evidence the defendants renewed this motion. The motion was overruled. Under the evidence adduced, the motion should have been sustained by the trial court. The cause was submitted to the jury and the jury found in favor of the defendants, which was the only verdict that the jury could properly return under the evidence adduced.

Concluding, as we do, that there was no error prejudicing the plaintiff in the presentation of his evidence and that the verdict was the only one that could be sustained by the evidence, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE LUMBER & COAL COMPANY, A CORPORATION, APPELLEE, V. RALPH ANDERSON ET AL., APPELLANTS, IMPLEADED WITH OLUF LAURITSEN, DOING BUSINESS AS LAURITSEN'S HARDWARE & ELECTRIC STORE, ET AL., APPELLEES.

76 N. W. 2d 630

Filed April 27, 1956. No. 33909.

1. **Appeal and Error.** A transcript of the proceedings at the trial to constitute a bill of exceptions must be settled as provided by statute and filed with the papers in the case in the office of the clerk of the district court where the case was brought and prosecuted. § 25-1140.06, R. S. Supp., 1955.
2. ———. Section 25-1140.06, R. S. Supp., 1955, provides that it is the duty of the clerk to settle the bill in the case of the death of the judge before whom the cause was tried.
3. ———. Where no extension of time has been granted, as authorized by section 25-1140.07, R. R. S. 1943, the appellant is limited, from the date of filing notice of appeal, to 40 days to reduce the bill of exceptions to writing, to 10 days thereafter to serve the same on the adverse party, to an additional 10 days to procure its return, and 10 days thereafter to procure a settlement and allowance of the bill. In other words, the bill must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived.
4. ———. This court takes judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal.
5. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by

the evidence, that it was correctly determined, and if the pleadings are sufficient to support the judgment of the district court, it will be affirmed.

6. **Appearances.** A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing.
7. **Appearances: Appeal and Error.** Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld.
8. **Interpleader.** A bill of interpleader is an equitable remedy in harmony with statutory provisions, whereby a disinterested stakeholder in possession of a fund or other property claimed by each of rival defendants may require them to litigate among themselves the issue of ownership without embroiling him.
9. **Actions: Interpleader.** When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action.
10. **Parties.** When the determination of a controversy cannot be had without the presence of new parties to the suit, the statute directs the court to order them to be brought in. § 25-323, R. R. S. 1943.
11. ———. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
12. **Parties: Appeal and Error.** When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant.
13. **Interpleader.** It is the intent of section 25-325, R. R. S. 1943, upon interpleader by a stakeholder, that the stakeholder should pay the money held by the stakeholder into court or aver a willingness to pay it into court so that the court has control of the fund and its order as to the disposition may be made effective.
14. ———. The court has the right to require the deposit of the fund involved as a condition precedent to a determination of the issue as to whom it shall be paid.

15. ———. On an interpleader the stakeholder may deposit the fund or property into court, and ordinarily he is required to make, or to offer to make, such a deposit.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM and ALFRED D. RAUN, JUDGES. *Affirmed in part, and in part reversed and remanded with directions.*

Richard E. Twohig, for appellants.

Rodney R. Smith, for appellees.

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

SIMMONS, C. J.

This is an action brought for the foreclosure of a mechanic's lien. After decree, an interpleader issue involving a payment for a fire loss was injected into the case. The defendant Anderson is alleged to be the owner of the land involved. Other defendants are three alleged lienholders. Other defendants are husbands and wives alleged to have an interest in the property. Trial was had and decree was rendered. Defendant Anderson and defendant Hankins, an alleged lienholder, appeal.

We affirm the judgment of the trial court as to its foreclosure decree and reverse the judgment as to its decree involving the insurance feature.

We determine each appeal separately as each presents a different question. We first determine the appeal of defendant Hankins.

Plaintiff alleged its lien in the sum of $2,869.58 and interest, and prayed for foreclosure thereof.

Defendant Lauritsen answered, admitting the allegations of plaintiff's petition and by cross-petition alleged a mechanic's lien in the sum of $497.28 and interest, and prayed for foreclosure thereof.

Defendants Udell, husband and wife, answered dis-

claiming any interest in the property and praying for dismissal as to them.

Defendant Automatic Heating & Cooling Corporation filed an answer alleging that it was the owner of a mechanic's lien paramount and superior to the lien of the plaintiff. It prayed only for a dismissal of plaintiff's petition.

Defendant Hankins answered, denying generally, and by cross-petition alleged that he had a mechanic's lien on the premises for $1,543.72 which he claimed was a prior lien to that of the plaintiff. He prayed for judgment for $1,543.72 and "equity." On the day he filed the above pleading, another attorney filed for him an answer denying generally, and by cross-petition alleging the mechanic's lien and that it was equal in priority with that of the plaintiff and other lienholders. He prayed for foreclosure and a decree that his lien was equal in priority with that of plaintiff and other lienholders.

Defendant Anderson answered and, so far as material here, claimed credit for $500 alleged to have been paid the plaintiff, and also for a 10 percent contractor's discount. He prayed only for the proper credits on the account of plaintiff and for equitable relief.

In reply to defendant Hankins' answers and cross-petitions, plaintiff denied generally, and specifically denied that Hankins had any right to a lien. In reply to the answer of Anderson and to the answers and cross-petitions of Hankins, defendant Lauritsen denied generally.

By statement filed in the case, defendant Automatic Heating & Cooling Corporation admitted its lien was not filed in time and was invalid, and authorized a decree that it had no lien, and the case as to it was dismissed.

On May 16, 1955, the court rendered a decree on "the evidence * * * heretofore submitted."

The court decreed that plaintiff had a lien in the

sum of $3,037.76 with interest; that Lauritsen had a lien for $526.48 with interest; and that said liens were coordinate and superior to any other liens. It decreed that Hankins had a lien for $1,696.04 subject and subordinate to the coordinate liens of plaintiff and Lauritsen.

It ordered the sale of the property to pay the liens in the order named, balance, if any, payable to defendant Anderson.

Defendant Hankins moved for rehearing contending that the "facts and evidence" entitled his lien to equal priority with that of plaintiff and Lauritsen. The court considering this as a motion for a new trial, denied the motion on August 10, 1955.

A notice of appeal of the above, and matter later discussed herein, was filed September 8, 1955.

Defendant Hankins assigns error in the decree in that it did not accord his lien equal priority with that of plaintiff and Lauritsen.

A purported bill of exceptions of the trial of the foreclosure action is before us. It was prepared and delivered to counsel for Anderson and Hankins on October 14, 1955. This was within the time required by section 25-1140, R. R. S. 1943. It shows that it was delivered to counsel for plaintiff and Lauritsen on October 17, 1955. This was done within the time required by section 25-1140.03, R. R. S. 1943.

It was then filed on October 17, 1955, with the clerk of the district court. Whether that filing was had before or after the service upon counsel for plaintiff and Lauritsen does not appear. The clerk's certificate that it is the bill of exceptions is dated October 17, 1955.

In Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312, we held that: "A transcript of the proceedings at the trial to constitute a bill of exceptions must be settled as provided by statute and 'filed with the papers in the case' in the office of the clerk of the district court where the case was brought and prosecuted. § 25-1140.06, R. R. S. 1943."

Here the only filing shown with the clerk of the district court was done before the bill had been settled. Obviously such a filing is not one contemplated by the requirement of the statute.

But the difficulty with the purported bill does not end there. The transcript shows that this foreclosure action was tried and the decree signed by Judge Frum. Judge Frum died. Judge Raun succeeded him. On November 4, 1955, Judge Raun settled the bill of exceptions. The parties did not stipulate as to the bill.

The Legislature has provided for the contingency that arose here by the death of Judge Frum. Section 25-1140.06, R. S. Supp., 1955, provides that it is the duty of the clerk to settle the bill in the case of the death of the judge before whom the cause was tried. That was not done here.

But the difficulty with the purported bill does not end there.

The certificate attached to the bill shows that it was returned by the attorney representing plaintiff and Lauritsen on December 15, 1955.

Section 25-1140.04, R. R. S. 1943, provides: "Within ten days after such submission, the adverse party may propose amendments thereto and shall return said bill with his proposed amendments to the other party or his attorney of record."

Obviously the purported bill was not returned within the time required by the statute.

This court held in Neighbors & Danielson v. West Nebraska Methodist Hospital, *ante* p. 33, 74 N. W. 2d 854, that: "* * * where no extension of time has been granted, as authorized by section 25-1140.07, R. R. S. 1943, the appellant is limited, from the date of filing notice of appeal, to 40 days to reduce the bill of exceptions to writing, to 10 days thereafter to serve the same on the adverse party, to an additional 10 days to procure its return, and 10 days thereafter to procure a settlement and allowance of the bill. In other words,

the bill must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived. * * * The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced in writing, served on the adverse party, returned, and submitted to the trial judge for settlement and allowance. The trial judge is without authority to allow a bill of exceptions not prepared in the manner and within the times fixed. Any attempt to allow a bill of exceptions not prepared in compliance with statutory authority is of no force and effect, and the lack of authority cannot be waived. The bill of exceptions must be prepared, served, returned, settled, and allowed in accordance with the statute. Its terms are mandatory. Consequently, a bill of exceptions which is not prepared in accordance with the statute will be quashed on motion of the adverse party. This court will also take judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal."

We are accordingly required to hold that the purported bill of exceptions was not returned, or settled and allowed as required by statute and cannot be considered in determining this appeal.

In Wabel v. Ross, *supra,* we held that: "In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, that it was correctly determined, and if the pleadings are sufficient to support the judgment of the district court, it will be affirmed." See, also, National Fire Ins. Co. v. Evertson, 157 Neb. 540, 60 N. W. 2d 638; Caldwell v. Savage, 157 Neb. 603, 60 N. W. 2d 657.

The pleadings in this case are sufficient to support

the judgment in the foreclosure proceedings. The decree of foreclosure is accordingly affirmed.

We now go to the appeal of the defendant Anderson.

Four days after the decree was rendered, Joe Morten & Son, Inc., a Nebraska corporation, filed a statement in the case to the effect that it represented an insurance carrier on the property where Anderson was the insured; that the insurance carrier was responsible for a loss by fire of a building on the premises in the sum of $1,500; that it had a "check or draft" from the insurance carrier in the above amount payable to "Anderson, Walter J. Boyle and Emily H. Boyle"; and that it was unable to determine to whom the money should be paid. It deposited the "check or draft" with the court and prayed for a determination of the proper payee or payees.

The Boyles, or at least parties of the same name, were named as defendants in the foreclosure petition. The transcript does not show service upon them. The decree of May 16, 1955, recites that they failed to plead, were in default, and default was entered.

Plaintiff and Lauritsen filed a joint claim and prayed that "said $1,500.00" be applied to their judgment liens in proportion to the amounts of each.

Anderson filed a motion asking that the joint claim be dismissed and that the check be released "payable to" Anderson based on the grounds that the foreclosure action was in decree; that it had nothing to do with insurance; that Joe Morten & Son, Inc. was not a party to the action; and that the insurance money belonged to Anderson.

On August 10, 1955, the court heard the joint claim matter and oral argument "from the Council (sic) for Claimants and Council (sic) for Defendant's (sic)" Anderson and Hankins. The court decreed that the joint claim be allowed; and that the insurance proceeds "deposited" with the court payable to Anderson and defendants Boyle be paid pro rata to the joint claimants.

Defendant Anderson contends here that the court was without jurisdiction in the matter of the joint claim; that Joe Morten & Son, Inc. was not a party to the action; that there was "no Loss-payable clause on the policy"; and that he is accordingly entitled to this money.

At best the statement filed herein is a quite informal one as a bill of interpleader. The trial court evidently so considered it. The transcript shows that plaintiff and Lauritsen filed a claim to the insurance fund. It does not appear that Hankins made any filing. It does appear that counsel for Anderson and Hankins made "oral argument" to the court. There is here no showing that evidence was taken. The terms of the insurance policy are in no wise shown here.

It is assigned that the court erred in allowing the insurance agent's statement to be filed after the decree was rendered. No objection of that kind appears to have been made in the trial court. Anderson moved to dismiss the "joint claim" and invoked the jurisdiction of the court as to the check. Plaintiff, Lauritsen, Anderson, and Hankins made a general appearance and contested the issue in the trial court.

It need not be demonstrated that the trial court has jurisdiction of a bill of interpleader. As above pointed out, that jurisdiction in the manner in which it was invoked was not challenged.

This court has held that: "A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing." McGinley v. Union P. R. R. Co., 129 Neb. 855, 263 N. W. 393.

The rule is: Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld. Bedford v. Ruby, 17 Neb. 97, 22 N. W. 76; Independent Elevators v. Davis, 116 Neb. 397, 217

N. W. 577. In the latter case we said: "The facts of this case and the procedure followed are most unusual, if not unique, * * *." As we there said, so we hold here that the conclusion above announced is based upon general principles and finds support in the decisions cited.

But does error appear on the record? We find that it does.

It is assigned that the court erred "in allowing the insurance money to be paid" to plaintiff and Lauritsen "after the case was in decree."

We sustain the assignment for reasons other than above given.

It appears from the statement filed by the agent of the insurance carrier that Walter J. Boyle and Emily H. Boyle had an interest or possible interest in the insurance payment sufficient to cause the insurance carrier to place their names on the "check or draft" as payees along with Anderson. The trial court recognized that fact in its decree and undertook in the decree to deny Boyles any part of the proceeds of the insurance.

Default was entered against the Boyles in the foreclosure decree before this interpleader proceeding began. They are not shown to have been served with process or to have appeared in this proceeding.

In Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N. W. 293, we held that: "A bill of interpleader is an equitable remedy in harmony with statutory provisions, whereby a disinterested stakeholder in possession of a fund or other property claimed by each of rival defendants may require them to litigate among themselves the issue of ownership without embroiling him."

In the body of the opinion it is made clear that the claimants of the fund should be made parties to the proceeding. See 48 C. J. S., Interpleader, § 24, p. 70. See, also, Conservative Savings & Loan Assn. v. City

of Omaha, 73 Neb. 720, 103 N. W. 286, wherein we held that: "When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action."

In Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533, we held that: "When the determination of a controversy cannot be had without the presence of new parties to the suit, the statute directs the court to order them to be brought in. Comp. St. 1929, sec. 20-323. (Now § 25-323, R. R. S. 1943.)

"Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

"When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the supreme court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant."

Accordingly, the judgment of the trial court rendered on August 10, 1955, hereinabove considered is reversed and the cause is remanded for further proceedings.

Implicit in the necessity for a remand is the correction of another patent error in this proceeding.

The insurance agent, for the insurance carrier, tendered into court a "check or draft" in the amount of $1,500 payable to Anderson and the Boyles, and stated he was unable to determine to whom the money should be paid. He prayed for a determination of the proper payee or payees. Plaintiff and Lauritsen claimed the

"said $1,500.00." Anderson moved that the check "be released payable to" him. The court ordered the "insurance proceeds as heretofore deposited with this Court * * * payable to * * *" Anderson and the Boyles, to be paid to plaintiff and Lauritsen.

So far as shown here the check payable to the three parties is all that was ever deposited with the court.

It is the intent of section 25-325, R. R. S. 1943, upon interpleader by a stakeholder, that the stakeholder should pay the money held by the stakeholder into court or aver a willingness to pay it into court so that the court has control of the fund and its order as to the disposition may be made effective. The court has the right to require the deposit of the fund involved as a condition precedent to a determination of the issue as to whom it shall be paid.

In 48 C. J. S., Interpleader, § 26, p. 74, the rule is stated as follows: "On an interpleader the stakeholder may deposit the fund or property into court, and ordinarily he is required to make, or to offer to make, such a deposit." See, also, 30 Am. Jur., Interpleader, § 24, p. 231.

Here the court's order provides for the distribution of the "insurance proceeds." The court does not have control of those proceeds. Its order is ineffective and erroneous.

The judgment of the trial court as to the foreclosure proceedings is affirmed.

The judgment of the trial court as to the interpleader is reversed and the cause remanded for further proceedings.

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

IN RE ESTATE OF DANIEL R. MCCLEERY, DECEASED. HOPE SUPP, APPELLANT, V. RUTH MCCLEERY ALLARD, EXECUTRIX OF THE ESTATE OF DANIEL R. MCCLEERY, DECEASED, APPELLEE.

76 N. W. 2d 459

Filed April 27, 1956. No. 33944.

Executors and Administrators. The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. § 30-605, R. R. S. 1943.

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

Aten & Chadderdon, for appellant.

Anderson, Storms & Anderson, for appellee.

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

WENKE, J.

This is an appeal from the district court for Harlan County involving a matter arising in the county court of that county in connection with its probating the estate of Daniel R. McCleery, deceased.

The only question raised by the appeal is whether or not appellant, being a nonresident and having no actual notice or knowledge of the time fixed for the filing of claims, may, under section 25-525, R. R. S. 1943, assert a claim against the estate at any time within 5 years or, as appellee contends, must appellant bring herself within the provisions of section 30-605, R. R. S. 1943?

Daniel R. McCleery, a resident of Harlan County and the owner of real and personal property located therein, died on February 7, 1954. He left a last will and codicil thereto which the county court of Harlan County allowed and admitted to probate on March 11, 1954, appointing Ruth McCleery Allard, appellee here, as execu-

trix. Appellee immediately qualified and letters testamentary were issued to her on the same day. Thereafter, pursuant to its authority provided by sections 30-601 and 30-603, R. R. S. 1943, the county court "* * * ordered that all claims against said estate must be filed on or before July 20, 1954, or be forever barred, and that a hearing on claims will be held in this court on July 21, 1954 at 10 o'clock a. m., and that notice thereof be published in the Harlan County Journal as provided by law." Notice was published as therein directed and, on July 21, 1954, the county court entered an "Order on Claims" which contains the following: "* * * it is further ordered that all other claims against said estate not heretofore filed and allowed be and the same hereby are forever barred and held of no validity." In this respect section 30-609, R. R. S. 1943, provides in part: "Every person having a claim or demand against the estate of a deceased person who shall not after the giving of notice as required in section 30-601 exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same in any action whatever."

On January 26, 1955, Hope Supp, appellant here, filed an "Application for Permission to File Claim" in the county court asking therein, as amended, "* * * that the judgments, orders, and decrees of this court with regard to claims, be opened and vacated, and this applicant be granted permission to file the claim as herein alleged at this time; * * *." As a basis for such relief she claims that at all times herein material she was a resident of the State of California and present therein and not in Nebraska; that she is an elderly person (57 years of age) and a relative of the deceased (niece); that she knew of his death; that notice of the probate proceedings and of the time limited for the presentation of claims were all given by publication and in no other manner; that she relied upon her relatives to advise

her with regard to the filing of her claim; that she had no actual notice of any kind or information or knowledge of the pendency of the probate proceedings or of the time limited for the filing of claims until the latter part of November or the fore part of December 1954 and therefore not in time to permit her to file her claim within the time provided therefor; and that deceased was indebted to her in the sum of $1,100 together with interest at 6 percent from September 24, 1953, which claim she now seeks to file against the estate.

The county court denied the application. Appeal was taken therefrom to the district court for Harlan County. The district court sustained the executrix's demurrer to the petition on appeal and, from a dismissal thereof, this appeal was taken. It will be noticed the application was filed more than 3 months subsequent to the order of July 21, 1954, which barred the filing of claims thereafter.

Section 30-605, R. R. S. 1943, provides, insofar as here material, that: "Any creditor who has failed to present his claim within the time allowed, may, within three months after the expiration of such time, apply to the court for additional time for the filing and determination of his claim, and the court may, for good cause shown, allow such further time not exceeding three months, * * *."

When filed within the 3 months, as provided therein, we have said: "The jurisdiction of the county judge to permit the filing of a belated claim depends upon good cause shown. In absence of such a showing he has no discretion to grant such permission." In re Estate of Golden, 120 Neb. 226, 231 N. W. 833. The question of good cause is not here as the application was not made within time.

If made beyond that time, we said in In re Estate of Hoferer, 116 Neb. 254, 216 N. W. 826: "To give the county court jurisdiction to make an order extending the time for filing claims, the application for such order

must have been made within three months after the expiration of the time previously allowed, and then only for good cause shown."

Neither the statute nor our holdings thereunder make any distinction as to creditors based on whether or not they are residents or nonresidents of the state, or upon the fact of whether or not they had personal notice or actual knowledge of the time allowed for the filing of claims. We think none was intended.

Section 25-525, R. R. S. 1943, upon which appellant relies, provides in part: "A *party against whom* a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened, and *be let in to defend;* before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such application, and *shall file a full answer to the petition,* pay all costs, if the court requires them to be paid, and make it appear to the satisfiction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; * * *." (Italics ours.)

It is clear from reading the foregoing language in relation to court proceedings that it has no relation to estate matters such as are here involved. We think the following principles apply thereto:

"In the absence of anything to indicate the contrary, words must be given their ordinary meaning." Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

"Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning." Franzen v. Blakley, *supra.*

"It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language." Franzen v. Blakley, *supra.*

There is a further principle here applicable. As early as McCann v. McLennan, 2 Neb. 286, we said that in

construing statutes: "* * * specific provisions relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law, which might otherwise be broad enough to include it." See, also, State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N. W. 59, 68 Am. S. R. 629, 39 L. R. A. 513; State ex rel. Douglas County v. Cornell, 54 Neb. 72, 74 N. W. 432; Mancuso v. State, 123 Neb. 204, 242 N. W. 430; Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W 2d 227.

And this is true regardless of which was enacted first, for as stated in State ex rel. Prout v. Nolan, 71 Neb. 136, 98 N. W. 657: "Where general and special provisions of a statute come in conflict, the general law yields to the special without regard to priority in dates, and a special law will not be repealed by general provisions, unless by express words or by necessary implication."

We have come to the conclusion that the only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so.

It may seem harsh to prevent appellant from filing what on its face appears to be a valid claim against an admittedly solvent estate but, as stated in In re Estate of Golden, *supra:* "The claim against the solvent estate makes a strong appeal to morality, equity and justice, but the arbitrary bar of the nonclaim statute and the peremptory order of the county court pursuant thereto apply alike to just and unjust claims."

We have come to the conclusion that the district court's action was correct and therefore affirm its holding.

AFFIRMED.

FRANCES L. DEFORGE, ADMINISTRATRIX OF THE ESTATE OF ADELAIDE RAYMOND, DECEASED, APPELLANT, V. ROBERT K. PATRICK, EXECUTOR OF THE ESTATE OF NELLIE F. CHAPLIN, DECEASED, APPELLEE.

76 N. W. 2d 733

Filed May 4, 1956. No. 33936.

1. **Joint Tenancy.** Nebraska recognizes common law joint tenancy with right of survivorship.
2. ———. Joint tenancies are created by contract.
3. **Joint Tenancy: Tenancy in Common.** Joint tenancies are not favored and, if not expressly created by contract, the law presumes the tenancy is in common.
4. **Joint Tenancy.** However, if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate the law will permit the intention of the parties to control and a joint tenancy with right of survivorship will be created.
5. ———. A joint tenancy with right of survivorship vests the whole title in the survivor free from the debts of the deceased joint tenant.
6. ———. An estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and such act has the effect of destroying the right of survivorship incidental to it.
7. ———. Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship.
8. **Joint Tenancy: Tenancy in Common.** After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains.
9. **Banks and Banking: Joint Tenancy.** Section 8-167, R. R. S. 1943, fixes the property rights of the persons named in the deposit where compliance with the statute has been had.
10. ———: ———. Upon the death of one payee named in such deposit the survivor or survivors named therein take the whole legal title thereto free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit.
11. **Fraudulent Conveyances.** To set aside a conveyance of real estate on the ground that it is fraudulent as to subsequent creditors, such creditors must allege and prove that such conveyance was made with intent to defraud subsequent creditors and in contemplation of such future indebtedness.

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

Mothersead, Wright & Simmons, for appellant.

Robert W. Patterson, for appellee.

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

WENKE, J.

This is an appeal from the district court for Scotts Bluff County in an action wherein Frances L. DeForge as administratrix of the estate of Adelaide Raymond, deceased, sought, on various grounds, to hold sufficient of the assets now in the possession and control of Robert K. Patrick as executor of the estate of Nellie F. Chaplin, deceased, to pay the creditors of Adelaide Raymond and the expenses of administering her estate. The administratrix asked the district court to require the executor to hold and pay over to her, as administratrix, a sufficient amount for that purpose. The trial court denied her the relief she asked for. She thereupon filed a motion for a new trial and has taken this appeal from the overruling thereof.

Adelaide Raymond and Nellie F. Chaplin were elderly sisters. At all times herein material they lived together in a home located at 2401 Avenue D in Scottsbluff, Nebraska, and legally described as Lot 33, Raymond Addition to Scottsbluff, Nebraska. This residence property, together with a brick business building located on Broadway in Scottsbluff and legally described as the south 4 inches of Lot 19 and all of Lot 20, Block 11, Original Town of Scottsbluff, Nebraska, were, prior to January 24, 1949, owned by Adelaide Raymond. On January 24, 1949, Adelaide Raymond, who was then 74 years of age, conveyed these two properties to herself and Nellie Chaplin, who is the same person as Nellie F. Chaplin herein referred to, as joint tenants and not as tenants in common. The deed goes on to

recite: "It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee." This deed was recorded in the office of the register of deeds for Scotts Bluff County on January 26, 1949, and recorded in Book 62 of Deeds at page 355.

On July 24, 1944, a joint survivorship checking account was opened in the Scottsbluff National Bank of Scottsbluff, Nebraska, in the name of the two sisters. It continued in this status up until Adelaide Raymond's death.

Adelaide Raymond died on April 15, 1953. Her estate is being administered in the county court of Scotts Bluff County and appellant is the duly qualified and acting administratrix thereof. Several claims have been filed in this estate. They include a claim for personal taxes for the year 1953 in the sum of $7.97; a claim by Dr. Ted E. Riddell in the sum of $882.50 for professional services rendered to the deceased from January 10, 1952, through February 5, 1953; a claim by Dr. Paul Q. Baker in the sum of $78.50 for professional services rendered to the deceased between March 20 and April 8, 1953; and a claim by the Sisters of St. Francis, Denver, Colorado, a Colorado corporation doing business in Scottsbluff as the St. Mary's Hospital in the sum of $465.90 for services, medicines, etc., rendered to the deceased while she was in the hospital from April 3 to April 15, 1953.

We think the claims of Dr. Ted E. Riddell, Dr. Paul Q. Baker, and the Sisters of St. Francis relate themselves to the last illness of Adelaide Raymond.

The record shows that at the time of her death Adelaide Raymond left no other property out of which these claims, if allowed, can be paid other than that held in joint tenancy.

At the time of her death the joint account in the Scottsbluff National Bank had a balance of $1,931.85.

The evidence shows that since June 1948 Adelaide Raymond had not enjoyed very good health but there is nothing in the record to show it in any way affected her mind. It appears she was at all times fully capable of taking care of her business.

Nellie F. Chaplin died on May 15, 1953. Her estate is being probated in the county court of Scotts Bluff County. Appellee is the qualified and acting executor thereof. He has taken possession of the property hereinbefore referred to as being held in joint tenancy and has sold the two pieces of real estate. He now has in his possession the proceeds thereof.

The question is, can appellant, on the basis of any of the grounds she has advanced, hold any of this property for the purpose of paying the creditors and expenses of administration of the estate of Adelaide Raymond, deceased?

Appellant says she believes she has an equitable interest in the funds received from the property hereinbefore referred to to the extent asked. That the equitable ownership of property can be in one person and the legal title in another is beyond question. See, Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252; Jewett v. Black, 60 Neb. 173, 82 N. W. 375.

This state has always recognized common law joint tenancy with right of survivorship. See, Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025; Tyrrell v. Judson, 112 Neb. 393, 199 N. W. 714; Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117; Olander v. City of Omaha, 142 Neb. 340, 6 N. W. 2d 62; Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327; Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271; Buford v. Dahlke, *supra*. In fact, joint tenancies have been approved by the Legislature. See § 76-118, R. R. S. 1943.

The deed here is within the authorization of section 76-118, R. R. S. 1943, passed by the 1941 Legislature, although it would have been deficient to create a common law joint tenancy in the absence of such statutory

enactment. See our holdings in Stuehm v. Mikulski, *supra,* and Anson v. Murphy, *supra.*

Joint tenancies are created by contract. See Sanderson v. Everson, *supra.* They are not favored and, if not expressly created by contract, the law presumes the tenancy is in common. See, Sanderson v. Everson, *supra;* Olander v. City of Omaha, *supra;* In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677; Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Buford v. Dahlke, *supra;* Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141.

As stated in Sanderson v. Everson, *supra:* "* * * in order to create a joint tenancy, the purpose must be clearly expressed, otherwise the tenancy will be held to be in common."

However, "* * * if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created." Sanderson v. Everson, *supra.* See, also, Olander v. City of Omaha, *supra;* In re Estate of Vance, *supra;* Bodeman v. Cary, *supra.* The intention of the parties must govern. Sanderson v. Everson, *supra.*

As stated in Elrod v. Heirs, Devisees, etc., 156 Neb. 269, 55 N. W. 2d 673: "The court in interpreting a conveyance of real estate is by legislative declaration required to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law. § 76-205, R. R. S. 1943. Each word and provision in the conveyance must be given such significance as will make effective the intention of the parties."

And, in Langan v. Langan, 135 Neb. 229, 280 N. W. 903, we said: "The intention of the parties to a deed must be gathered from the whole instrument itself. Comp. St. 1929, sec. 76-109."

There can be no doubt from the language used, which

has been hereinbefore set forth, that it was the intention of the parties to the deed under consideration to create a joint tenancy with right of survivorship; that is, upon the death of one the survivor should take the whole title. It would vest the whole title in the survivor free from the debts of the deceased joint tenant. See, Stuehm v. Mikulski, *supra;* Anson v. Murphy, *supra.* As stated in Stuehm v. Mikulski, *supra:* "* * * upon the death of one of two cotenants holding such an estate, the survivor takes the entire fee free from the debts of the deceased cotenant * * *."

It is, of course, true, as stated in Anson v. Murphy, *supra:* "* * * 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." See, also, Buford v. Dahlke, *supra;* Whiteside v. Whiteside, *supra.* We said in Whiteside v. Whiteside, *supra:* "Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship."

"In order to effect a severance of the jointure, the effect of the act or transaction, whether it is voluntary or involuntary insofar as the joint tenant is concerned, must be to divest him of his estate in joint tenancy." Gau v. Hyland, 230 Minn. 235, 41 N. W. 2d 444.

And if such occurs, we said in Anson v. Murphy, *supra:* "After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains."

We find no evidence of any act by either grantee which would have such effect unless it can be said that the incurring of these debts by Adelaide Raymond, for which claims have been filed against her estate, had such effect. We do not think the mere incurring of debts by one of two joint tenants, subsequent to the cre-

ation thereof, has the effect of destroying such joint tenancy.

Appellant suggests we now declare that there is no longer such a thing in this state as a joint tenancy with right of survivorship and that all estates so denominated be declared tenancies in common with right of survivorship. As such they would be subject to the debts of the deceased joint owner. See, Stuehm v. Mikulski, *supra;* Anson v. Murphy, *supra.* Appellant bases this argument, in part, on the fact that the 1955 Legislature has made jointly held property subject to the debts of a deceased joint tenant under certain conditions as therein set forth. See, Laws 1955, c. 110, p. 295; § 30-624, R. S. Supp., 1955.

It seems to us if public policy should so require the Legislature could abolish joint tenancy. The fact is it not only has not done so but has, through the legislation hereinbefore referred to, expressly acknowledged and approved its existence. We find no reason sufficient for our doing so.

"The relation of and estate of joint tenancies may be created in any kind of personal property that is subject to be held in severalty." In re Estate of Vance, *supra.*

The joint survivorship checking account in the Scottsbluff National Bank in the name of Adelaide Raymond and Nellie Chaplin is specifically controlled by section 8-167, R. R. S. 1943, which provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

This statute fixes the property rights of the persons named in the deposit where compliance with the statute has been had. Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760; Rose v. Kahler, 151 Neb. 532, 38 N. W.

2d 391; Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540. Upon the death of one payee the survivor takes the whole legal title free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit. Rose v. Kahler, *supra*. No such contrary intent appears from the deposit herein involved.

Was the conveyance made with intent to hinder, delay, or defraud expected creditors?

It should be borne in mind that although the grantees were, at the time, elderly sisters, this is not a case involving debts existing at the time of the conveyance nor of contingent liabilities then in being. The debts for which claims have been filed against the estate of Adelaide Raymond, deceased, were not incurred until 4 years or more after the deed was executed and recorded and not until more than 8 years after the joint survivorship checking account was opened. Consequently the principles applicable and controlling in cases involving existing or contingent liabilities have no application. The rule here controlling is stated in Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036, as follows: "The rule seems to be well settled that, to set aside a conveyance on the ground that it is fraudulent as to subsequent creditors, such creditors must allege and prove that such conveyance was made with intent to defraud subsequent creditors and in contemplation of such future indebtedness." See, also, Jansen v. Lewis, 52 Neb. 556, 72 N. W. 861; Creason v. Wells, 158 Neb. 78, 62 N. W. 2d 327.

While it is true that Adelaide Raymond was not in very good health at the time she executed the deed to herself and her sister and had the same recorded, we do not think it can be said that debts incurred in connection with her last illness some 4 years later were then in contemplation and that she executed the deed with an intent to avoid the payment thereof.

If there is to be any further or additional relief for creditors from the legal effect of joint tenancies by those

dealing with persons who hold their property in joint tenancy with right of survivorship than what has already been enacted by the Legislature we think it should come from the same source.

Having come to the conclusion that the trial court was correct in denying appellant the relief she sought we affirm its judgment doing so.

AFFIRMED.

LESLIE L. BLAUVELT ET AL., APPELLEES, V. CLARENCE S. BECK, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
76 N. W. 2d 738

Filed May 4, 1956. No. 33954.

1. **Pleading.** A general demurrer tests the substantive legal rights of the parties upon admitted facts including reasonable inferences of law and fact deduced from the facts which are alleged. It does not admit conclusions alleged in the pleading to which the demurrer is directed.
2. **Statutes: Pleading.** If it is claimed that a statute is invalid because it is in its substance violative of the fundamental law, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid.
3. **Auctions and Auctioneers.** The business of auctioneering and the sale of merchandise at auction are legitimate, lawful, and useful activities.
4. ———. The business of conducting public auction sales of merchandise is lawful and useful but it is affected with a public interest and is subject to reasonable legislative restrictions.
5. ———. The source of the authority to regulate auctions is the police power and a regulatory statute enacted by virtue thereof must have relation to the public health, safety, and welfare.
6. ———. If the regulations imposed by such a statute do not have relation to the public health, safety, or welfare they are invalid as an invasion of property rights of persons affected.
7. **Constitutional Law.** Liberty in the constitutional meaning includes absence of arbitrary and unreasonable restraint upon an individual in the conduct of his business and the use and enjoyment of property.

8. **Constitutional Law: Statutes.** If a condition of affairs exists concerning which the Legislature, exercising its conceded right to enact laws for protection of health, safety, and welfare of the people, might pass the law in question it must be sustained.
9. ———: ———. If such legislative action is arbitrary and an unreasonable interference with the right to engage in and carry on business and has no relation to the protection of the public within the legislative power, the act must fail.
10. ———: ———. The reasonableness of restrictions imposed by the Legislature by the exercise of the police power is a judicial matter.
11. ———: ———. A regulatory provision of a statute having some relation to public health, safety, or welfare but which arbitrarily and unreasonably interferes with private business and imposes unreasonable and unnecessary restrictions may not be upheld.
12. ———: ———. The question if legislation is in the public interest is ordinarily one for legislative determination, but the Legislature may not, under the guise of regulation in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory.
13. **Constitutional Law.** The constitutional validity of a law may be tested by what may by its authority be done.
14. ———. The fundamental requisite of due process of law is opportunity to be heard and this right has small reality or value unless one is informed that the matter is pending and he can choose for himself what action he will take in reference to it.
15. ———. The method of transmitting notice to a person of a pending matter to constitute due process must be one that is reasonably calculated to give him notice thereof and an opportunity to be heard.
16. **Constitutional Law: Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment.
17. **Auctions and Auctioneers: Constitutional Law.** The Nebraska Public Auction Law makes arbitrary and unreasonable classification because it limits the right to conduct auction sales of new merchandise as therein defined to less than all who are similarly situated without distinctive circumstances which reasonably justify such limitation.

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

Clarence S. Beck, Attorney General, *Homer G. Hamilton, Elmer M. Scheele*, and *Edward F. Carter, Jr.*, for appellants.

Albert S. Johnston and *Thomas H. Adams*, for appellees.

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

BOSLAUGH, J.

The objective of this litigation is to secure an adjudication that the Nebraska Public Auction Law is constitutionally invalid and to enjoin appellants from taking any action intended to enforce the provisions of the law.

The substance of the petition is as follows:

Appellees Leslie L. Blauvelt, Mac Wondra, and Clifford E. Anderson, duly qualified and experienced auctioneers, are and each have been for many years engaged in conducting retail sales of personal property at public auction in a lawful manner in the State of Nebraska. The property sold by them at auction includes personal property of other persons consigned to appellees for sale and they are paid compensation for making a sale of it at auction. A part of the property sold consists of new merchandise not previously sold at retail and it is impossible to ascertain and know in many instances if the articles offered for sale and sold have or have not been previously sold at retail. Appellee C. C. Gannett & Co., Inc., is a domestic corporation and appellee Charles C. Gannett is one of its officers and stockholders. Appellee Prima Sales Co. is an association of persons engaged in business in Nebraska. C. C. Gannett & Co., Inc., and Prima Sales Co. are each engaged in buying and selling at retail personal property including merchandise not previously sold at retail. Their method consists of the sale of a part of the merchandise at pub-

lic auction. Their method of selling merchandise has been and is lawful and legitimate. Appellant Clarence S. Beck, the Attorney General of Nebraska, is authorized to act for the state in the enforcement of its laws and to prosecute violations of any of them. Appellant Elmer M. Scheele, county attorney for Lancaster County, is charged with the duty of enforcing the laws of the state and prosecuting violation of any of them that occur within the county.

The Legislature of Nebraska at its 1955 session enacted Legislative Bill 498 as the Nebraska Public Auction Law. It by its terms became in force and operative May 6, 1955. It contains conditions and restrictions that are discriminatory and unreasonable. It does not accord to appellees equal protection of the law in the conduct of their lawful business and it abridges the privileges and immunities of appellees and other persons similarly situated, contrary to the Constitution of the United States and the Constitution of Nebraska. The classifications of business made therein and thereby are discriminatory, the fees required to be paid thereby are confiscatory, and the fines imposed by it are excessive. The law in each of said respects is contrary to the Constitution of the United States and the Constitution of Nebraska.

The county attorney of Lancaster County, one of the appellants, filed a complaint in the county court of that county charging plaintiffs with the violation of the Nebraska Public Auction Law. Appellees Leslie L. Blauvelt and Charles C. Gannett were each arrested at the Lincoln Sale Barn, owned and operated by the former, while each of said persons was engaged in the lawful sale of merchandise consigned to them for auction sale by C. C. Gannett & Co., Inc. The action of the county attorney in that regard was the occasion of the commencement of this litigation. Appellants each threaten to continue to attempt to enforce the invalid law and to harrass appellees in the conduct of their business.

Appellants challenged the sufficiency of the petition by general demurrer. It was overruled and appellants elected not to plead further in the case. The district court found that the Nebraska Public Auction Law conflicts with the Constitution of Nebraska and the Constitution of the United States in the particulars alleged in the petition of appellees; that it was invalid; and that appellees were entitled to an injunction preventing appellants from attempting to enforce the provisions of the law. A judgment was rendered in harmony with the findings. This appeal contests the correctness of the judgment.

A general demurrer tests the substantive legal rights of the parties upon admitted facts including reasonable inferences of law and fact which may be deduced from the facts which are alleged. It does not admit conclusions alleged in the pleading to which the demurrer is directed. Central Nebraska Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240; Montgomery v. Blazek, 161 Neb. 349, 73 N. W. 2d 402.

The petition is quite general in its averments of the basis for the claims of appellees that the statute is in conflict with the Constitution. The ability of appellees to contest the validity of the statute by virtue of their business status is not assailed by appellants. Appellees allege that they are threatened with its attempted and intended enforcement; that the legislation violates the fundamental law because it is discriminatory, unreasonable, and confiscatory; that the classification made by it is arbitrary and illegal; and that it denies appellees in the prosecution of their business equal protection of the law and denies them the privileges and immunities to which they are entitled. The petition is sufficient to the extent and in instances that appellees assert that the statute is invalid because it is in its substance, as shown by its language and effect, violative of the fundamental law. This doctrine was announced in this

jurisdiction many years ago and has not since been departed from. The statement of it in City of York v. Chicago, B. & Q. R. R. Co., 56 Neb. 572, 76 N. W. 1065, is as follows: "When it is claimed that a statute or ordinance is invalid because it is in its substance violative of the fundamental law, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid."

The statute designated the Nebraska Public Auction Law, the cause of this controversy, by its terms became effective May 6, 1955. Laws 1955, c. 266, p. 832; §§ 69-801 to 69-817, R. S. Supp., 1955. It will be herein referred to by its name or as the law The often-repeated words in the law "new goods, wares, and merchandise" will be spoken of as merchandise. Public auction sale or sales will be mentioned as auction.

The following is the substance of the relevant portions of the law: It defines auction as offering for sale or selling merchandise to the highest bidder or offering for sale or selling merchandise at a high price and then offering it at successively lower prices until a buyer is secured. New goods, wares, and merchandise as used in the law refers to items of those classes not previously sold at retail. Established place of business is any building at which a legitimate, permanent business is carried on as such in good faith and at which stocks of the property being sold at auction are produced or kept in quantities reasonably adequate and usually kept for the requirements of such business. Applicant is any person, firm, or corporation making an application under the law for a license to conduct an auction.

The law makes it unlawful for any person to offer for sale or to sell at auction in the state merchandise unless such person shall have secured a license as provided by the law, except as otherwise provided therein. A license may be procured by an application in writing filed with the county clerk of the county in which an

auction is desired to be held not less than 10 days prior to the auction, containing: The name, residence, and post-office address of the applicant; if a firm or corporation, the names and address of the members of the firm or officers of the corporation and the date and place of incorporation; if a foreign corporation, the date it qualified as such to do business in Nebraska; the name, residence, and post-office address of the auctioneer who will conduct the auction; if the applicant is not the owner of the merchandise to be offered for sale, the name and address of the owner thereof; a detailed inventory and description of the merchandise to be offered for sale which shall set forth "the cost to the applicant of the several items" therein; a receipt for payment of personal property tax on the merchandise to be offered for sale or evidence satisfactory to the county clerk that it is not liable for taxation; a copy of notice which 10 days before the application has been filed shall have been mailed by registered mail by the seller to the State Tax Commissioner stating the precise time and place the auction will be held, the approximate value of the merchandise to be offered or sold, and any other information the State Tax Commissioner requests or requires; and the number of days the auction will be held.

A bond shall be filed and deposited with the county clerk as a part of and at the time the application is filed, with sureties to be approved by the clerk, in the sum of twice the value of the merchandise to be offered for sale, in which the state must be named as obligee, for the use and benefit of any purchaser of such merchandise at the auction who might have a cause of action of any nature resulting from a sale at the auction against the applicant. The bond must be conditioned for the payment of any tax due the state or any subdivision of it; the payment of any fines against the applicant for violations of the auction law; the satisfaction of any cause of action commenced within 1 year from the date of the sale and arising therefrom; and the pay-

ment by the applicant to the purchasers at the auction of any loss or damage caused any purchaser by breach of any express or implied warranty of the manufacturer, owner, or seller, including cost of servicing and repairs incurred by purchasers, unless the owner or seller of the merchandise shall state in public notices of the auction that the goods to be sold are not warranted or guaranteed in any manner and that the costs of servicing will have to be paid by the purchaser. The applicant and sureties shall in the bond appoint the county clerk their agent for the service of process. The county clerk shall within 5 days after the service of any process on him send a copy thereof by ordinary mail to the party for whom he has been served to his last-known address. "Failure to so mail said copy shall not, however, affect the court's jurisdiction."

An applicant for a license must file the receipt of the county treasurer for payment to him by the applicant of a license fee of $50 per day for the entire time he estimates he will conduct an auction. The license is not transferrable. It is valid only in the county where issued except it is not valid in any city or village which has an ordinance licensing auctions unless a license has also been obtained from the city or village, and a city or village license is not one in lieu of a county license. A license may be used for only one place in the county.

The applicant within 10 days of the termination of the auction is required to file in duplicate with the county clerk an inventory of all merchandise sold at the auction and the price received therefor and a copy of it must immediately be sent to the State Tax Commissioner. The provisions of the law do not apply to "public auctions of goods, wares, and merchandise held by the owner thereof at his * * * established place of business."

The law authorizes cities and villages to tax, license, and regulate persons who desire to engage or are engaging in auctions therein and to charge a fee therefor

not to exceed $50 per day and it shall be in addition to the license fee of $50 per day the law requires for a county license.

The law inflicts for each violation of it a fine of not less than $200 and not more than $1,000 or imprisonment in the county jail for not less than 30 days and not more than 180 days. Cities and villages are authorized to provide penalties for violation of any ordinance concerning auctions in force therein.

The selling of merchandise at auction and the occupation of auctioneer are legitimate, lawful, and useful. Caldwell v. City of Lincoln, 19 Neb. 569, 27 N. W. 647; Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635. The business of an auctioneer, notwithstanding it is perfectly lawful and useful, is affected with a public interest and is subject to reasonable legislative restriction. Riddles, Inc. v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A. L. R. 766; City of Chicago v. Ornstein, 323 Ill. 258, 154 N. E. 100, 52 A. L. R. 489; Annotation, 31 A. L. R. 299; 5 Am. Jur., Auctions, § 3, p. 447. The source of the authority to regulate auctions is the police power and a regulatory statute adopted by virtue of the police power must have relation to the public health, safety, and welfare. If the regulations imposed by the statute do not have such relation they are void as an invasion of the property rights of any person affected by their enforcement. Webber v. City of Scottsbluff, *supra*.

All persons are insulated against deprivation of life, liberty, or property without due process of law and discrimination between citizens in respect to the acquisition, ownership, possession, and enjoyment of property by constitutional prohibitions. Art. I, §§ 3, 25, Constitution of Nebraska. The federal Constitution safeguards the citizen from state legislation which abridges his privileges and immunities or denies him the equal protection of the laws or deprives him of liberty or property without due process. Art. XIV, § 1, Constitu-

tion of the United States. A controlling principle is that if legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limits of its power in interfering with the rights of persons affected by the legislation but if there is reasonable relation to an object within governmental authority, the exercise of the legislative discretion is not subject to judicial review. If there existed a condition of affairs concerning which the Legislature of the state, exercising its conceded right to enact laws for the protection of health, safety, or welfare of the people, might pass the law it must be sustained but if such action was arbitrary and an unreasonable interference with the right to carry on business and had no just relation to the protection of the public within the legislative power, the act must fail. Liberty is not absolute. It implies absence of arbitrary restraint but not immunity from reasonable regulations. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608. The reasonableness of restrictions imposed by the Legislature by the exercise of the police power is a judicial matter. The scope of judicial inquiry as to the validity of a statute is limited to the question of power to enact it. The inquiry in this case is not in reference to lack of authority of the Legislature. The problem is whether or not the Nebraska Public Auction Law places arbitrary and unreasonable limitations, regulations, and impositions on the conduct of a lawful business, whether or not it is class legislation, or whether or not it prohibits rather than regulates. Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Webber v. City of Scottsbluff, *supra.*

The following required matters—Notice to be given by the applicant for a license to conduct an auction to the State Tax Commissioner 20 days before the date of the commencement of the auction stating the precise time and place of the auction, the value of the merchandise to

be sold, and "such other information as the State Tax Commissioner may request or * * * require"; the verified, detailed inventory and description of the merchandise to be sold at the auction and "the cost to the applicant of the several items contained in such inventory" which must accompany the application for a license at least 10 days before the auction; the verified inventory in duplicate of all merchandise sold at the auction and the price received therefor which must be filed with the county clerk within 10 days of the last day of the auction; and the condition of the bond for the payment by the principal and surety of "damage occasioned to any purchaser by reason of the breach of any express or implied warranty of the manufacturer, owner, or seller, including costs of servicing and repairs incurred by purchasers within the warranty" unless the licensee gives public notice that the merchandise sold is not warranted or guaranteed, or any of them—have no such relation to public health, safety, or welfare as to justify the exercise of police power in reference to them as is attempted to be done in the statute in controversy in this action. If it is assumed that the regulatory provisions of the statute above outlined have some relation to public health, safety, or welfare it must nevertheless be said that they arbitrarily and unreasonably interfere with private business and impose unreasonable and unnecessary restrictions on auction sales and for that reason they may not be approved and upheld.

In Webber v. City of Scottsbluff, *supra,* the court said concerning provisions of an ordinance intended to regulate auction sales: "If ordinances under the police power do not bear some relation to the public health, safety or welfare, they are void as an invasion of the property rights of persons affected by their enforcement. * * * A regulatory provision of an ordinance having some relation to public health, safety or welfare, but which arbitrarily and unreasonably interferes with pri-

vate business and imposes unreasonable and unnecessary restrictions, may not be upheld." In the opinion it is said: "It is difficult, if not impossible, to find a basis for a conclusion that a 15-day notice to a city clerk before an auction sale, an inventory to the city clerk of all goods to be sold, containing the quality, quantity, kind and grade of the merchandise intended to be sold, * * * a requirement by ordinance that accurate records shall be kept, * * * or any of these restrictions, have any relation to public health, safety or welfare."

In McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., *supra*, it is declared: "The question of whether or not legislation is in the public interest is ordinarily one for legislative determination, but the Legislature may not, under the guise of regulation in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory." See, also, Jones v. City of Jackson, 195 Tenn. 329, 259 S. W. 2d 649; Sam's Loan Office, Inc. v. City of Beaumont (Tex. Comm. App.), 49 S. W. 2d 1089; Perry Trading Co. v. City of Tallahassee, 128 Fla. 424, 174 So. 854, 111 A. L. R. 463.

Appellants say that the requirements indicated above, except the one concerning the condition of the bond, have sufficient relation to public welfare to legally justify them because they are intended to assist in the imposition and collection of taxes and to prevent escape of property from taxation. This is a tenuous and undemonstrable argument. It is condemned by other provisions of the law. The applicant must file with his application for a license a receipt showing payment of taxes on the merchandise to be sold or satisfactory evidence that the merchandise is not liable for taxation. A condition of the bond is payment by applicant of any legal taxes due from him. Any additional requirements relative to taxation of the property or payment of taxes thereon would be clearly arbitrary and unreasonable.

It is an exaction of the law that an applicant for a license pay a license fee or tax of $50 per day for the entire estimated duration of the auction to the county treasurer of the county where the application is made and that he file the receipt therefor with his application. The license authorizing the conduct of an auction, when issued, is valid in only one place in the county and it is not valid in any city or village which has an ordinance "licensing public auction sales unless a license is also obtained from such city or village." The law expressly gives cities and villages power to tax, license, and regulate persons engaging in or who desire to engage in public auctions and the municipality may require a license and charge a fee therefor not in excess of $50 per day and "such fee shall be in addition to the amount" of the county license fee of $50 per day. "A city or village license shall not be in lieu of a county license." The practical effect of this is that if the statute is valid an auction may only be legally conducted by one who has secured a county license for a fee or tax of $50 per day and a license from the city or village at an additional cost of $50 per day, or a total outlay of $100 per day for the duration of the auction. He may also be subjected to exactly duplicate regulations as provided in the statute. It is permissible under the language of the statute for a municipality to adopt an ordinance containing substantially all of the terms of the statute. In appraising the validity and effect of the statute it is proper to examine and determine what may be required under it pursuant to the provisions of it. The inquiry is not confined to what has been done under the act in any particular instance but by what may be done under and by virtue of its authority. The constitutional validity of a law is tested by what may by its authority be done.

In Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, the court said: "* * * in determining whether any particular legislation * * * is valid, it is proper to

examine and ascertain what may be done or accomplished under and pursuant to such statutory provisions."

This doctrine is expressed in Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056, in this manner: "It may be said that this is not the situation presented by the facts in this case, but it must be remembered that the validity of the act does not depend upon what has been done, but upon what the act authorizes and by what may be accomplished under it." See, also, Montana Company v. St. Louis Mining & Milling Co., 152 U. S. 160, 14 S. Ct. 506, 30 L. Ed. 398; Burtch v. Zeuch, 200 Iowa 49, 202 N. W. 542, 39 A. L. R. 1349; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333; Abbott v. McNutt, 218 Cal. 225, 22 P. 2d 510, 89 A. L. R. 1109; 11 Am. Jur., Constitutional Law, § 102, p. 737. A statute that makes it possible for dual regulations to be imposed upon persons affected by it is arbitrary, unreasonable, and confiscatory.

The law makes it mandatory that the bond appoint the county clerk agent for making service of process issued in an action against the licensee and the surety jointly or severally in the county where the auction is held. The county clerk is admonished in one part of the act to send within 5 days by ordinary mail a copy of the process served to the person for whom the agent was served at the last-known address of the principal. In another sentence of the law it is provided: "Failure to so mail said copy shall not, however, affect the court's jurisdiction." The net result of this is that the law attempts to make it immaterial that the person sued has no actual notice or means of knowledge that he is subjected to the hazard of suit and final judgment and, of course, no opportunity to be heard in defense. The failure to send the copy of the process to him "shall not, however, affect the court's jurisdiction." This may have been intended to be an indirect admonition to the agent, who was not voluntarily selected, not to mail the copy. In any event it was not intended to inspire

the agent to promptness, diligence, and prudence in mailing the copy in such a manner that it would probably reach the person for whom the process was issued.

Legislation in this state concerning notice to a person by use of the postal service has generally required transmission of the notice by registered mail. See, § 25-1606, R. S. Supp., 1955; § 25-1226, R. S. Supp., 1955; § 27-1703, R. R. S. 1943; § 27-204, R. R. S. 1943. This is recognized and resorted to in the provision of the law involved in this case concerning the sending of the notice to the State Tax Commissioner of the time and place an auction is to be held. The manner of transmitting the notice in that instance is "shall have been mailed by registered mail by the proposed seller to the State Tax Commissioner." There is significance in the distinction made by the statute between the method of sending by registered mail to the State Tax Commissioner a mere notice of a nature that no liability could result or great harm be done if he did not receive it and the requirement for sending of notice of the service of process in an action in court by "ordinary mail" to a defendant against whom a final judgment would certainly be rendered unless a defense was made, which requirement is accompanied by an assurance to the agent that it is immaterial in result whether he does or does not mail the copy of the process to the defendant for whom it was issued.

A statute which authorizes the use of the postal service to notify a defendant that he has been sued in court is strictly construed and it must be specifically observed. The method of transmitting the notice must be one that is reasonably calculated to give the defendant notice of the pending action and an opportunity to be heard in defense. The fundamental requisite of due process of law is the opportunity to be heard. The right to be heard has little reality or value unless one is informed that the matter is pending and he can choose for himself whether to appear or default, acquiesce or

contest. There is no possible situation where it is not reasonably possible or practicable to give adequate warning to the principal in the bond that he has been sued. The agent designated for service of process has available in his office by mandate of the statute as part of the application for license with which the bond is filed the name, residence, and address of the defendant. Service on a defendant of the character selected and attempted by the statute involved in this case must contain a requirement that makes it reasonably probable and certain that the notice of service on the person designated will be communicated to the defendant. Anything less than this is not due process. The method stated in the statute is inadequate because it is not reasonably calculated that notice of the service will reach the person affected who could easily be informed by other means at hand and proof that it had been accomplished could be had and made of record. See, Herzoff v. Hommel, 120 Neb. 475, 233 N. W. 458; Rose v. Gisi, 139 Neb. 593, 298 N. W. 333; 72 C. J. S., Process, § 51, p. 1065. The statute in the respect discussed is arbitrary and unreasonable. A citizen may not be subjected to such an implicit hazard as a condition of being permitted to engage in lawful business.

Any person, firm, or corporation may not without compliance with the statute sell or offer for sale at public auction in the state any new merchandise except the statute does not apply to auction sales of livestock, auction sales by officers required by law, sales by receivers or assignees of property for the benefit of creditors, or public auctions of merchandise held by the owner at his established place of business. This law is not limited to auction sales of merchandise conducted by or for non-residents or itinerants. It applies to any person not specifically excepted from its operation. A responsible local citizen with every desirable qualification, of good character and reputation, who has been or is sensitive to the prompt and full performance of every

duty, obligation, or responsibility or an itinerant who may be equally desirable or less desirable who does not have an established place of business as characterized in the law cannot conduct an auction of merchandise without complying with and subjecting himself to the requirements and impositions thereof. However, any person, without regard to his defaults, irresponsibilities, irregularities, and disregard of duties and obligations who has an established place of business may conduct a continuous auction sale of any merchandise he has or which he procures without any regard to this law if the auction is held at his established place of business. This law has no application to him. So far as it is concerned he is a free agent.

Appellees question the classification made by the law. The doctrine is that the Legislature may for purposes of legislation make classifications but a classification to be valid must rest on some reason of public policy or some substantial difference of situation or circumstances that naturally suggests the justice or expediency of diverse legislation with regard to the subject classified. In Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643, it is said: "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; * * *." See, also, Ernesti v. City of Grand Island, 125 Neb. 688, 251 N. W. 899; Webber v. City of Scottsbluff, *supra;* Hagerman v. City of St. Louis, — Mo. —, 283 S. W. 2d 623.

The classification which the statute makes does not rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of legislation which renders appropriate its enactment. The statute makes an arbitrary and un-

constitutional discrimination and classification. It is invalid.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. RUSSELL R. STROM, JR., RELATOR, V. FRANK MARSH, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT, FERN HUBBARD ORME, INTERVENOR.

77 N. W. 2d 163

Filed May 5, 1956. No. 34050.

Original proceeding before a Judge of the Supreme Court, on the relation of Russell R. Strom, Jr., against Frank Marsh, Secretary of State of the State of Nebraska. *Petition dismissed.*

Russell R. Strom, Jr., pro se.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyers*, for respondent.

WENKE, J.

This is a special statutory proceeding had under and pursuant to the authority of section 32-517, R. R. S. 1943, and, as a Justice of the Supreme Court, I am filing this opinion to set forth the reasons for my order of April 30, 1956, denying the relator, Russell R. Strom, Jr., the relief he prayed for and dismissing his petition. It should be understood this is not an opinion of the Supreme Court.

The facts are not in dispute. About 10:30 a. m. on Thursday, April 5, 1956, intervenor, Fern Hubbard Orme, filed with respondent, Frank Marsh, Secretary of State, a petition, together with her affidavit and a receipt, the latter showing she had paid the statutory $10 filing fee. By her petition and affidavit intervenor requested that

her name be placed on the official nonpolitical ballot at the primary to be held on May 15, 1956, as a candidate for nomination for the office of member of the Nebraska Legislature from the Twentieth Legislative District. Intervenor was at that time and had been, since August 20, 1946, a duly qualified and acting member of the Lincoln City Council, Lincoln being a charter city.

Shortly after 2 p. m. on the same day intervenor orally requested the Mayor of the City of Lincoln to call a special meeting of the city council to consider her resignation which she had tendered to the council to be "effective immediately." This the Mayor and four members of the council, including intervenor, did, the council convening about 4 p. m. At this meeting, which the record shows was properly called, intervenor's resignation was accepted by a unanimous vote of those present.

About 4 p. m. on the same day intervenor withdrew her first filing and thereafter, about 4:40 p. m., she made an entirely new filing for the same office, having paid a second filing fee. Relator filed objections thereto on April 16, 1956, wherein he questioned the legality thereof. On April 18, 1956, a hearing was had on these objections before the respondent who, on April 19, 1956, overruled them. Relator thereupon perfected this proceeding by filing his petition in the Supreme Court on April 25, 1956.

It is relator's thought that intervenor continued to hold her office as a member of the city council until her successor was appointed and qualified, which was not until April 16, 1956. In support thereof he cites section 32-1045, R. R. S. 1943; section 27-409, the Lincoln Municipal Code of 1936; and Article I, section 3, and Article IV, sections 6 and 13, Charter of the City of Lincoln, dated February 1, 1949.

In this respect section 32-1045, R. R. S. 1943, provides: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed, and qualified, unless the statute under which

he is elected or appointed expressly declares the contrary."

Section 27-409, the Lincoln Municipal Code of 1936, provides: "All officers of this city, unless otherwise provided by law or ordinance, shall hold their offices for two years and until their successors shall be duly appointed and qualified, and the terms of all elective officers shall begin on the first Monday following election. The terms of all appointive officers shall begin at time of appointment."

Ordinarily, in the absence of some statutory provision, a resignation is effective upon its delivery to the proper authorities at the time therein designated and no official acceptance thereof is necessary. As stated in State ex rel. Roberts v. The Mayor, 4 Neb. 260: "In the absence of some statutory provision, we know of no rule which requires such resignation to be accepted by the municipal authorities, to make it effective. Their refusal even, to accept it, would not have the effect to compel him to retain the office against his will. We must hold, therefore, that by his written resignation of the office to the mayor and council, on the 28th of May, the relator ceased to be such city engineer."

I do not think that either the statutory or municipal code provisions hereinbefore quoted have application to cases of resignation. In my opinion intervenor's resignation became effective upon its delivery to the city council. Its acceptance by the city council at a properly called special meeting in no way affected its immediate effectiveness.

Section 32-503, R. S. Supp., 1955, provides as follows: "All partisan and nonpartisan candidates for elective offices shall be nominated: (1) By a primary held in accordance with Chapter 32, article 5, or (2) by nomination papers signed and filed as provided by section 32-504. If the candidate for an elective office is the incumbent of another partisan or nonpartisan elective office, the filing of the requisite nomination papers of

such incumbent for any other partisan or nonpartisan elective office shall be perfected at least fifty days prior to the date of such primary, notwithstanding any more general or special law respecting elections contained in sections 32-504, 32-514, and 32-515. The filing of the requisite nomination papers, perfected as aforesaid, shall create a vacancy in the elective office which such candidate then holds as of the date of the commencement of the term of the office or as of the date such vacancy is filled by the election for which he filed or for which he accepted filing. Candidates may file for the unexpired term of the office which becomes vacant, as provided in this section."

It is relator's contention that if a candidate to which this section applies is an incumbent of another partisan or nonpartisan elective office that he cannot by resigning that office after the 50th day and on or before the 40th day prior to the date of the primary election, bring himself within the provisions of section 32-535, R. S. Supp., 1955. With this I agree provided he is the incumbent of another partisan or nonpartisan elective office to which this statute has application for it seems to me one of the purposes of this legislation is to give to all those who may have a right to do so a reasonable opportunity to file and become a candidate for the unexpired term of any elective office which the candidate would thereby vacate in accordance with the provisions of this statute. To permit a resignation to be effective to defeat this purpose would, in my opinion, be contrary to the intent of the Legislature and defeat the purpose for which this legislation was enacted. It should, of course, be understood that this statute could not create a vacancy in any constitutional office contrary to the provisions of the state Constitution.

Did the intervenor, as a member of the city council, come within the scope of this law? I think not. The office she held as a member of the city council of the city of Lincoln is not subject to the primary election

laws. See Article IV, sections 5 and 9, Charter of the City of Lincoln, dated February 1, 1949. It is my opinion the requirements of section 32-503, R. S. Supp., 1955, apply only to incumbents of partisan or nonpartisan elective offices subject to the primary election to which the statute has application.

There is a further reason why intervenor is not subject to the provisions of section 32-503, R. S. Supp., 1955. As recent as the opinion in Supp v. Allard, *ante* p. 563, 76 N. W. 2d 459, the Supreme Court approved the principle, quoted from McCann v. McLennan, 2 Neb. 286, that: "* * * specific provisions relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law, which might otherwise be broad enough to include it." Therein the court went on to say, by quoting from State ex rel. Prout v. Nolan, 71 Neb. 136, 98 N. W. 657, that: "Where general and special provisions of a statute come in conflict, the general law yields to the special without regard to priority in dates, and a special law will not be repealed by general provisions, unless by express words or by necessary implication." See, also, State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297; Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W. 2d 227.

In 1935 the Legislature enacted what is now section 32-536, R. R. S. 1943. See Laws 1935, c. 112, § 1, p. 358. This section provides: "When any person holding any other elective public office becomes a candidate for the office of Legislator, the office which he is holding shall become vacant as of the date of the beginning of the term of the office of Legislator. Filing of candidates for the unexpired term of the office which the candidate then holds may be made and the time for filing for such office is extended five days beyond the filing date prescribed for that office."

In my opinion this section relates specifically to when any person holding any other elective public office be-

comes a candidate for the office of "Legislator." It is therefore controlling here. Without deciding whether or not intervenor was the holder of any other elective public office within the meaning of this section, I think, in either event, she could file within the time provided by section 32-535, R. S. Supp., 1955, as the only effect of whether or not she was or was not would relate to the 5 days extension referred to in section 32-536, R. R. S. 1943, which is not here material.

CHARLES W. CORBITT, APPELLANT AND CROSS-APPELLEE, V. OMAHA TRANSIT CO., APPELLEE AND CROSS-APPELLANT. CHARLES W. CORBITT, APPELLEE, V. OMAHA TRANSIT CO., SUBSTITUTED DEFENDANT FOR OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, A CORPORATION, APPELLANT.
77 N. W. 2d 144

Filed May 11, 1956. Nos. 33868, 33877.

1. **Trial.** A motion for a 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. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring asd cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
3. **Street Railroads: Negligence.** Section 39-751, R. R. S. 1943, declaring certain circumstances under which a pedestrian has the right-of-way in crossing a street, does not relieve the pedestrian of responsibility for the results of his own contributory negligence.
4. ———: ———. When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes

contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

5. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

6. ———. In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

7. **Appeal and Error.** In an appeal to review the ruling of the district court on a motion for new trial the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto.

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

Pilcher, Haney & Howard and *Harry D. Haykin*, for appellant Corbitt.

George L. DeLacy and *William P. Mueller*, for appellee Omaha Transit Co.

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

MESSMORE, J.

This is an action at law brought by Charles W. Corbitt in the district court for Douglas County, as plaintiff, against the Omaha & Council Bluffs Street Railway Company, now Omaha Transit Co., defendant, to recover damages for personal injuries sustained when he was in the act of crossing a street and was struck by a streetcar owned by the defendant and being operated by one of its employees.

The case was tried to a jury, resulting in a verdict in favor of the plaintiff and fixing the amount of his

recovery in the sum of $23,807. The defendant filed a motion for judgment notwithstanding the verdict, and in the alternative, a motion for a new trial. The trial court overruled the motion for judgment notwithstanding the verdict, but sustained the defendant's motion for new trial, and set aside the verdict. The plaintiff appealed from the order granting the new trial. The defendant appealed from the order overruling its motion for judgment notwithstanding the verdict. The defendant also made a cross-appeal in its brief in the appeal made by the plaintiff.

The parties stipulated that inasmuch as both parties had appealed, the appeals should be consolidated and that one bill of exceptions would be used on appeal.

While there are several assignments of error made by the plaintiff on his appeal and by the defendant on its separate appeal and cross-appeal, we deem the most important assignment of error to be the one made by the defendant that the trial court erred in overruling the defendant's motion for judgment notwithstanding the verdict. We determine this assignment of error.

The defendant, at the close of the plaintiff's evidence and at the close of all of the evidence, moved the court to either dismiss the plaintiff's cause of action or to direct the jury to return a verdict in favor of the defendant. In this connection, a motion for a 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. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. See Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679.

For convenience we will refer to the parties as they are designated in the district court and at times to the defendant as the transit company.

To determine the validity of the above assignment of error, and with the foregoing-stated rule in mind, we review the relevant and material evidence which we summarize as follows.

There is a plat in evidence, drawn to scale, which discloses certain measurements and distances relative to buildings located on the north side of Farnam Street which have no particular bearing in this case except as appears subsequently in the evidence. On the south side of Farnam Street, on the southwest corner of the intersection of Twenty-sixth Street, is the Lied Buick used car lot. The sidewalk that runs south from Farnam Street along the west side of Twenty-sixth Street is 6 feet 1 inch wide. Twenty-sixth Street is 40 feet 1 inch wide. On the southeast corner of Twenty-sixth Street and Farnam Street is the Webber Motors Company building which will be referred to in the opinion with reference to matters concerning the accident. From the west edge of this building to the west edge of the door into the office it is 29 feet 3 inches. The door is 7 feet 6 inches wide. From the east edge of this door to the west edge of the overhead garage door in said building it is 51 feet 6 inches. From the east edge of the overhead garage door of said building to the west edge of the east overhead door of said building it is 43 feet 4 inches. The east overhead door is 11 feet 11 inches wide.

Farnam Street runs east and west and there are streetcar tracks, one set for eastbound traffic and one set for westbound traffic. Streetcars leaving downtown Omaha going west travel on the north set of tracks, and those going east on the south set of tracks. The surface of the street is asphalt. There is a space of 4 feet 7 inches between the two sets of tracks. Rail measurements are taken to the gauge line which is the inside edge of the rail, and show the eastbound tracks to be 4 feet 8½ inches apart.

There is a pole located on the north curb in front of

the Barnhart Press building which is 126 feet from the east curb of Twenty-sixth Avenue.

On the southwest corner of Twenty-sixth Street and Farnam Street is a driveway into the used car lot which is 24 feet 3 inches wide from the east edge to the west edge.

There are numerous exhibits in evidence which show the entire area surrounding and in the immediate vicinity of the place where the accident occurred.

The plaintiff testified that he was 40 years of age and a laborer. On September 18, 1952, he was not working. He got up at 11 a. m., and went to a dentist to have four teeth extracted. He left the dentist's office about 2 p. m. After leaving the dentist's office, he stopped at a drug store and at the Virginia Cafe at Fifteenth and Douglas Streets for coffee. After leaving the Virginia Cafe, he walked to Twenty-fourth and Dodge Streets, and from there to Twenty-sixth and Farnam Streets. He decided to return to his room on Thirteenth Street. In order to do so, he had to cross Farnam Street. At that time he was directly north of the west side of the Webber Motors Company building on the east side of Twenty-sixth Street. On the north side of the street and at the area where he started to cross, there was a pole. He was standing by this pole before he started to cross. It was a clear day, the streets were dry, and it was about 6 p. m. He had on a light shirt, trousers, and a light hat. He started south across Farnam Street. He first looked to the east and observed traffic about a block east. Then he looked to the west. There he saw a streetcar stopped 10 feet west of the west curb line of Twenty-sixth Avenue. There were automobiles parked along the north side of Farnam Street, and just east of the cross walk in front of the Webber Motors Company building on the south side of Farnam Street. After he looked to the west and saw the streetcar stopped, he started across the street and was directly in line with the sidewalk on the east side of Twenty-sixth Street.

As he stepped off the curb he looked to the east again and saw traffic three-fourths of a block east. He proceeded to walk normally across the street. When he was near the north rail of the westbound streetcar tracks, he observed an automobile coming north on Twenty-sixth Street. The front of this automobile was about even with the front of the Webber Motors Company building on the east side of Twenty-sixth Street. No signals were given by its driver to indicate which direction he was going to turn. He slowed down to see which way the automobile coming into the intersection on Twenty-sixth Street would turn, east or west, to keep from getting struck by it if it turned east. He stopped on the north rail of the eastbound tracks. The automobile proceeded on across Farnam Street and turned west. As this automobile proceeded ahead and was making its turn, the plaintiff was looking toward the south intersection and could see both curb lines to the east and west of Twenty-sixth Street, and observed no streetcar in that area. When he ceased to look at the automobile, he went possibly two steps forward and he could see, out of the corner of his eye, a streetcar loom up. It was coming from the west, and at that time was 5 to 10 feet west of him. He involuntarily raised his hands upward, the streetcar struck him, and he blacked out. At the time he raised his hands, he testified that he was between the rails of the eastbound tracks. The next thing he remembered, he was in the County Hospital. He further testified that his right eye was injured in an industrial accident in 1944, and he had impaired vision in that eye, but he had good vision in his left eye. At no time when he was walking across Farnam Street did he hear any streetcar bell sound before the was struck. He walked in a straight line, and had no recollection of being thrown under the streetcar.

On cross-examination he testified that he knew there were streetcar tracks on Farnam Street before he

crossed it, and that one carried eastbound cars and the other westbound cars. He knew the streetcar he saw standing on the eastbound track would proceed east. He did not see the streetcar after he left the curb until just before it hit him. He further testified that he had stopped when the automobile was crossing Farnam Street to made its turn, and that when he hesitated on the north rail of the eastbound track, he was south of the center line of the street and westbound traffic was behind him.

The motorman of the transit company was called by the plaintiff and testified that when he first saw the plaintiff the plaintiff was to his left, directly in front of the streetcar, approximately in line with the west edge of the Webber Motors Company building on the south side of Farnam Street. Just before the streetcar struck the plaintiff, an automobile turned to the left in front of the streetcar. At that time the streetcar was at the entrance driveway into the Lied Buick used car lot. Under the conditions existing at the time of the accident, he could stop the streetcar within a distance of 40 feet.

A salesman employed by the Webber Motors Company testified that at the time of the occurrence of the accident he was inside the building on the south side of Farnam Street standing near the large window which is west of the front door on the ground floor. When he first saw the plaintiff he was between Twenty-fifth Avenue and the Car Craft Company on the north side of Farnam Street. At that time the plaintiff was walking west and proceeded to an iron light pole a little east of the entrance of the Barnhart Press building. He stopped at the pole and leaned against it. A man walked up, and apparently the plaintiff asked him a question. After that the plaintiff walked back and leaned on a parking meter directly west of the light pole and was looking to the west. His walk was unsteady. A streetcar proceeding east on the eastbound

tracks pulled into its regular loading zone to the west of Twenty-sixth Street on Farnam Street by the Lied Buick used car lot, and he believed a lady got off the car. He paid no further attention until he heard the air brakes being released on the streetcar. He then turned and looked north across Farnam Street and noticed that the plaintiff was walking off the curb south across Farnam Street with his hand in the air, and walking hurriedly. As the plaintiff got onto the track, the streetcar was practically upon him, and hit him. The streetcar then continued on east of the intersection and stopped about 12 feet past the front door of the Webber Motors Company building.

A witness and his wife and their child who was in a stroller were walking on the south side of Farnam Street going west and observed the plaintiff walking in the same direction on the north side of Farnam Street. As the plaintiff left the sidewalk and started across the street, he was walking in a diagonal direction from the northeast to the southwest. It seemed apparent to this witness that there would be an accident. His wife said: "That streetcar is going to hit him!" The plaintiff had his right arm extended as if trying to ward off the streetcar. He was going southwest when he started across the eastbound tracks. At that time the streetcar was very close to him, and when the streetcar struck the plaintiff, the plaintiff was almost directly in front of the streetcar. As soon as the plaintiff was hit, he dropped below the vision of this witness. When the streetcar stopped it was 10 feet west of the front door of the Webber Motors Company building.

On cross-examination this witness testified that the plaintiff walked normally; that when he put up his arm he was almost directly in front of the headlight of the streetcar which would place him approximately in the center of the track and at that time the streetcar was closer than 10 feet to the plaintiff; and that when his wife remarked that the plaintiff was going to be hit, this

witness looked up and at that time the plaintiff was standing in the area between the two lines of track, in the "dummy." He also testified that the plaintiff kept walking a couple of steps then all of a sudden he became aware of the streetcar. He did not stop until he was in the middle of the tracks, or until the time he was struck.

A witness who was a passenger on the streetcar, sitting on a cross seat three rows back from the front of the car on right-hand side, testified that the streetcar stopped at the first alleyway that goes into the used car lot on the south side of Farnam Street. A lady got off at the rear entrance of the car at that time. The streetcar then started at a speed of about 10 miles an hour. An automobile was coming from the south on Twenty-sixth Street into Farnam Street. The motorman observed the automobile, slowed the streetcar's speed, and the automobile proceeded across in front of the streetcar and then made a left turn on Farnam Street. The automobile was going a little faster than the streetcar and was about 5 feet distant from the streetcar when it crossed in front of it. He had been observing the plaintiff walking normally and pretty fast in a sort of southwest direction toward the westbound track, and he did not stop. The last time he saw the plaintiff he was somewhere between the south rail of the westbound car tracks and the north rail of the eastbound tracks, and when the plaintiff was in the "dummy" track, about 3 feet or so from the streetcar, this witness lost his view of the plaintiff. When the streetcar was about 3 feet from the plaintiff, its speed was 10 miles an hour. The motorman applied the brakes of the streetcar and when it stopped the front of it was about even with the door of the Webber Motors Company building. When the automobile came out of Twenty-sixth Street across Farnam Street, the plaintiff was east of the automobile.

The motorman testified that he started to work for

the transit company on August 6, 1952; that he was 52 years of age; that on September 18, 1952, at about 6 p. m., he was operating a streetcar proceeding east on Farnam Street; that he had three passengers, two ladies and a boy; that one of the ladies got off on Twenty-sixth and Farnam Streets; that he stopped the streetcar at the regular stop which is about 15 feet west of the east driveway entering the Lied Buick used car lot on the south side of Farnam Street; and that there is a pole just west of the east driveway into the Lied Buick used car lot with a yellow band about 2 feet wide which is slightly faded but can be seen, and it constitutes a stop signal for streetcars. After he let the lady off the streetcar, he closed the door and proceeded east. He sat in a special seat in the cab at the front of the streetcar, and his eye level would be 7 or 7½ feet above the ground. There were three windows in the front of the streetcar. The one directly in front was a large window, and there were two narrow windows on the left and right sides of it. His position was almost directly behind the middle window. There was a controller a little to the left and in front of him, which he operated with his left hand. He explained the manner in which he started and stopped the streetcar. There was a foot brake to his right and in front of him. After the lady got off the car, he started it forward. He observed an automobile approximately half a block south on Twenty-sixth Street. Twenty-sixth Street runs a little up hill from Farnam Street south. This automobile came to a partial stop and then proceeded north, slowed up, and then crossed in front of the streetcar and made a left turn. When the automobile came across the eastbound tracks, it was 25 or 30 feet in front of the streetcar which was barely moving. The back wheels of the automobile cleared the north rail of the eastbound tracks about the time the streetcar entered the intersection. The streetcar was in the vicinity of the east driveway of the Lied Buick used car lot when the automobile

crossed in front of it. He then pressed the controller around to three points, which increased the speed of the streetcar. Then he shut off the power, as it is a little downhill to the east. The streetcar was just about into the intersection. He first saw the plaintiff when he was immediately in front of the window to the left, in line with the west edge of the Webber Motors Company building. He saw the top of the plaintiff's head which appeared to him as if the plaintiff was in motion and coming around the front of the streetcar. He estimated the speed of the streetcar at that time at between 7 and 10 miles an hour. The instant he saw the plaintiff, he applied the brakes which locked the wheels of the streetcar. He did not sound the bell. The plaintiff disappeared from his view immediately. The streetcar came to a stop in front of the entranceway of the Webber Motors Company building. The front end of the streetcar was about 4 feet past the front door of the Webber Motors Company building when it came to a stop. After the streetcar stopped, he got out. He then told the position in which the plaintiff was lying under the streetcar.

On cross-examination there was some testimony with reference to a deposition which had been taken, wherein he testified that he stopped the streetcar in front of the church which is west of where he had stopped the streetcar according to his testimony at the trial. The church is on the north side of Farnam Street and the west side of Twenty-sixth Avenue. The regular stopping place for the streetcar is 55 feet west of the west curb of Twenty-sixth Street coming into Farnam Street from the south. The front wheels of the streetcar were 8 feet back from the front end of the car. He further testified that he had stopped the streetcar approximately 40 feet from the place where he applied the brakes, and that he could not have stopped the streetcar any sooner.

A fireman assigned to the rescue squad testified that the rescue squad arrived at the scene of the accident

about 6:06 p. m. They proceeded to jack up the two front wheels on the south side of the streetcar to enable them to get under it. He went under the streetcar to investigate the situation. The plaintiff was lying just ahead of the front wheels of the streetcar with his head to the south, his feet to the north, and his arm up against the right front wheel. They removed him from underneath the streetcar, placed him on a stretcher, and put him into the rescue unit.

A police officer who worked with another officer arrived at the scene of the accident at approximately 6:08 p. m. At that time the rescue squad was present and jacking up the front end of the streetcar. The streetcar was stopped 46 feet from the east cross walk. That was the measurement to the front end of the streetcar. He took the names of some persons who had seen the accident.

The defendant contends that the accident which occurred and the injuries suffered by the plaintiff were not caused by the negligence on the part of the operator of the defendant's streetcar, but were the direct and proximate result of plaintiff's own negligence which was more than slight and caused and contributed to any injuries sustained at said time as a result of the collision.

Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. See, Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620; Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790.

Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. See, Welsh v. City of South Omaha, 98 Neb. 148, 152 N. W. 302; Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Cuevas v. Yellow Cab & Baggage Co., *supra*.

In Belville v. Bondesson, 130 Neb. 926, 266 N. W. 901, a pedestrian was crossing a street when he was struck by an automobile. There this court said: "In examining the question of plaintiff's contributory negligence, it is necessary for us to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances. We think he would act about as follows: On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south (in the instant case to cars coming from the west) whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected."

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices." A city ordinance to like effect is in evidence.

The plaintiff contends that in the instant case he had the right-of-way and argues that the failure of the streetcar to yield the right-of-way was negligence on the part of the defendant's motorman. This statute does not relieve the plaintiff of responsibility for the results of his own negligence. The streetcar could not change its course; it is not shown that it could have stopped

after the plaintiff placed himself in front of it and indicated that he was intent on crossing the street ahead of it. See Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N. W. 2d 509.

It may be said that the plaintiff may not disregard the possibility of negligence on the part of the defendant, relying solely upon its statutory duty, then proceed to a place of danger and expect the defendant, whose streetcar cannot turn out or stop instantly, to be an insurer of his safety. See, Eggeling v. Chicago, R. I. & P. Ry. Co., 119 Neb. 229, 228 N. W. 361; Hughes v. Omaha & C. B. St. Ry. Co., *supra.* Therefore, the right-of-way statute is not conclusive of the plaintiff's right, under the evidence adduced in this case, to cross the eastbound streetcar tracks in the manner in which he did.

The following cases are applicable to the case at bar. In Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb. 168, 288 N. W. 512, this court stated the following rule: "When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." See, also, Cuevas v. Yellow Cab & Baggage Co., *supra.*

In Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614, we said: "However, as stated in Travinsky v. Omaha & C. B. Street R. Co., 137 Neb. 168, 288 N. W. 512: 'The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision.'"

Therefore, if the plaintiff saw or should have seen the defendant's streetcar and then suddenly either walked into its path or into it, the above rule would apply. See, Cuevas v. Yellow Cab & Baggage Co., *supra;* Halli-

day v. Raymond, *supra;* Leonard v. Trimble, 133 Neb. 254, 274 N. W. 593; McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N. W. 489; Heinis v. Lawrence, 160 Neb. 652, 71 N. W. 2d 127.

We conclude from the evidence that after the plaintiff left the north curb of Farnam Street and looked to the left and right for approaching traffic and had passed to the center of the street so that westbound traffic would be behind him, it then became his duty to devote the greater part of his attention to cars coming from the west whose traffic lanes he would cross in reaching the south side of Farnam Street. He did not look after leaving the curb. All that he did see before making the fatal steps into the approaching streetcar was the south curb line and the east and west curb lines of Twenty-sixth Street. Under such a situation, the aforecited rules prevail. The conclusion is inescapable that the negligence of the plaintiff contributed to, if it was not, the proximate cause of the accident, and that he was guilty of such contributory negligence that any recovery is barred as a matter of law.

Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. See, McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Allen v. Kavanaugh, 160 Neb. 645, 71 N. W. 2d 119; Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., *supra.*

"In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict." Halsey v. Merchants Motor Freight, Inc., 160 Neb. 732,

71 N. W. 2d 311. See, also, Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769.

"In an appeal to reveiw the ruling of the district court on a motion for new trial the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto." Wax v. Co-Operative Refinery Assn., *supra.*

The judgment of the trial court is reversed and the cause is remanded with directions to render judgment notwithstanding the verdict in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF PAUL V. SHIRLEY, DECEASED. MARGARET STARMAN, APPELLEE, V. MARY F. SHIRLEY, EXECUTRIX OF THE ESTATE OF PAUL V. SHIRLEY, DECEASED, APPELLANT.

76 N. W. 2d 749

Filed May 11, 1956. No. 33911.

1. **Municipal Corporations: Statutes.** When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given.
2. ———: ———. In construing a statute or ordinance the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent.
3. ———: ———. The maxim, expressio unius est exclusio alterius, means that where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Young, Holm & Miller and *Edmund D. McEachen,* for appellee.

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

SIMMONS, C. J.

This action began as a claim against the estate of Paul V. Shirley, deceased. Claimant was employed as a domestic in the home of deceased during his lifetime. She fell on stairs in the home while engaged in her employment and suffered severe injuries. Subsequent thereto Mr. Shirley died. Claimant filed her claim against the estate in county court. It was there denied. Claimant appealed to the district court.

There the claim was tried, in essence, as an action in tort for damages. For convenience we here designate claimant as plaintiff and the executrix of the estate as defendant.

Issues were made in the district court and trial was had. Defendant moved for a directed verdict at the close of plaintiff's case-in-chief, and again at the close of all the evidence. These motions were overruled. At the close of the evidence on motion of plaintiff, the trial court ruled that the only issue to be submitted to the trial court was the amount of the recovery. This motion rested on the failure of the defendant's decedent to maintain a handrail on the stairway which plaintiff claimed was required by an ordinance of the city of Omaha. There is some doubt as to the clarity of the instructions in that regard; however, the parties here take the position that that was the only issue submitted to the jury. The result was a substantial verdict for the plaintiff.

Subsequent to the filing of a motion for judgment notwithstanding the verdict or in the alternative for a new trial, and prior to a ruling thereon, defendant

moved the court for permission to amend the answer so as to challenge the constitutionality of the ordinance, if applicable to private residences, as violative of the Fourteenth Amendment of the Constitution of the United States and the Constitution of Nebraska as an unwarranted exercise of the police power. The court granted the motion and the amendment was made. Thereafter the court overruled the motion for judgment notwithstanding the verdict and for a new trial. Defendant appeals.

We reverse the judgment of the trial court and remand the cause with directions to render judgment for the defendant.

The stairway involved was between the second and third floors of the Shirley home. At the top, the stair opening was surrounded by bannisters and railing, save for the opening at the steps. The first steps below the third-floor level were winders of uneven width so as to permit a 90° turn in the stairs. There were then rectangular steps followed by winders permitting another 90° turn followed by rectangular steps to the second floor.

The stairway was enclosed by plastered walls. There was no handrail on either side of the enclosed stairway.

Plaintiff testified that she started down the stairway from the third to the second floor and when "down about 2 or 3 steps" her "foot sort of slid and caught and it threw me forward and slightly to the right"; that she did not know what caused her to start falling; and that she fell "sort of to the right wall and then grabbed toward the wall to try to break my fall and there was nothing to hang onto and I went down head first."

Plaintiff alleged that the stairway was dangerous and unsafe in that it had no handrail, bannister, or other safety device on either of the stairway walls; that the failure to provide a handrail was in violation of section 6-11.3(i) of Ordinance 14924 of the city of Omaha; that

by reason of the absence of the handrail or other safety device she was unable to avert or break her fall; and that she was injured as a proximate result of that failure and negligence.

Defendant by answer admitted the employment; denied that the stairway was unsafe; denied negligence; alleged that plaintiff's injuries were caused solely by her own negligence; and pleaded assumption of risk.

The cause was tried on those issues. The question of constitutionality of the ordinance was presented as above recited.

The defendant assigns error as to the rulings on the various matters and in the admission of evidence.

The first question to be determined here is whether or not the ordinance is applicable to a stairway in a private residence and, if so, whether it is constitutional as a proper exercise of the police power.

We have held: "The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare." State v. Geest, 118 Neb. 562, 225 N. W. 709.

Obviously a serious question is raised as to whether or not a requirement by ordinance for a handrail on a stairway in a private home is a valid exercise of the police power. However, before we reach that question, there comes the preliminary question as to whether or not the ordinance involved makes that requirement.

We go to the second question in the light of the rule that when an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given. Union Stock Yards Co. v. Nebraska State Railway Commission, 103 Neb. 224, 170 N. W. 908.

We consider the question in the light of the rule that in

construing a statute or ordinance the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. Anstine v. State, 137 Neb. 148, 288 N. W. 525.

Parts of the Building Code ordinance were introduced in evidence. Article 6 of the code relates to "Classification of Building." Section 6-6.1 provides: "All buildings and structures now existing or hereafter erected, altered or enlarged, shall be classified as follows and shall be subject to the special provisions relating to each class, and the general provisions relating to all classes.

"Special Class: Churches (The provisions covering the requirements for buildings in Class VI shall apply).

"Class I. Office buildings, hotels, clubs and rooming houses (sleeping accommodations more than ten people).

"Class II. Theatres, moving picture and vaudeville houses.

"Class III. Apartments, tenements and residences.

"Class IV. Schools, hospitals, homes for sick and aged, asylums, jails, police stations and homes for children and imbeciles.

"Class V. Storage, sales, department stores, manufacturing and garages.

"Class VI. Lodge halls, dance halls, banquet and assembly halls and skating rinks.

"Class VII. Miscellaneous, such as grand stands, athletic and amusement parks, stables and sheds."

Each classification is given a separate treatment in the article. Both parties here assume that the building falls within Class III. Under "Class III" there are 30 separately numbered sections dealing with construction in relation to height; live loads; habitable rooms; pantries, bathrooms, and water closets; bay windows and light shafts; frame buildings; quantity of air for

each person; subdividing habitable rooms; basement or cellar rooms in new tenements and existing tenements; basement walls and floors; entrance halls; stair halls; dividing walls between apartments; bay windows, courts, and vent shafts; bottom of shafts, courts, and yards; stairways; stair treads and risers; fire escapes and their obstructions; porches; access to roof; access to rooms through bedrooms; windows in water closets; bathroom requirements; sinks; buildings damaged by fire; frame tenements; and unsanitary conditions. Of these provisions, 6 are related by the language of the section to all buildings in the class, 22 are related to tenements or apartments, and 2 have provisions in part relating to tenements.

Section 6-6.61 deals with stairways. Concededly it is limited to existing and new tenements. It sets out the requirements for stairways in such structures and includes therein requirements for handrails on enclosed and open stairways.

Defendant contends that here was the place to put requirements as to handrails on stairways in private residences, had that been the intention, and that the absence of such requirement negatives such an intent.

The rule is: The maxim, expressio unius est exclusio alterius, means that where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

Plaintiff contends that a contrary intent is plainly indicated by other provisions of the act. Plaintiff then refers to the provision of section 6-6.1 (above quoted) that structures "shall be subject to the special provisions relating to each class, and the general provisions relating to all classes." Plaintiff then goes to Article 11, "Stairways," and there in a subparagraph in section

6-11.3 finds this provision upon which she bottoms her cause: "(i) Stairs which are less than three feet three inches wide shall have not less than one hand rail, and stairs which are more than three feet three inches wide shall have not less than two hand rails. Stairways which are over eight feet wide shall have one or more double intermediate hand rails with end newel posts as approved by the Chief of Building Department."

Before analyzing Article 11 we have examined those parts of Articles 7, 8, 9, and 10 which were offered in evidence.

Of Article 7, sections 6-7.1, 6-7.2, 6-7.3, 6-7.4, 6-7.5, 6-7.6, at least a part of section 6-7.7, and all of section 6-7.62 appear to have been offered in evidence. Pages 50 to 63, inclusive, of the ordinance are not here. The parts of the above sections introduced indicate by their terms that they are of a general nature. Section 6-7.1 provides that if there is a conflict between general provisions and special provisions that the special provisions shall govern.

Article 8, "Miscellaneous Details," is here only in part. Pages 65 to 72, inclusive, of the ordinance are not here. The sections that are here deal with alcove rooms, awnings, drains, and chimneys.

Article 9 is here. By its subtitle it relates to "Ventilation in Buildings of Classes II, IV, V, and VI."

Article 10 deals with fire escapes, standpipes, and automatic sprinklers for fire protection.

Article 11 deals with "Stairways." An analysis of its provisions reveals that it is not made up of "general provisions relating to all classes" of structures, but rather contains a series of special provisions relating generally to two or more of the various classes. As shown later herein it is complementary of the provisions of Article 6 which deal with Class III structures.

The opening paragraph of section 6-11.1 relates to existing stairway and stairway fire escapes in fireproof buildings.

Section 6-11.1(a) relates to stairways in structures in Classes I and V. Paragraphs (b), (c), and (d), of section 6-11.1 obviously relate to buildings in those classes.

Section 6-11.1(e) relates to the width of stairways in Classes I, IV, and V. Section 6-11.2 relates to the width of stairs and fire escapes in buildings in Classes I and V.

Without any indicated change in the classes covered by the provision, section 6-11.3 provides that the width of stairway fire escapes, and three-fourths of the width of sliding fire escapes "required by this code" may be deducted in determining the width of stairs required. This is followed by paragraph (a) relating to the location of stairways "as far from each other as practicable." There is a particular reference to buildings in Classes I to V that stairways "shall be complete in every respect from the first to the topmost floor." This is the first requirement that is specifically inclusive of Class III buildings.

Paragraph (b) requires two stairways from "every story below the street grade."

Paragraph (c) relates to stairways where two areas of the same building are separated by fireproof dividing walls.

Paragraph (d) relates to stairways where buildings are connected by fireproof bridges.

Obviously none of the above provisions are designed to be applicable generally to residences.

Paragraph (e) specifically relates to stairways in buildings in Classes I and V.

Paragraph (f) relates to exterior stairways in buildings of Classes I and V.

Paragraph (g) relates to the width of stairways and stairway fire escapes in buildings in Class V.

Paragraph (h) relates to the width of stairways, and the reduction in width in the higher stories with a particular provision that no stairway in a department store shall be less than 3 feet in width.

Then follows paragraph (i) which the plaintiff would

pick bodily out of its context and use as a separate, independent, general provision applicable to all classes of structures. It provides for handrails on stairways depending on their width. Obviously, by sequence and context, it relates to the stairways mentioned preceding it—and those provisions do not relate as to width in anywise to residence stairways. The language in section 6-11.3(i) that "Stairways which are over eight feet wide shall have one or more double intermediate hand rails with end newel posts" might in exceptional cases be applicable to a residence, but obviously would be quite applicable to Class V structures, the classification referred to in the second preceding paragraph.

We find nothing in Article 11 which directly or by inference sustains a contention that section 6-11.3(i) was intended to apply to stairways in residences. A contrary intent appears to be the only rational conclusion.

Paragraph (j) prohibits "spiral" stairways in stairways "hereafter erected"; prohibits winders "except in residences"; and permits "circular or elliptical stairways" under certain circumstances. Paragraph (k) relates to the height of risers and the width of treads. Paragraph (l) relates to "counter balancer" stairways or "ladder fire escape" hereafter "erected on any public thoroughfare." Paragraph (m) requires the approval of the Building and Fire Departments as to the location of "every stairway required by this Article."

Obviously these provisions cannot be held as normally applicable to residences while they might reasonably have reference to the particular classes of structures named in the article.

Our conclusion that Article 11 is complementary of Article 6 is sustained by an examination of the handrail provisions of the various classes of buildings as set out in Article 6 in comparison with those of Article 11. There is no provision as to stairways and handrails in the provisions dealing with Class I buildings in

Article 6. That void is supplied by the provisions in Article 11 as to that class of structures.

Section 6-6.16 makes provision as to stairways in Class II buildings. As above pointed out, Article 11 makes no specific provision as to handrails and stairways in buildings of this class.

As above pointed out, section 6-6.61 relates to stairways and handrails in tenements only. Article 11 makes no reference to stairways or handrails in this class of buildings.

As to Class IV buildings, section 6-6.82 provides for the number and width of stairways, and that "All stairways shall have railings on both sides." (§ 6-6.82(c).) As above pointed out, Article 11 makes no reference to this subject matter except as to the formula contained in section 6-11.1(e) for determining the width of stairways and fire escapes.

Article 6 with reference to Class V buildings contains provisions (section 6-6.105) relating to stairways being kept unobstructed, and relates the exit doors, halls, and passageways to the width of the stairs. It provides for their lighting and numbering. As above pointed out, provisions relating to stairways and handrails as to this class of buildings are stated in Article 11.

Article 6 with reference to Class VI buildings contains provisions (section 6-6.115) as to the width of stairways, number of stairways, and that "Stairways shall have handrails on each side." As above pointed out, Article 11 makes no reference to handrails or stairways in this class of buildings.

Class VII includes grandstands, amusement parks, grain elevators, stables, sheds, and miscellaneous structures. Neither Article 6 nor Article 11 makes specific reference to stairs, stairways, or handrails in connection with the structures in this class. An absence of such provision as to this class of structures appears to be reasonable. And yet if plaintiff is correct in the analysis of the ordinance, then it would seem to follow that the

provisions of section 6-11.3(i) would apply to all buildings and structures included in this miscellaneous classification. There is no indication of such a far-reaching intent in this ordinance.

We find that section 6-11.3(i) does not apply to stairways or require handrails in private residences. Plaintiff grounded her action on the applicability of that section. It necessarily follows that the trial court erred in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

The judgment is accordingly reversed and the cause remanded with directions to render judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LESLIE WARREN, APPELLANT.
76 N. W. 2d 728

Filed May 11, 1956. No. 33919.

1. **Criminal Law: Appeal and Error.** Only judgments and sentences of the district court upon conviction of felonies and misdemeanors under the criminal code may be brought to this court by petition in error.
2. **Municipal Corporations: Appeal and Error.** A prosecution for violation of a city ordinance, which does not include an offense made criminal by statute of this state, is a civil proceeding to recover a penalty, and a judgment and sentence therein may be reviewed in this court only by appeal.
3. **Municipal Corporations: Evidence.** On appeal of a conviction in a municipal court of a violation of an ordinance, the district court will take notice of the facts the former could have noticed judicially before the removal of the case to the district court.
4. **Municipal Corporations: Pleading.** A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal, except in case of a complete failure to state an offense.
5. **Municipal Corporations: Trial.** The judgment of a district court in a prosecution for a violation of a city ordinance will on appeal to this court be accorded the usual presumptions of

regularity, and it will be presumed, nothing appearing to the contrary, that the facts before the court were sufficient to sustain a finding of a violation of the ordinance.

6. ———: ———. The word "manure" has no technical meaning and has not acquired a commercial one different from its ordinary use. Manure is a common product universally known and hence an ambiguity or indefiniteness cannot arise from the use of the term.

7. ———: ———. An offense charged in a prosecution for a violation of a city ordinance is required to be proven by only a preponderance of the evidence to justify a conviction.

8. **Municipal Corporations: Appeal and Error.** The credibility of witnesses and the weight of evidence are for the jury to determine in a prosecution for a violation of a city ordinance and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed. Petition in error dismissed.*

Ernest A. Hubka, for appellant.

Frederick W. Carstens, for appellee.

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

BOSLAUGH, J.

Appellant was charged in the police magistrate court for the city of Beatrice with violation of an ordinance of the city. He was convicted of the offense with which he was accused. He took an appeal to the district court. The result of a trial in that court was a verdict of guilty and he was adjudged to pay a fine and the costs of the case. His motion for a new trial was denied. He has appealed from the judgment and sentence and he has also filed a petition in error in this court.

The accusation made against appellant, herein called defendant, as stated in the complaint is that he on or about the 3rd day of July 1954, did cause, allow, and permit manure to accumulate on his premises without providing pens, boxes, bins, or other suitable receptacles

therefor, contrary to the provisions of the ordinances of the city of Beatrice. The charge made against defendant is not an offense by any statute of this state. This is a civil proceeding to recover a penalty for the violation of an ordinance. An appeal is the proper procedure to obtain a review in this court of the conviction and sentence of defendant. Wells v. State, 152 Neb. 668, 42 N. W. 2d 363; State v. Renensland, 160 Neb. 206, 69 N. W. 2d 860. The petition in error was improvident and should be dismissed. § 25-1912, R. R. S. 1943; Wells v. State, *supra.*

The defendant at the termination of the evidence of appellee, referred to hereafter as city, by motion asked the district court to dismiss the case for the reason that the complaint did not contain sufficient facts to allege the commission of an offense. The motion was denied. The defendant properly reserved exception to the action of the court and he challenges in this court the adjudication against him on the basis that the ruling of the court was prejudicial to him.

A section of the municipal code of the city contains this relevant provision: "It shall be the duty of all property owners and tenants occupying premises upon which manure of any kind accumulates to provide pens, boxes, bins or other suitable receptacles therefor * * *." The specific alleged defect in the complaint upon which defendant relies is that it does not aver that he owned the premises where it is claimed the offensive material accumulated or that he occupied them. Defendant urges the point that a complaint must contain all facts essential to constitute the violation charged and to connect defendant with the violation, and that a complaint cannot be aided by intendment, inference, or presumption but must positively and explicitly state all the essential elements of the offense. The complaint alleges that defendant did cause and permit manure to accumulate on his premises. This is an adequate charge that defendant was a property owner and that as such he caused

and permitted manure to accumulate thereon, contrary to the provisions of the code. There was no objection made to the complaint until the evidence of the city was concluded at the trial. In such a situation the language will be more tolerantly viewed, if there is not an entire absence of necessary language, than when an early objection is made to the sufficiency of the charge of an offense. There was not a complete failure to charge an essential element of the offense within the ambit of the provisions of the code alluded to above. State v. Novak, 153 Neb. 596, 45 N. W. 2d 625. The complaint informed defendant that he was charged with a violation of the ordinances of the city because he caused and permitted offensive material to accumulate on his property within the city. It is established in the record that defendant has owned and occupied the premises concerned in this litigation since the fall of 1950. The matter complained of did not mislead or prejudice the defendant. His assignment in this respect may not be sustained.

The correctness of instruction No. 5 is disputed by defendant. It consists of a recitation of the substance of what is referred to in the record as Sec. 9-214 of an ordinance of the city which makes it the duty of all property owners occupying premises upon which manure of any kind accumulates to provide suitable receptacles therefor; a statement of the substance of the portion of what is identified in the record as Sec. 9-402 of an ordinance of the city to the effect that animal manure must be so kept as to be securely protected from flies and the elements; and a definition of the word "manure." The defendant says that the statement therein that "The ordinance further provides that animal manure must be so kept to be securely protected from flies and the elements" is not a part of the ordinance under which the complaint was made which is identified by defendant as ordinance 9-214. The part of the instruction quoted above is the substance of what he refers to as ordinance 9-402. He says the court erroneously and prejudicially

charged the jury on a matter as an issue which is not in the complaint or supported by evidence. The record is not definite as to whether or not sections 9-214 and 9-402 are contained in a single ordinance of the city. It was stipulated by the parties "* * * that Sec. 9-214 of the Beatrice municipal code of 1941, being general revision ordinance No. 500 of the city * * * is a city ordinance which was in full force and effect on July 3, 1954 * * *; that Sec. 9-402 of the same code was an ordinance" in force on that date. The district court in the instruction spoke of them as being parts of an identical ordinance. In the first sentence thereof there are the words "an ordinance of the City." Later it is said therein "* * * and further provides that any person violating said ordinance shall be punished * * *." The second part of the instruction quoted above to which specific objection is made contains the expression "The ordinance further provides." The penalty section of the ordinance referred to in the instruction is identified in the record as Sec. 9-701. The court did not submit to the jury as an issue or separate essential element of the offense the part of the instruction quoted above. The conclusion is justified that the sections referred to are parts of the general revision ordinance No. 500 of the city as it appears in the municipal code of 1941 and that the court by the challenged instruction advised the jury of the substance of two sections of the ordinance on the subject of how the undesirable material referred to therein should be cared for and handled within the city of Beatrice. There was inserted in the complaint "Ord 9-214 and 9-402" between the words "other suitable receptacles therefor" and "contrary to the Provisions of the Ordinances of the City." Defendant stipulated sections of an ordinance identified by these numbers in evidence on the trial of the case. This indicates he understood that the complaint was based upon and the prosecution was had for a violation of sections 9-214 and 9-402 of an ordinance. A municipal court may take

judicial notice of the ordinances of a city. The district court, on appeal of a conviction in a municipal court of a violation of an ordinance, will take judicial notice of the facts the latter could have noticed judicially before removal of the case to the district court. The judgment of the district court in such a case is on appeal to this court accorded the usual presumptions of regularity. Wells v. State, *supra;* State v. Novak, *supra.*

The definition of the word "manure" contained in the instructions is objected to by defendant as incorrect and improper. However, it is substantially the same in meaning as the one quoted by defendant in his brief from Webster's New International Dictionary. In Keyes & Watkins Livery Co. v. Freber, 102 Mo. App. 315, 76 S. W. 698, it is said: "The manure was the subject-matter of the contract. It is described in the contract as 'all manure that may accumulate there (at the plaintiff's stable) every day.' Nothing is said about any foreign mixture, but it is a matter of common knowledge that manure accumulated in stables does become mixed with the material used to bed the animals and the mixture is universally denominated manure. The word has no technical meaning, nor has it acquired a commercial one differing from its ordinary one. Manure is a common article, well known to all mankind, and hence an ambiguity can not arise from the use of the term."

The trial court advised the jury that the essential elements of the charge against defendant which the city was required to prove beyond a reasonable doubt before the defendant could be found guilty were that he in the city of Beatrice on or about July 3, 1954, caused and permitted manure to accumulate on his premises and that it was not contained in pens, boxes, bins, or other suitable receptacles. The charge then said that if the state had established both of them beyond a reasonable doubt it was the duty of the jury to find the defendant guilty, but "if you have a reasonable doubt as to the truth of said propositions or either of them, or if you

find that the State has failed to establish said propositions or either of them by evidence beyond a reasonable doubt, then in that case it would be your duty to find the defendant not guilty of said offense." Defendant assails the statement above quoted. This court has condemned similar statements in instructions. Flege v. State, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. N. S. 1106; Hayward v. State, 97 Neb. 9, 149 N. W. 105. It may not be considered prejudicial in this case. The city was required to prove the charge made against the defendant by only a preponderance of the evidence. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81; Wells v. State, *supra;* State v. Renensland, *supra.* The defendant may not complain that the district court required the city to satisfy the jury of the truth of the charge made by the evidence beyond a reasonable doubt. He had the benefit of it.

It is argued by defendant that the ordinance does not require that manure on premises in the city be placed in a suitable container and that the assumption in the charge that it does is wrong. The ordinance is clear that any property owner of premises occupied by him in the city upon which manure accumulates must put it in a suitable receptable securely protecting it from flies and the elements and dispose of it in a manner satisfactory to the board of health.

The city produced positive and substantial evidence that manure accumulated on the premises in the city owned and occupied by defendant; that it remained there for a considerable time; that it caused annoyance and discomfort to persons living near the premises; that defendant persistently refused to remove it when he was requested and demanded to do so by authorities of the city, including the members of the board of health; and that the offensive, noxious material was not placed in any container or receptacle. The defendant testified that there was no accumulation of the offensive material on his premises that was not placed in

a metal container which was confined in a closed bin expressly constructed and maintained for that purpose; that the container when filled was transported to a farm near but outside the city and emptied; that defendant did not at any time place, deposit, or leave any of the offensive material at the place on his premises described by the witnesses for the city; and that there was not any manure there. The defendant produced much and substantial corroboration to support his version of the matter. The evidence relative to the issues of the case is sharply conflicting. The credibility of witnesses and the weight of evidence are for the jury to determine in a prosecution for a violation of a city ordinance and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701; Sall v. State, 157 Neb. 688, 61 N. W. 2d 256. The evidence supports the verdict. It is not clearly wrong.

The petition in error filed in this court should be and it is dismissed. The sentence and judgment of the district court should be and they are affirmed.

AFFIRMED. PETITION IN ERROR DISMISSED.

F. E. IRELAND, APPELLANT, V. GEORGE J. STALBAUM ET AL., APPELLEES.

77 N. W. 2d 155

Filed May 18, 1956. No. 33918.

1. **New Trial: Appeal and Error.** In a case where the court has set aside a verdict and judgment and granted a new trial without giving any reasons therefor, and an appeal has been taken from the order, it is ordinarily necessary to examine the entire record to ascertain whether or not the action of the court in granting the new trial finds justification.
2. **Negligence.** In an action based on negligence where the evidence shows as a matter of law that the plaintiff was guilty of negligence which was slight and that of the defendant was less than gross, or more than slight by comparison with that of

the defendant which was gross, he may not be allowed to recover.

3. **Evidence.** Where the parties to an action have stipulated to the existence of a fact or the truth of testimony the stipulation to the extent it has been made is binding upon the parties, the jury, and the court.
4. **Evidence: Trial.** Where a stipulation has been entered into that a witness or witnesses if called would give testimony of a particular kind or character or in a particular manner such evidence is not necessarily binding upon the triers of the facts. The triers of the facts are under such circumstances free to consider its weight and credibility the same as any other evidence adduced on the trial of the case.
5. **Trial.** A general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

John H. Keriakedes, for appellants.

Leo M. Bayer, for appellee Abegg.

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

YEAGER, J.

This action as commenced was one for damages by F. E. Ireland, plaintiff, against George J. Stalbaum and William David Abegg, defendants. Service of process was not had upon Stalbaum, hence the action proceeded with Ireland as plaintiff and Abegg as defendant. Originally the action was in two causes of action, the first for damages to a truck and semi-trailer belonging to the plaintiff and the second for loss of use of the truck and trailer. The second cause of action was removed from consideration of the jury by the trial court. The propriety of the removal of this cause of action is not presented here for consideration. The appeal here therefore relates alone to the first cause of action.

The case was tried to a jury. The jury returned a

verdict in favor of the plaintiff for $1,853.66. Judgment was rendered on the verdict. The judgment does not appear in the transcript but by recital in the order granting a new trial it appears that one was rendered. Thereafter Abegg, who will be hereinafter referred to as the defendant, filed a motion for new trial. This motion was sustained and the defendant was granted a new trial. From the order granting a new trial the plaintiff has appealed.

The motion for new trial contains numerous assignments of error. The order of the trial court sustaining the motion contains no specifications of reason or reasons for the action.

In this light it ordinarily would become necessary to examine the entire record to ascertain whether or not the action of the trial court in granting a new trial finds justification. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

In the light of the manner, however, in which the parties have presented this case to the court this does not become necessary. They have limited consideration to one proposition as will hereinafter appear.

As pointed out this is an action for damages wherein the plaintiff charged that his truck and semi-trailer were damaged on account of negligence of the defendant. The defendant denied that he was guilty of negligence and affirmatively charged that plaintiff was guilty of contributory negligence.

The case was tried upon these theories, which theories were fully submitted by the charge to the jury. On this appeal there is no contention by either party that there was anything erroneous in the charge.

On the trial of the case the plaintiff adduced a considerable amount of evidence by witnesses as to the physical injury to his equipment. Also introduced in evidence were a number of photographs disclosing to the jury the appearance of the equipment after the occurrence.

No witness was called by either party as to the amount of the damage in dollars and cents, or the cost of repair. The evidence in this respect was by stipulation. The stipulation was as follows:

"MR. KERIAKEDES: It is stipulated and agreed by and between the parties that the service manager of the Denver Branch of the White Motor Company if present would testify that it required the sum of $2,570.37 in labor and parts to restore the White tractor involved herein to its condition as nearly as possible prior to the accident; that said witness would further testify that he is familiar with the fair and reasonable charges for work of that kind, and that said charge was the fair and reasonable charge.

"It is further stipulated and agreed by and between the parties that the service manager for the Tempte Brothers Company would testify that the fair and reasonable cost of restoring the trailer involved herein to as nearly as possible the condition it was in prior to the accident involved herein is $349.07; and that said witness would further testify that he was familiar with the fair and reasonable charges for such items of labor and material and that said charges were the fair and reasonable charges for such work.

"MR. BAYER: So stipulated."

It is to be observed that the total was $2,919.44 and it is further to be observed that the parties did not stipulate that the amount was the cost of repair but only that the witness if called would so testify.

The theory upon which the parties assume that the court granted a new trial is that the stipulated evidence indicated conclusively the amount of the damage; that since the jury returned a verdict for only $1,853.66 it became likewise conclusive that the jury found that the plaintiff was guilty of contributory negligence which accounted for the difference between the two amounts; and that this being true it became necessary to say in the light of this large variance between

the damage and the verdict that the contributory negligence was more than slight, or more than slight by comparison with that of the defendant which was gross within the meaning of the comparative negligence law, in consequence of which no verdict and judgment could be sustained in favor of plaintiff. If, of course, it is true that the evidence did disclose as a matter of law that the plaintiff was guilty of negligence which was slight and that of the defendant was less than gross, or more than slight by comparison with that of the defendant which was gross, he could not be allowed to recover. See Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403.

The basis of the plaintiff's appeal is that this assumption is invalid, in consequence of which the court erred in granting a new trial. This is the only question presented.

It is of course a sound and basic principle that where the parties have stipulated to the existence of a fact or the truth of testimony, the stipulation to the extent that it has been made is binding upon the parties, the jury, and the court. 83 C. J. S., Stipulations, § 23 (b), p. 51.

It however is not true that where a stipulation has been entered into that a witness or witnesses if called would give testimony of a particular kind or character or in a particular manner that such evidence is necessarily binding upon the triers of the facts. 83 C. J. S., Stipulations, § 23 (f), p. 54; 50 Am. Jur., Stipulations, § 16, p. 616; Goess v. Lucinda Shops, Inc., 93 F. 2d 449, 115 A. L. R. 264; Hutcheson v. Savings Bank, 129 Va. 281, 105 S. E. 677. Such a stipulation leaves a jury free to consider its weight and credibility the same as any other evidence adduced on the trial of the case.

In this case, as pointed out, there was evidence of damage other than that contained in the stipulation. This consisted of photographs and testimony as to

physical injury. Under the rules stated the jury had the right to consider this evidence along with the evidence contained in the stipulation and in the light of all of it determine for itself the true amount of plaintiff's damages.

In this light the jury with perfect propriety and in valid performance of its function could have arrived at $1,853.66 as the true and full amount of plaintiff's damage. If it did so, it performed its duty as that duty was outlined in the instructions. Again if it did so it must be said that the verdict was valid.

To say that the jury did otherwise would be to say on conjecture and speculation alone that it failed to perform its proper duty as outlined in the instructions. Verdicts of juries may not thus be impeached.

The correct rule to be applied in situations such as this is that a general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. It will be declared void only where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed upon by the jury. Abrams v. Lange, 158 Neb. 512, 63 N. W. 2d 781. See, also, Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739.

The rule applied to this case, instead of making it necessary to declare the verdict invalid, requires only that it be said that the jury in the performance of its functions under its instructions evidently found that plaintiff's total damage was $1,853.66.

Accordingly the court erred in granting a new trial. The order setting aside the verdict and judgment is reversed and the cause remanded with directions to reinstate the judgment which was set aside.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF MILDRED M. WEBER, DECEASED. SARAH M. BENNETT ET AL., APPELLANTS, V. BLUE MOUND CEMETERY ASSOCIATION, A CORPORATION, ET AL., APPELLEES.
77 N. W. 2d 158

Filed May 18, 1956. No. 33929.

1. Wills. Any estate, right, or interest acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator. § 30-203, R. R. S. 1943.
2. ———. A will speaks as of the date of the death of the testator.
3. ———. A will which makes defined bequests and devises to individuals and persons named, and contains a general residuary clause, will, as against collateral heirs, be held to dispose of all the property of the estate, unless the contrary appears from the language of the will itself.
4. ———. The residuary clause of a will is just as much a part of the will as any other provision contained therein, and a disposition of the property to which it applies is just as effective as a disposition pursuant to any other provision.
5. ———. The test of power of disposition by a residuary clause is whether the property belonged to the testator, and not whether the testator knew that the property was his. The legal effect of such a clause is to cover everything capable of being passed by will which is not otherwise well disposed of, and includes such property as the testator may have forgotten or overlooked, or to which he may not have known that he had title.

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

Paul H. Bek and *Wagner, Wagner & Robak,* for appellants.

Ginsburg & Ginsburg, Russell A. Souchek, and *Ivan A. Blevens,* for appellees.

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

SIMMONS, C. J.

This case in the trial court presented multiple issues.

On appeal here it presents basically the question as to whether dollar proceeds of building and loan stock are to be distributed under the terms of a will or as intestate property distributable to the heirs of a deceased person.

The trial court, in effect, held that the money was the property of the estate, distributable under the residuary clause of the will. We affirm that judgment.

Mildred M. Weber, on October 14, 1947, made her will. She will be referred to hereinafter as the testatrix.

Paragraph Fourth of the will provided: "I am not unmindful of the fact that I have a sister, Sarah M. Bennett; two nieces, Phydella W. Belford, and Barbara Carr; and two nephews, Lawrence G. Weber and Byron T. Weber, the last above four named being children of my deceased brother, Otto, but it is my wish that they have and receive nothing from my estate." The parties named in this provision are the claimants in this case. They will be referred to herein as plaintiffs.

Paragraph Sixth of the will provided: "My personal property, money or credits remaining on hand after the payment of the charges herein enumerated, and the settlement of my estate, I hereby give and bequeath unto the Blue Mound Cemetery of Milford, Nebraska, to be held by them in trust, the income therefrom to be used annually and seasonably for the maintenance of my grave and those of my brother and sister, father and mother, located in said cemetery, said income in addition to be used for maintenance, I enjoin on them to place flowers upon our grave, particularly on decoration day." The Blue Mound Cemetery of Milford, Nebraska, will hereinafter be referred to as the cemetery.

During testatrix's lifetime, $25 had been deposited with the cemetery to be placed in the perpetual maintenance fund applicable to one of these graves. Also $50 for said fund had been paid as a part of the purchase price of a lot in the cemetery. The annual income from

these two deposits was about $2.25. It was insufficient to provide adequate care of the graves.

Subsequent to the making of the will, testatrix received by inheritance from a brother a deposit in excess of $5,000 in a building and loan association in Lincoln, Nebraska. In May 1949 this deposit was withdrawn and $5,000 redeposited to the account of testatrix. We will refer to this deposit as the building and loan money.

For many years Charles F. Barth of Seward, Nebraska, had been the trusted friend and confidential and legal adviser of testatrix and represented her in all such matters.

Testatrix was a woman of strong will. Several times prior to February 1950 she offered to and insisted on giving the building and loan money to Mr. Barth as a gift. He refused to so receive it.

On February 3, 1950, testatrix signed a letter to the building and loan association directing them to change this account to "Mildred Weber or Chas. F. Barth as joint depositors and owners and to the survivor thereof." She recited that the "pass book" was enclosed to permit compliance.

It does not appear who suggested this form and condition of the change of the payees of this money. It does appear that Mr. Barth participated in it and his wife signed the letter as a witness. There is no contention here that there was any overreaching or influence exerted on testatrix by Mr. Barth. Such a conclusion is negatived by the evidence. Rather it may be concluded that Mr. Barth assented to the repeated requests of his client and friend that he accept this money.

Also on February 3, 1950, the building and loan association issued a new certificate to "Mildred M. Weber and Chas. F. Barth, as joint tenants or either or survivor." The amount shown deposited was $5,125.77.

On the day that this transfer was made, testatrix advised a trusted friend of what she had done; that if she needed the money she could use it; but that after

her death Mr. Barth would pay her bills and hospital, doctor, and funeral expenses, and that whatever was left was to go to the cemetery.

About that same time she told other friends of what she had done with the building and loan money; and that if she needed it for any purpose during her lifetime, it was hers, but that after her death it was to be Mr. Barth's property.

It does not appear that any part of the money was withdrawn during testatrix's lifetime. She died June 25, 1952. Thereafter Mr. Barth was paid $141.38 as interest and dividends on the building and loan money. Mr. Barth was nominated by testatrix as executor of the will. He offered it for probate on June 30, 1952.

Thereafter certain of testatrix's heirs-at-law contested the will. It appears that this contest was withdrawn as a result of a substantial payment made by a devisee of land under the will. The will was admitted to probate.

Mr. Barth declined to serve as executor and Mr. Russell M. Struthers, an attorney of Seward, Nebraska, was appointed as administrator with the will annexed. We will herein refer to him as the administrator.

Mr. Blevens, Mr. Barth's law partner, was employed as attorney for the administrator.

During the course of these proceedings this transaction of the testatrix and Mr. Barth became a matter of community discussion. It was embarrassing to Mr. Blevens, not only in his service as attorney for the administrator, but in his law practice. Mr. Barth was seriously ill. It caused worry to him. He felt that he had done nothing wrong. Representatives of the cemetery discussed the matter with the attorney for the administrator and took the position that the building and loan money should be recovered for the benefit of the estate and the cemetery's benefit under the residuary clause. The administrator and Mr. Blevens discussed the matter on several occasions. Mr. Blevens felt that it was impossible for Mr. Barth to keep this money.

Mr. Blevens discussed the matter on a number of occasions with Mr. Barth, both as his partner and as representative of the administrator.

Mr. Blevens undertook to withdraw as the representative of the administrator as to this question or, if need be, generally. Mr. Barth secured the advice of other counsel. Obviously they considered the strict rules of law that apply to a transaction of this kind between lawyer and client.

In May 1953, the time came for the filing of an inventory by the administrator. Mr. Blevens was preparing it. He then went to Mr. Barth and insisted that he act in the matter. Mr. Barth then signed a certificate of transfer in blank on the passbook representing this account. At his direction, Mr. Blevens delivered it to the administrator. Later the administrator received the money and accounted for it as assets of the estate. At the same time Mr. Barth paid to Mr. Blevens the amount he had received in dividends and it too was delivered to the administrator by Mr. Blevens and included in his account. Mr. Barth died in September 1953.

It appears that all claims against the estate were paid and, in addition to the money here involved, there are several hundred dollars in the hands of the administrator.

The plaintiffs, in county court and in district court proceedings, claimed that the funds were intestate funds and passed to them as heirs-at-law.

Plaintiffs argue here that the transaction with Mr. Barth and testatrix was one which vested title as a joint tenant in Mr. Barth when made and that upon the death of testatrix that title became vested in Mr. Barth unconditionally as sole owner. On that foundation plaintiffs argue that when the building and loan money was transferred to Mr. Barth there was an ademption of the residuary bequest to the cemetery and that that provision was then revoked by operation of law. They then argue that when the money was later paid by Mr. Barth

to the administrator it became an asset of the estate undisposed of by the will, and hence was intestate property that passes to them by operation of law. We find no merit in this contention.

Plaintiffs would use the claimed ademption not to satisfy but to defeat the very purpose of the testatrix in the residuary bequest.

The plaintiffs in this argument ignore the obvious fact that the validity of the transfer to Mr. Barth of the building and loan money was challenged by the administrator and, by negotiation, the money was recovered by the estate as funds which at all times had properly belonged to the estate. As far as the estate is concerned, the funds stand as though the transfer to Mr. Barth and the retransfer to the estate had never occurred.

If, as plaintiffs contend, the gift to Mr. Barth was complete, then it would seem that this money belongs to the estate of Mr. Barth. We are advised of no rule of law that would permit the plaintiffs to successfully assert title to it under those circumstances. The title, if any, of Mr. Barth to this property is not an issue here. He effectively removed and determined that question.

Here the corpus of the gift was received by the donee, the validity of the gift was challenged, and it was returned to the estate of the donor. It became a part of the assets of the estate distributable under the will.

Section 30-203, R. R. S. 1943, provides: "Any estate, right, or interest acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator."

A will speaks as of the date of the death of the testator. Tiehen v. Hebenstreit, 152 Neb. 753, 42 N. W. 2d 802.

As of the date of her death, testatrix bequeathed personal property, money, or credits remaining on hand to the cemetery under the terms and conditions set out.

It is manifest that this includes after-acquired property.

In In re Estate of Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D 128, we held: "A will which makes defined bequests and devises to individuals and persons named, and contains a general residuary clause, will, as against collateral heirs, be held to dispose of all of the property of the estate, unless the contrary appears from the language of the will itself."

The rule is applicable here. Not only does a contrary intent not appear "from the language of the will itself," but here the testatrix specifically provided that these plaintiffs should "receive nothing from my estate."

In In re Verchot's Estate, 4 Wash. 2d 574, 104 P. 2d 490, it was held: "The residuary clause of a will is just as much a part of the will as any other provision contained therein, and a disposition of the property to which it applies is just as effective as a disposition pursuant to any other provision. * * *

"The test of power of disposition by a residuary clause is whether the property belonged to the testator, and not whether the testator knew that the property was his. The legal effect of such a clause is to cover everything capable of being passed by will which is not otherwise well disposed of, and includes such property as the testator may have forgotten or overlooked, or to which he may not have known that he had title." See, also, 57 Am. Jur., Wills, § 1415, p. 946; 69 C. J., Wills, § 1477, p. 421; In re Ingham's Estate, 315 Pa. 293, 172 A. 662, 93 A. L. R. 510.

The trial court correctly decreed that the building and loan money involved herein was properly a part of the assets of the estate of the testatrix and is required to be paid as a part of the residue disposed of by the residuary provision of the will.

Other provisions of the decree are not challenged here.

The judgment of the trial court is affirmed.

AFFIRMED.

HERMAN R. KURTH ET AL., APPELLEES, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
76 N. W. 2d 924

Filed May 18, 1956. No. 33945.

1. **Mandamus: Officers.** In order to justify the issuance of a peremptory writ of mandamus against public officers it must appear that the duty is imposed by law, that the duty exists at the time the writ is applied for, and that the duty to act is clear.
2. ———: ———. The discretionary powers of public officers cannot be controlled by mandamus.
3. ———: ———. The acts of public officers which are to be performed in a ministerial as distinguished from a governmental or discretionary capacity may be controlled by mandamus.
4. ———: ———. Where public officers are required to examine facts and law in order to make a determination, action to be taken on that basis is not ministerial but is governmental and judicial, and mandamus will not lie to control the action.

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

Jack M. Pace and *Wayne R. Douce*, for appellants.

Homer L. Kyle, for appellees.

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

YEAGER, J.

This is an action in mandamus by Herman R. Kurth and Albert P. Schwarz, plaintiffs and appellees, against the City of Lincoln, a municipal corporation, the Mayor and the respective members of the City Council of the City of Lincoln, defendants and appellants.

For cause of action the plaintiffs pleaded in substance that they and their predecessors in title were the owners in fee simple during all of the times involved of certain real estate described as Lot 52 of Irregular Tracts in the southeast quarter of Section 14, Township 10, Range 6, in Lincoln, Lancaster County, Nebraska; that on or about May 21, 1937, the city of Lincoln instituted proceedings to condemn a part of this land for street

and highway purposes (apparently the land was situated in what was at that time described as Lot 38, Irregular Tracts); that the proceeding was heard and award rendered thereon from which award the plaintiffs herein appealed to the district court; that after appeal an agreement was reached whereby the matter was settled; that by the settlement, among other things, the city agreed to zone the east 194 feet of the property remaining in Lot 38 of Irregular Tracts lying north of the Cornhusker Highway Cut-off for local business (this area appears to be the area lying to the north of the Cornhusker Highway Cut-off in what is now described as Lot 52 of Irregular Tracts); that in 1939 in performance of the agreement the city did zone this area for business; that in 1953 while the area was zoned for business the plaintiffs negotiated a lease agreement for the lease of a part of this area for the erection of a filling station; that thereafter a building permit was requested but denied by the defendant city; that it was denied for the reason that it had been rezoned for park purposes (presumably it was rezoned between the time the agreement was entered into and the building permit requested); that the rezoning and repeal of the ordinance classifying the real estate for local business purposes was contrary to and in violation of the terms of the agreement entered into by the city and the plaintiffs in 1939; that it was done without notice to plaintiffs; that it was confiscatory and in violation of the provisions of the Constitutions of the United States of America and of the State of Nebraska in that it was the taking of private property for public use without just compensation and without due process of law; and that it was arbitrary and unreasonable.

On the facts as alleged the relief prayed for was that a peremptory writ of mandamus be issued requiring the defendants to revoke and annul the present zoning classification; requiring that the defendants zone the area for local business purposes; and requiring that

a permit be issued to the plaintiffs and their successors in interest and title to erect a filling station and other buildings suitable and proper for the operation of small business enterprises.

To the petition the defendants filed a general demurrer. This was overruled. Thereafter an answer was filed. The answer admitted the alleged capacity of the defendants, the ownership of the real estate in question, and the alleged condemnation proceeding. Otherwise it was a general denial.

A trial was had to the court at the conclusion of which a decree was rendered by the terms of which the relief prayed by the plaintiffs was granted. The defendants duly filed a motion for new trial which was overruled. From the decree and the order overruling the motion for new trial the defendants have appealed.

The brief of the defendants contains three assignments of error which they contend constitute grounds for reversal. The first one is that the court erred in ordering the issuance of a peremptory writ of mandamus to the defendants commanding them to annul the present zoning, to restore the former zoning, and to grant permission for the erection of filling stations and the conduct of other business on the area.

In this assignment inheres a question which, in the light of plaintiffs' pleaded cause of action, is fundamental and must receive first consideration. The question apparently was never presented to the trial court and it has not been presented here by the briefs of the parties except to the extent that it inheres in this assignment of error. Nevertheless in the interest of legal and judicial integrity and understanding it may not be ignored.

From the petition with its prayer, which has been abstracted in considerable detail herein, it becomes clear that the action is neither nominally nor in substance injunctive in character. It is an action in mandamus. In the action is sought a peremptory writ of

mandamus requiring the governing body of the city of Lincoln to repeal a part of a zoning ordinance, to reenact an effectually previously repealed zoning provision, and to issue general authority for the construction of unnamed structures on the described area. The decree of the district court responded affirmatively to the petition and its prayer.

No historic or contemporary rule of law or equity has come to our attention under which relief such as this under the conditions such as those described in the petition may be awarded to an aggrieved party by the extraordinary writ of mandamus. There are numerous rules the effect of which is to say that it may not be done.

One of these rules is that in order to justify the issuance of a peremptory writ of mandamus against public officers it must appear that the duty is imposed by law, that the duty exists at the time the writ is applied for, and that the duty to act is clear. State ex rel. Long v. Barstler, 122 Neb. 167, 240 N. W. 273; State ex rel. Schoonover v. Crabill, 136 Neb. 819, 287 N. W. 669; Hess v. Taylor, 142 Neb. 184, 5 N. W. 2d 346; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26; State ex rel. Bates v. Morgan, 154 Neb. 234, 47 N. W. 2d 512.

The purpose of this action is to compel the legislative body of the city of Lincoln by its vote to repeal a part of the zoning ordinance enacted in 1953 and to enact a new zoning provision restoring the property involved to the status it had prior to 1953. It cannot well be said that any law specially enjoins the performance of any such act or acts upon this body.

Another rule is that the discretionary powers of public officers cannot be controlled by mandamus. State ex rel. Union Fuel Co. v. City of Lincoln, 68 Neb. 597, 94 N. W. 719; State ex rel. Nebraska B. & I. Co. v. Board of Commissioners, 105 Neb. 570, 181 N. W. 530; State ex rel. Strange v. School Dist., 150 Neb. 109, 33 N. W.

2d 358; State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862; State ex rel. Shineman v. Board of Education, 152 Neb. 644, 42 N. W. 2d 168; State ex rel. Bintz v. State Board of Examiners, 155 Neb. 99, 50 N. W. 2d 784; State ex rel. League of Municipalities v. Loup River P. P. Dist., 158 Neb. 160, 62 N. W. 2d 682.

Obviously the action of the members of the legislative body of the city is a matter of discretion and is not the subject of mandatory control by the courts.

Another rule is that acts of public officers which are to be performed in a ministerial as distinguished from a governmental or discretionary capacity may be controlled by mandamus. State ex rel. Bates v. Thayer, 31 Neb. 82, 47 N. W. 704; State ex rel. Pinkos v. Rice, 98 Neb. 36, 151 N. W. 925; State ex rel. Ball v. Hall, 130 Neb. 18, 263 N. W. 400; State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341; State ex rel. Shineman v. Board of Education, *supra;* State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297.

Regardless of what may be said concerning the portion of plaintiffs' cause of action relating to issuance of a permit to use the area involved for business purposes, it will of course not be contended that the portion referring to the repeal and enactment of zoning ordinances relates to a ministerial function. The portion related to the permit for use will be adverted to later here.

Still another rule, or more accurately a phase of the discretionary rule applicable to public officers, is that where public officers are required to examine facts and law in order to make a determination, action taken on that basis is not ministerial but is governmental and judicial and mandamus will not lie to control the action. 55 C. J. S., Mandamus, § 132 (b), p. 218; Klevesahl v. Byington, 1 Cal. App. 2d 671, 37 P. 2d 179; Taylor County Farm Bureau v. Board of Supervisors of Taylor County, 218 Iowa 937, 252 N. W. 498; Rogers v. Brown,

135 Me. 117, 190 A. 632; Harden v. City of Raleigh, 192 N. C. 395, 135 S. E. 151.

This rule is peculiarly applicable to that phase of the cause of action relating to repeal and enactment of zoning ordinances.

Under these rules it is clear that the district court was without legal right, by peremptory writ of mandamus, to command the defendants to rezone as was commanded by the decree. In this respect the decree was erroneous.

The portion of the decree commanding the issuance of a permit for use of the property for business purposes was also erroneous, under the same rules, but more particularly under the rules that the writ of mandamus is not available unless it is one specially enjoined by law, and if the officers are required to examine facts and law in order to take action.

In this case facts which the members of the city council were required to examine to ascertain whether or not the plaintiffs were entitled to a permit disclosed an ordinance which on its face denied that right. In this light, and of course, the question of the validity of the ordinance and the further question of the power of the city to issue the permit, among perhaps others, became questions of law and fact necessary to be examined.

In practical application it may be observed that, in the very nature of things, under the facts and law which required examination in this respect so long as the 1953 zoning ordinance had not been repealed, or had not been adjudged invalid and ineffective, there existed no basis for the issuance of a permit for a use other than that permitted by the ordinance. Thus it becomes clear that on this phase of the pleaded cause of action the plaintiffs were not entitled to a writ of mandamus.

The conclusion therefore is that the court erred in the entirety in granting a peremptory writ of mandamus. The further conclusion is that the pleadings

will not permit the consideration of the case on any theory other than a petition for writ of mandamus.

It follows that the decree of the district court should be and it is reversed and the action is dismissed.

REVERSED AND DISMISSED.

GRACE PHILLIPS, APPELLANT, V. CHARLES PHILLIPS, APPELLEE.
77 N. W. 2d 152

Filed May 18, 1956. No. 33957.

1. **Divorce.** Remarriage is a change of circumstance that may be considered by the court along with other changes of circumstances in passing upon an application to reduce child support payments fixed in a previous order or decree.
2. ———. Remarriage, standing alone, does not afford a valid basis for reducing payments for child support. It does not bear directly upon the legal duty of a father to contribute to the support of his minor children by a former marriage.
3. ———. In determining the provision to be made for the support of minor children in a divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in accordance with the best judgment and sound discretion of the court.
4. ———. Where there has been a change of circumstances, the same rule applies in determining whether child support payments should be increased or reduced.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Leamer & Graham, for appellant.

E. J. McCarthy, for appellee.

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

CARTER, J.

The plaintiff appeals from an order of the district court for Dakota County reducing the amount awarded

as child support in a decree of divorce from $80 per month to $54 per month.

The record shows that on November 27, 1947, plaintiff was awarded a decree of divorce from the defendant. Plaintiff was awarded the custody of the three minor children, Romona, Ronald, and Linda. An award for the support of the children in the amount of $80 per month was also made.

On December 16, 1954, defendant filed his application in the original divorce action to obtain a reduction in the amount of such support payments. Defendant alleged that the three children are of the following ages: Romona 17, Ronald 16, and Linda 11. He alleged further that Romona had become an unwed mother and had removed to the State of Oregon, where she is living with her grandmother. The defendant alleged the remarriage of the plaintiff in July 1952, and his own remarriage and the birth of a child which he is obligated to support. He contended that due to the foregoing changed conditions the child support payments were excessive and prayed that they be reduced.

The record shows that defendant earned a net take-home pay of $320 per month. His present wife earns approximately $700 per year. He testifies that his monthly expenses are about $305 per month. The evidence shows defendant's annual income to be $3,840 and his annual living expenses to be $3,660. The plaintiff lists among her living expenses many items of household and car expenses which cannot be properly charged to the support of these minor children. The allegations of fact in the application are not in dispute and are generally supported by the evidence.

It is a general rule in this jurisdiction that remarriage, and the resulting new obligations, is a change of circumstance that may be considered by the court upon an application to revise and alter the child support provisions of the original decree. McIlwain v. McIlwain, 135 Neb. 705, 283 N. W. 845. But the re-

marriage of the father does not relieve him of the obligations fixed by the decree. Winter v. Winter, 95 Neb. 335, 145 N. W. 709, 50 L. R. A. N. S. 697. The fact of remarriage, standing alone, is not sufficient to justify a modification of child support payments. It does not bear directly upon the legal duty of a father to contribute to the support of his minor children by a former marriage.

It is a general rule that in determining the amount of child support to be awarded, the status, character, and situation of the parties and all the attendant circumstances must be considered, and the amount determined in accordance with the best judgment and sound discretion of the court. Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535. Where there has been a change of circumstances the same rule applies in determining whether child support payments should be increased or reduced. Hoffmeyer v. Hoffmeyer, 157 Neb. 842, 62 N. W. 2d 138.

In considering the evidence in this case the trial court could properly find that changes of circumstances did exist. The defendant had remarried and had a wife and child to support. The plaintiff had also remarried and some of her living expenses had become a liability of her husband. The court could consider the fact that Romona had left the jurisdiction of the court and the care and custody of her mother. The age of the parties, the health and present earning capacity of the defendant, and all the changes in circumstances are subject to the scrutiny of the trial court. The record does not disclose that the trial court abused the legal discretion which the law vests in that court when it reduced the child support to $54 per month. The plaintiff states that she will have to assist Romona for some time. There is no evidence that she has done so since Romona has left her care and custody, nor any credible evidence that it will be necessary for her to do so.

We do not find that defendant lacks the ability to

pay child support in the amount of $80 per month. We do find that the trial court had evidence before it of changed conditions from which it could properly find that child support in the amount of $54 per month was reasonable and proper under all the circumstances shown by the record. We find no reason for holding that the trial court abused its discretion in reducing the amount of child support as it did. If conditions and circumstances again change, a further application to the court by the aggrieved party provides a complete remedy. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MERTON O. BATES, RESPONDENT.

77 N. W. 2d 302

Filed May 25, 1956. No. 33813.

1. **Judges.** A county judge is prohibited by Article V, section 14, of the Constitution from practicing law in any court in any matter arising in or growing out of any proceeding in his court.
2. **Attorney and Client.** The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and any others which are adopted by this court.
3. ———. Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by this court in proper cases.
4. **Equity.** Laches is an equitable doctrine and it does not result from the mere passage of time.
5. ———. The objection of laches is not tenable to defeat a cause if there has been no material change in the position of or prejudice by the delay to the objector.
6. ———. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to respondent as a defense.

Original action. *Judgment of censure and reprimand.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for relator.

William S. Padley, for respondent.

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

BOSLAUGH, J.

Respondent became a member of the bar of Nebraska in the month of June 1911. He has practiced law at Lexington since 1917 except when he was in military service for about 2 years and during the time he was judge of the county court. He was appointed judge of the county court of Dawson County in the early part of 1942, was thereafter twice elected to that office, and he qualified and served as such officer until January 1953. He was for many years before his appointment as judge of the county court acquainted with and was counsel for Isaac Large, the owner of considerable valuable land in Dawson and Keith Counties. Respondent was familiar with the transactions and affairs of Isaac Large and had accumulated a record of many important transactions involving him, some of which resulted in and were determined by litigation in which he was represented by respondent.

Isaac Large, hereafter referred to as the deceased, died testate June 17, 1939. Proceedings were commenced May 31, 1944, in the county court of Dawson County in reference to his will and for the administration of his estate in which his will was admitted to probate and administration of his estate was granted. The deceased by his will gave his property to his daughters, Edna Tuttle and Della Wyman, as tenants in common.

An action was brought in the district court for Dawson County by Edna Tuttle against Della A. Wyman and her husband to obtain an adjudication that lands owned by the deceased in his lifetime were held in trust by defendants for the benefit of the estate of the

deceased and to secure an accounting of rents and income from the land collected and received by defendants. Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744. That case was pending in the district court but was not at issue when the proceedings were instituted in the county court for the probate of the will and the administration of the estate of the deceased. Respondent accepted employment by the defendants and he continued as their counsel and conducted the case on their behalf until its termination on July 13, 1945. Respondent disqualified himself and refrained from acting as county judge in the proceedings in the county court in the matter of the estate of Isaac Large, deceased. There was additional litigation in the district court of Dawson County which grew out of the proceedings in the matter of the estate of Isaac Large, deceased, in which respondent was counsel for Della A. Wyman and her husband. That litigation terminated July 7, 1948. In re Estate of Large, 149 Neb. 783, 32 N. W. 2d 751.

The complaint filed in the pending proceedings charges respondent with unprofessional conduct in the practice of law, violative of the law of Nebraska and the canons of professional ethics because while he was judge of the county court of Dawson County he engaged in the practice of law as counsel for litigants in the district court for Dawson County and in the Supreme Court of Nebraska in matters arising in or growing out of proceedings in the county court of that county; that Dawson County had a population in excess of 16,000 inhabitants; and that respondent pursued a course of conduct in the practice of law by him which was in violation of the canons of professional ethics and the law of Nebraska. Respondent by answer denied the charges of improper practice of law made against him. The cause was referred to a referee. His report finds that the evidence sustains all the allegations of the complaint and recommends that respondent be reprimanded and required to pay the costs of this proceeding. Respond-

ent has filed exceptions to the report of the referee.

There is no issue of fact in this cause. The evidence conclusively establishes the charge made by the complaint. The participation of respondent in the litigation referred to above as counsel for parties thereto was a violation of the prohibition of the Constitution that no county judge shall practice law in any court in any matter arising in or growing out of any proceeding in his court. Art. V, § 14, Constitution of Nebraska. This provision is, as respondent asserts, self-executing. It has been considered, interpreted, and applied by this court. In Tucker v. Heirs of Myers, 151 Neb. 359, 37 N. W. 2d 585, it is said: "This provision clearly means, as it applies to a county judge, that such judge may not appear as counsel in any matter in his own court or in any matter in which he would be disqualified if he had acted as county judge. By disqualifying as county judge he may not thereby remove himself from the prohibition of this constitutional provision in any matter in which he would otherwise be prohibited from engaging. * * * It is just as improper to disqualify himself as county judge for any reason and participate in such a trial in the district court in view of the constitutional provision cited. * * * This being true, counsel for appellee was clearly disqualified from appearing as counsel for plaintiff in the district court and for such plaintiff as appellee in this court in the matter presently before us." See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

The improper professional conduct ascribed to the respondent by the complaint and verified by the evidence transgressed section 31 of the Canons of Judicial Ethics of the American Bar Association which provide in part: "If forbidden to practice law, he should refrain from accepting any professional employment while in office." It is said in State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra:* "The ethical standards relating to the practice of law in this state are the

canons of professional ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court. * * * Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by this court in proper cases."

Respondent has interposed laches as a defense. The litigation in which the unprofessional conduct of respondent occurred as charged herein continued until and terminated on July 7, 1948. The complaint before the Committee on Inquiry of the Nebraska State Bar Association was made and filed November 16, 1954. There is no pleading or showing that respondent changed his position or that he was in any manner or degree prejudiced by the time which elapsed after the litigation terminated until the time when the original complaint was made. Laches is an equitable doctrine and it does not result from the mere passage of time. The defense of laches exists only if it is inequitable to enforce the right of the claimant. The objection of laches is not tenable to defeat a cause if there has been no material change in the position of the objector. Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921; Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618; Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. See, State ex rel. Nebraska State Bar Assn. v. Merten, 142 Neb. 780, 7 N. W. 2d 874; In re Smith, 73 Kan. 743, 85 P. 584; Annotation, 45 A. L. R. 1110.

Respondent violated the constitutional prohibition and the canons of judicial ethics. He is subject to disciplinary action. His improper conduct cannot be justified, condoned, or disregarded. It must be and is condemned. He knew he was not observing the law. He sought out opposing counsel and solicited and obtained his promise not to interpose objections to respondent accepting em-

ployment as a lawyer in and appearing and conducting the litigation for his clients in the belief that opposing counsel alone could object thereto. He scrupulously avoided previous engagements as an attorney in other matters throughout the long years of his incumbency as judge and in his testimony implies that the litigation in which he did appear was considered exceptional because it was "a good lawsuit." Conduct of this character does not enhance the standing of the profession with the public or contribute to the dignity of and respect for the courts of which he is an officer. It justifies an inference of compromise with principle induced by monetary consideration. It manifests a disregard for law. It argues that an attorney who is willing to violate one rule intended to govern his action as judge may likewise be induced to disregard other laws if the inducement is deemed adequate. No officer of the court may be permitted to set the law in defiance with impunity. The obligation of a court is to give effect to the law wisely, impartially, and inexorably.

However, the record presents mitigating circumstances. There is an absence of moral turpitude. The professional transgression was not habitual or repetitious. The employment of respondent and his participation in the related cases were his only indulgence in practicing law during the many years he was judge of the county court. He has otherwise acted honorably. He is near the age of three score years and ten, he is substantially retired, and he does not maintain an office. He has renounced any purpose or desire to attempt to again engage in the active practice of law. His age and circumstance contribute to the probability of his adherence to the determination to have relief from the rigors of active practice of law.

The exceptions to the report of the referee should be and they are overruled. The report of the referee should be and it is approved.

It is the judgment of the court that respondent should

be and he hereby is censured and reprimanded and that the costs and allowances of this cause should be and they are taxed to respondent.

JUDGMENT OF CENSURE AND REPRIMAND.

JOAN K. RILEY, APPELLEE, V. NATIONAL AUTO INSURANCE COMPANY, A CORPORATION, APPELLANT.
77 N. W. 2d 241

Filed May 25, 1956. No. 33932.

1. **Automobiles: Insurance.** Damages to an automobile resulting from a collision, where plaintiff's husband was operating it with plaintiff's permission, while in an intoxicated condition, was an "accidental loss" within an automobile policy providing collision coverage.
2. ———: ———. An accident within the meaning of an automobile insurance policy indemnifying against loss by collision or upset includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.
3. ———: ———. The payee named in a loss-payable clause of an automobile insurance policy is a proper but not an indispensable party.
4. **Parties.** Where a defect of parties is not raised by demurrer or answer, such defect is waived unless such parties are indispensable to the rendering of a final judgment consistent with equity and good conscience.
5. **Automobiles: Insurance.** Where a provision of an automobile insurance policy purports to limit the liability to a used-car price fixed in a current publication, and such current publication does not establish such price, such provision is ineffective as a limitation upon the liability of the insurer.
6. ———: ———. A clause providing for a deduction of $100 for each collision or upset contemplates one deduction for each accident giving rise to a cause of action.
7. ———: ———. An automobile insurance policy is a contract and its plain provisions will be enforced in the absence of statutory regulation or illegality.
8. ———: ———. An unambiguous provision fixing the limit of the insurance company's liability for damage to an automobile is binding upon the parties and the instructions of the court

dealing with the assessment of damages should be in conformity therewith.

9. ———: ———. Where the contract of insurance provides that the insurer may repair the insured vehicle after it has been damaged in an accident, it is error for the trial court not to instruct on the measure of damages with reference to repairs where there is evidence that it can be repaired and placed in substantially as good condition as before the accident.

10. Trial. Where the evidence conclusively establishes that a verdict is excessive, it will ordinarily be set aside for that reason.

11. **Trial: Appeal and Error.** Where the evidence discloses that the trial court unduly restricted the oral argument of defendant's counsel in submitting its case to the jury, it constitutes reversible error unless it is shown not to have prejudiced the defendant's case.

12. Interest. The recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount.

13. **Attorney and Client: Insurance.** The court has no authority to award an attorney's fee in favor of the plaintiff upon rendition of judgment in its favor in an action for damages resulting from a collision under an automobile insurance policy, it being an indemnity policy not within section 44-359, R. R. S. 1943, or a uniform course of procedure.

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

Ginsburg, Rosenberg & Ginsburg and *Joseph V. Benesch*, for appellant

Kelley, Grant & Knowles and *John F. MacKenzie*, for appellee.

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

CARTER, J.

This is an action on an automobile-collision policy to recover damages to the insured vehicle resulting from an accident while it was being operated by plaintiff's husband. The verdict and judgment were for the plaintiff in the amount of $3,400. The defendant appeals.

On July 13, 1953, plaintiff procured a policy of insurance from the defendant company which covered and insured a certain 1953 model Jaguar automobile owned by the plaintiff. She alleged that on August 8, 1953, the automobile was being operated by her husband, with her permission, and became involved in a collision. It was claimed that the automobile was damaged to such an extent that it was beyond repair. The value of the automobile before the collision was alleged to have been $4,000 and the value thereafter, $500. Plaintiff prayed for judgment in the amount of $3,500.

The defendant by its answer admitted the execution and delivery of the automobile insurance policy. It alleged further that plaintiff's husband had a pecuniary interest in the insured automobile which would inure to his direct benefit, that there was no accident within the meaning of the insurance contract, and that the loss and damage to the automobile is not within the insuring provisions of the policy.

By her reply the plaintiff alleged that defendant is estopped to assert the foregoing defenses and has waived them by investigating the claim, by entering into negotiations with the plaintiff, by taking possession of the automobile, and by denying liability on the claim.

The evidence shows that on August 8, 1953, Riley drove the automobile from his home to his place of employment in Omaha. After his working hours, and about 1 p. m. of said day, he drove to a tavern where he engaged in the drinking of intoxicating liquors until about 7 p. m. He then drove the automobile to Onawa, Iowa, arriving there about 9 p. m. He engaged in drinking intoxicating liquors until some time after midnight, when he entered his car and with deliberation set out to violate traffic rules and regulations to attract the attention of the police. He was successful in his efforts and the police gave chase. He drove out of town at a high rate of speed, eluded the police, and returned to Onawa to further entice the police into pursuing him.

The police again gave chase, and while the pursuit was in progress plaintiff's husband had a series of mishaps. The evidence shows he struck the curb of the street several times, that he sideswiped a parked car, that he struck and knocked down some road signs near the post office, drove head-on into the foundation of a church, and otherwise damaged the automobile until it would not operate. The police shot at the automobile a number of times and two bullet holes were found in the body of the car. Plaintiff's husband was arrested and convicted of drunken driving as a result of this episode.

The automobile was removed to a garage in Onawa. Plaintiff subsequently caused it to be removed to Blair, Nebraska, and it was subsequently taken to Loyal's garage in Omaha at her direction. The car was later removed to the DeLuxe Body Company, where it was repaired. There is a dispute in the evidence as to the person who directed the removal of the car to the DeLuxe Body Company for repairs, but it is clear that both the plaintiff and defendant knew that it had been taken there for that purpose. There is evidence in the record that it cost $919.82 to repair the car and that it was in substantially the same condition after it was repaired as before the accident. There is evidence in the record that the automobile was worth from $500 to $1,500 after the alleged accident. There is undisputed evidence that the car had depreciated in value to the extent of $500 after the purchase of the car and before the accident. Interest was allowed on the judgment from the date of the accident. Defendant asserts this was error. The trial court allowed attorney's fees to the plaintiff which the defendant alleges as error. Certain instructions to the jury are alleged to be erroneous and complaint is made that defendant's counsel was unduly restricted by the court in presenting the case to the jury.

The evidence will not sustain a finding that John Riley had such an interest in the automobile as would

defeat plaintiff's claim under the provision providing that: "The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile."

The insuring agreements of the policy include the following coverage for collision or upset: "Direct and accidental loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile." It is the contention of the defendant that, although the result was accidental in the sense that it was unintentional, it was not caused by accidental means within the purview of the foregoing policy provision. It is argued by the defendant that plaintiff's husband embarked upon a plan or scheme of becoming drunk and disorderly, and engaged thereafter in a plan or scheme of conduct to drive the motor vehicle in an unlawful manner. While so engaged, the automobile was damaged while Riley was attempting to escape arrest. This, the defendant asserts, is not injury or damage sustained as the result of any direct and accidental loss or damage to the vehicle by collision within the coverage of the policy.

The evidence is clear that plaintiff's husband was drunk when he left Omaha for Onawa, and that he continued to drink intoxicating liquors thereafter. That he was intoxicated during the time the events herein recited took place and until his arrest by the Onawa police is sustained by the record. There is no contention made that plaintiff was negligent in permitting her husband to use the car. The drinking by her husband and the occurrences at Onawa were without any connivance or knowledge on the part of the plaintiff. While it is true that plaintiff's husband became drunk and drove the car while in that condition, the damaging of the car was not intentional. Although plaintiff's husband intentionally drove plaintiff's car while he was intoxicated, there is no evidence that he did the recited acts deliberately, even though it is clear that

they were the result of negligence. The results of the conduct of her husband were not the natural and probable consequences of the act of plaintiff in entrusting the use of the automobile to him. As to the plaintiff, the consequences were not the result of design, could not have been reasonably anticipated, were unexpected, and were produced by an unusual combination of fortuitous circumstances. It was therefore a damage produced by and was the result of accident.

In Terrien v. Pawtucket Mutual Fire Ins. Co., 96 N. H. 182, 71 A. 2d 742, in discussing the term "accidental loss," it was said: "While it could be found that the plaintiff's action in driving his truck over the holes was deliberate, he was not so far chargeable with knowledge that the resulting breakdown was probable, as to require a finding that he deliberately incurred the loss. The collapse of the truck could be found to be an untoward, unusual and unexpected event. What happened was well within the meaning attributed to the word 'accidental' as commonly understood. * * * The loss which occurred to the plaintiff's automobile on July 13 was 'an accidental loss' within the meaning of the policy, which contained no exclusion of loss due to negligent or intentional acts of the insured."

The term "accident" was discussed in American Accident Co. of Louisville v. Carson, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. S. R. 473, as follows: "While our preconceived notions of the term 'accident' would hardly lead us to speak of the intentional killing of a person as an 'accidental' killing, yet no doubt can now remain, in view of the precedents established by all the courts that the word 'intentional' refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was acci-

dental, and the injury one inflicted by accidental means within the meaning of such policies."

This court determined the meaning of the word "accident" as follows: "An accident, within the meaning of contracts of the kind here considered, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby." Railway Officials & Employes Accident Assn. v. Drummond, 56 Neb. 235, 76 N. W. 562. See, also, Cutrell v. John Hancock Mutual Life Ins. Co., 145 Neb. 550, 17 N. W. 2d 465.

Applying these principles to the case at bar, we hold that the episode herein related was an accident as to the plaintiff within the meaning of the policy. The events which followed the permissive use of the car by her husband were not reasonably to be anticipated, were unexpected, and were produced by an unusual combination of fortuitous circumstances. While it might be said that Riley intentionally drove the car while he was intoxicated, it does not follow that the accident was intentional from the fact of intoxication alone. We think the insured automobile suffered damage as a result of accident within the insuring provisions of the policy.

The defendant contends that the payee named in a loss-payable clause is an indispensable party to an action on the policy. Such payee is a proper but not an indispensable party. The record does not show that this question was ever raised by demurrer or answer. We think the alleged defect of parties was waived as provided by section 25-808, R. R. S. 1943. See, also, Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533.

The policy contained an endorsement containing the following language: "It is understood and agreed that the Actual Cash Value shall not exceed the average 'as is' price published by the current N.A.D.A. Official Used Car Guide Book." The evidence shows that the current National Automobile Dealers Association official

used car guide book did not list the value of 1953 model Jaguar automobiles. Defendant offered in evidence the October 1953 guide book and the trial court sustained objections thereto. Defendant's claim of error on this ruling is without merit. No such used-car price being in existence at the time the provision was placed in the contract, it was a vain attempt to limit liability under the policy.

The defendant urges that the trial court erred in holding that there was but one collision and that the total deductible amount from any sum awarded the plaintiff was $100. The applicable provision of the policy provides coverage for collision and upset as follows: "Actual cash value less $100.00 which deductible amount shall be applicable to each collision or upset." The series of events which produced the damage to the insured vehicle in the present case constitutes but one accident within the meaning of the foregoing provision. While the automobile actually struck more than one object and, technically, was involved in more than one collision, the intent of the provision is that the insured shall have coverage over and above $100 on each accident, whether collision or upset. It does not contemplate that $100 shall be deducted for each contact made with other objects while an accident is taking place. The meaning of the provision is that $100 is deductible for each collision or upset for which a cause of action arises. Here there is but one claim, one cause of action, and one deduction of $100. The trial court did not err in so holding.

It is the contention of defendant that the trial court failed to properly instruct the jury as to the measure of damages. On the question of damages the court instructed the jury as follows: "In assessing the amount of the plaintiff's recovery, you will allow her the difference between the fair and reasonable cash value of her automobile immediately before the accident and collision, and the fair and reasonable cash value of her automo-

bile immediately after the accident and collision less $100.00."

With reference to the limit of liability by the company, the policy provides: "The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

"The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company."

Under this provision the company had the right (1) to repair the automobile if it could be repaired and placed in substantially the same condition as before, or to wholly replace it; (2) pay the loss in money; or (3) if a total loss resulted, to pay not to exceed the actual cash value of the automobile. There is evidence in the record that the automobile had been repaired for the sum of $919.82 and that it was in good running condition. The jury should have been permitted an opportunity to find that the automobile could have been repaired and placed in substantially the same condition as before. If the jury found that the automobile could not be repaired and placed in substantially the same condition as before the accident, and that the loss was total, it should have been instructed to allow plaintiff the difference between the actual cash value of the automobile before and after the accident, less the $100 deductible amount provided for in the policy. It is error for the trial court to submit the case to the

jury on the sole theory that the automobile was a total loss when there is evidence in the record that it could be repaired and placed in substantially the same condition as it was before the accident. It is for the jury to determine under the evidence whether the automobile could be repaired and placed in substantially the same condition as before and, if so, to determine the damages on that basis under proper instructions. If the jury finds that the automobile could not be repaired, it should determine the actual cash value of the automobile before and after the accident as provided by the policy. The rule is: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265. The instruction on damages was insufficient in that it failed to advise the jury as to the proper method of assessing the damages under the provisions of the policy and the other evidence adduced on the subject. The error is prejudicial to the rights of the defendant.

The defendant contends the judgment is excessive under the evidence. In this respect the evidence shows that the automobile cost $4,277 when it was purchased by plaintiff on or about July 13, 1953. The evidence is undisputed that it depreciated in the amount of $500 before the accident. The evidence shows that the cash value of the automobile after the accident was from $500 to $1,500. The policy provided for a deduction of $100. Accepting the minimum cash value of the automobile after the accident as $500, a judgment in excess of $3,177 would exceed any amount which the evidence will support under the instructions as given by the court. The judgment is clearly excessive.

The defendant complains of the action of the trial

court in limiting the argument of its counsel in presenting its case to the jury. The record shows that the trial court refused to permit defendant's counsel to allude to the insuring provisions of the policy. We point out that the action was brought on the insurance policy. Its provisions prescribed the liability assumed by the defendant. It was error for the trial court to refuse defendant's counsel the right to refer to the insuring provisions of the insurance policy, it having been properly received in evidence. Other limitations upon the defendant's argument to the jury relate to the repair and subsequent condition of the automobile. Upon proper instructions as to the measure of damages, such argument is entirely proper. In view of the necessity for a retrial of the case under proper instructions as to the measure of damages, the claimed error is not likely to occur again and we shall therefore devote no further attention to it.

The verdict of the jury awarded interest on the amount recovered from the date of the accident on August 8, 1953. The rule is stated in National Fire Ins. Co. v. Evertson, 157 Neb. 540, 60 N. W. 2d 638, as follows: "Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount." The present case is within this rule and interest may be recovered only from the date a judgment is rendered.

The defendant complains of the action of the trial court in allowing plaintiff's counsel an attorney's fee. Plaintiff contends that such fees are allowable as costs under section 44-359, R. R. S. 1943. The contract of insurance sued upon in this case is an indemnity policy and as such it is not within the cited section of the statute. This was fully discussed in Borden v. General Ins. Co., 157 Neb. 98, 59 N. W. 2d 141. See, also, Ehlers

v. Campbell, 159 Neb. 328, 66 N. W. 2d 585. It was error to allow an attorney's fee in this type of case.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NORMAN PHOENIX, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
77 N. W. 2d 237

Filed May 25, 1956. No. 33938.

1. **Criminal Law.** By statute, the court or a magistrate thereof may, in case of the violation of probationary conditions, upon motion and showing by affidavit of the county attorney, issue a warrant for the arrest of the probationer. Such procedure is not exclusive. The same purpose may be accomplished by the filing of a verified information stating specifically the conduct constituting violation of the probationary conditions.
2. ———. Section 29-2219, R. S. Supp., 1955, simplifies the procedure to vacate a parole. However, such proceeding may be instituted by a verified information.
3. ———. To vacate a parole granted by the district court, whether by motion or information, the defendant is entitled to notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial.
4. ———. The accused is entitled to a fair and impartial hearing. He may not demand a formal trial or trial by jury. It is sufficient that the violation of the conditions is established by clear and satisfactory evidence, and proof beyond a reasonable doubt is not required.
5. ———. Technical formality and preciseness of charge are not a prerequisite to judicial investigation of whether or not defendant has observed the conditions of his probation. A statement of the facts showing the claimed violation of his parole, notice to the defendant of a hearing, and a lawful hearing on the charge, are sufficient.

ERROR to the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Eugene D. O'Sullivan and *Eugene D. O'Sullivan, Jr.*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams*, for defendant in error.

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

MESSMORE, J.

The plaintiff in error, hereinafter called defendant, brings his case to this court for review. The questions raised by the defendant for determination are as follows: (1) Whether or not the proper statutory procedure was followed on July 5, 1955, by the State in bringing the matter of his parole violation before the trial court to act upon; and (2) whether or not the trial court committed error in permitting the deputy county attorney to amend an information filed in this proceeding on July 5, 1955, the amendment being allowed on September 22, 1955, after the 3-year probation period had expired, the expiration date of the same being July 21, 1955.

The transcript discloses that on July 16, 1952, an information was filed in the district court for Douglas County charging Norman Phoenix with grand larceny. On the same date the defendant entered his plea of guilty to the charge of grand larceny. Sentence was deferred, and an assistant public defender was appointed to defend Phoenix. On July 21, 1952, the trial court placed the defendant on probation to the adult probation officer of Douglas County for a period of 3 years from and after July 21, 1952, the conditions of probation being generally as provided by sections 29-2218, 29-2219, and 29-2220, R. R. S. 1943.

On July 5, 1955, an information was filed against the defendant charging him with violation of his parole. Under the terms of the probation, the defendant was required to make a report each month to the adult probation officer. The information alleged that the defend-

ant failed to make his report to the adult probation officer for the month of December 1954. The information alleged that the defendant, in the month of January 1955, left the jurisdiction of the court and the State of Nebraska without the permission of the adult probation officer, and failed to notify such officer of his change of address. On September 22, 1955, the State, over objections of the Douglas County public defender, was permitted to delete from the information the words "did in the month of January, 1955, leave the jurisdiction of the court and the State of Nebraska without the permission of the said Adult Probation Officer or this court" and to amend it by adding the words "did fail to make monthly reports to the Adult Probation Officer for the months of January to July, 1955, inclusive."

Counsel for the defendant objected to these amendments and requested a 24-hour continuance before pleading to the information. The defendant then filed a motion to quash the amended information. It recited that the amendment to the information charging that the defendant did violate the terms of the order of probation entered by the court by failing to report to his probation officer for the months of January through July 1955, was improper for the reason that said amendment was not made until after the period of probation fixed by said order of probation had expired and charged a violation of probation totally separate and distinct from the violation of probation charged in the information. The motion to quash the amended information was overruled. The defendant was arraigned and entered his plea of not guilty. The trial court sentenced the defendant to serve a period of 3 years in the State Penitentiary from and after September 23, 1955.

With reference to the first question above set forth, the defendant argues that under scetion 29-2219, R. R. S. 1943, and before it was amended by the 1953 Legislature, which is now cited as section 29-2219, R. S. Supp., 1955, the proper procedure was by information filed in

the district court to bring a matter of parole violation before the court; and that under section 29-2219, R. S. Supp., 1955, the court or a magistrate thereof may, under subdivision (3) (b) of said section "in case of the violation of such probationary conditions, upon motion and showing by affidavit of the county attorney, issue a warrant for the arrest of the probationer," which changes the mode of procedure from what it was formerly.

In Sellers v. State, 105 Neb. 748, 181 N. W. 862, this court held: "In a proceeding to vacate a parole granted by the district court, the correct practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, but a proceeding by motion, stating that defendant violated his parole, may be sustained, if defendant had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial." See, also, Moore v. State, 125 Neb. 565, 251 N. W. 117; Moyer v. State, 144 Neb. 673, 14 N. W. 2d 220; Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

In Young v. State, 155 Neb. 261, 51 N. W. 2d 326, we cited the foregoing cases, referred to the principle announced therein, and said: "Obviously, if a matter of this kind may be raised by motion without depriving a defendant of any rights protected by law, it of necessity follows that compliance with section 29-1602, R. R. S. 1943, is not mandatory as to an information charging a probation violation and the failure to endorse names of witnesses thereon is not error."

At the time of all of the above holdings by this court, the statute provided in part: "* * * The court or a magistrate thereof may * * * in case of violations of the probationary conditions issue a warrant for the arrest of the probationer, * * *; and in case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation; * * *."

Section 29-2219, R. S. Supp., 1955, provides in part, in

(d) under (3) thereof, as follows: "in case of the violation of such probationary conditions, impose any penalty which it might have imposed before placing the defendant on probation; * * *."

It will be noted the change that was made in the statute pertains to the conditions precedent, that is, to the issuance of a warrant and to the arrest of a probationer. There is no intention expressed in the statute that the proper procedure to obtain a hearing for revocation of probation is not as before by verified information.

Technical formality and preciseness of charge are not a prerequisite to judicial investigation of whether or not defendant has observed the conditions of his probation. A statement of the facts showing the claimed violation of his parole, notice to the defendant of a hearing, and a lawful hearing on the charge, are sufficient. Carr v. State, *supra;* Sellers v. State, *supra;* Moyer v. State, *supra.*

Under the proceedings in the instant case the defendant was afforded due and proper notice of hearing; he had the assistance of counsel; and he had a fair and impartial hearing wherein testimony was taken. The record discloses that the defendant violated his parole as contended for by the State. In fact, he does not deny such violation. In a case such as the instant case, the accused is entitled to a fair and impartial hearing, but it is generally held that he may not demand a formal trial or trial by jury. It is sufficient that the violation of conditions is established by clear and satisfactory evidence, and proof beyond a reasonable doubt is not required. See 24 C. J. S., Criminal Law, § 1618 (d), p. 195.

Section 29-2219, R. S. Supp., 1955, endeavors to simplify the procedure as set forth therein, however, it does not dispense with the proceedings in such matters as announced by the decisions of this court above set forth.

Irrespective of any argument as to the proper procedure to obtain a hearing, the ultimate fact is that the defendant in the instant case was in no manner

prejudiced by the procedure followed, and his substantial rights were in no way affected by such procedure. The defendant's contention with reference to the first question raised is without merit.

The defendant takes the position that the amendment made by the county attorney with permission of the trial court on September 22, 1955, after the expiration date of the probationary period which was July 21, 1955, was error for the reason that the term of probation had expired and adding to or deleting from the charge, and being permitted to do so by the trial court, was tantamount to filing a new pleading and is prejudicially erroneous.

It is true that it has been held, under varying statutes, that revocation and commitment may be ordered at any time during the suspension or probation period, during the period of the term of the sentence, or during the maximum period for which the accused could have been sentenced. 24 C. J. S., Criminal Law, § 1618 (c), p. 192. There are cases from foreign jurisdictions where a statute provides that the particular court may revoke an order suspending sentence and placing on probation at any time during the term of the probation, which has been held to mean that there is no jurisdiction in such court to revoke probation after the period of probation has passed, which need not be cited in the instant case and have no applicability here.

The statute here involved, so far as material to the present question, provides in part as follows: "(1) When any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation, which period shall not exceed, in the case of any defendant convicted of an offense less than a felony, two years; and in the case of any defendant convicted of a felony, five years. * * * (3) The court or a magistrate thereof may (a) modify the conditions and the period of probation referred to in subsections (1) and (2) of this section, (b) in case of the violation

of such probationary conditions, upon motion and showing by affidavit of the county attorney, issue a warrant for the arrest of the probationer, (c) at any time discharge the probationer, and (d) in case of the violation of such probationary conditions, impose any penalty which it might have imposed before placing the defendant on probation; * * *." § 29-2219, R. S. Supp., 1955.

It will be noted that the statute does not contain the language "the court may revoke the probation at any time during the period of probation." We believe a proper interpretation of the statute is that if a court is to revoke probation for a violation occurring within a probationary period, procedure to that end must have been instituted within the probationary period, as was done in the instant case, or within a reasonable time thereafter. Under such an interpretation, a violation occurring on the last day of probation could still properly result in the revocation of probation after the probationary term.

The gist of the present action is a revocation of probation. The amendment to the information is an amplification of the facts upon which the charge is made, and nothing more. We believe, where an amendment of this nature is made within a reasonable time after the expiration of the probationary period, that no substantial rights of the defendant are affected.

We find no prejudicial error in the record, and the judgment of the trial court is affirmed.

AFFIRMED.

BERNARD F. SHANAHAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
77 N. W. 2d 234

Filed May 25, 1956. No. 33939.

1. **Appeal and Error.** Where a case is presented upon the transcript alone, without a bill of exceptions, instructions given to the trial jury by the district court will be presumed to be correct, unless they misstate the law and contain propositions which could not be held correct in any possible case made by the proof under the complaint or information upon which the prosecution was founded, all presumptions being in favor of the regularity of the proceedings of the district court.
2. ———. When no bill of exceptions, showing the evidence, is presented on review, instructions that might have been proper under any evidence that might have been legally admissible under the pleadings or information will not be held prejudicial and erroneous. The presumption of law is in favor of the instructions.
3. **Trial: Appeal and Error.** Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

ERROR to the district court for Merrick County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Dryden & Jensen, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

MESSMORE, J.

This is a criminal action originally instituted in the county court of Merrick County by the State of Nebraska as plaintiff against the defendant Bernard F. Shanahan. By complaint duly filed it was charged that Shanahan committed the offense of operating a motor vehicle in said county while under the influence of intoxicating liquor. He was tried in the county court and convicted

of the offense charged against him. From this conviction he appealed to the district court where he was tried before a jury. The jury returned a verdict finding him guilty of the charge. Following conviction he filed a motion for new trial which motion was overruled. Following the overruling of the motion for new trial he was sentenced to pay a fine of $100, his motor vehicle operator's license was suspended for 6 months, and court costs were taxed against him. From this sentence and judgment the defendant has come to this court by petition in error seeking a reversal of the judgment and sentence. Shanahan is plaintiff in error but will be referred to hereinafter as defendant. The State of Nebraska is defendant in error and will be referred to as the State.

The defendant predicates error on the part of the trial court in giving instruction No. 4 on its own motion to the jury. Instruction No. 4 reads as follows: "A person is intoxicated or is under the influence of alcoholic liquor if such person is under the influence of alcoholic liquor to such an extent as to have lost to an appreciable degree the normal control of his body and mental faculties."

In this connection, the defendant cites Freeburg v. State, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E 1101. In the cited case the court defined "intoxicated" as follows: " 'The word "intoxicated" is synonymous with "drunk," and in the Standard Dictionary "drunk" is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness and bestiality.' 4 Words and Phrases, 3734. 'The word "intoxication" means an abnormal mental or physical condition due to the influence of alcoholic liquors, a visible excitation of the passions, and impairment of the judgment, or a derangement or impairment of physical functions or energies. This implies a condition which

would not result from the reasonable, ordinary, and moderate use of the most intoxicating liquors.'" The court instructed the jury that where a person is under the influence of intoxicating liquor to such an extent that it affects him mentally or physically, and that such effect resulting from the use of intoxicating liquor is visible to one observing such person, then as a matter of law said person would be in a drunken or intoxicated condition. In criticizing the instruction, the court said: "It makes the mere fact that the effect resulting from the use of intoxicating liquor is visible sufficient evidence that the person is drunk."

The defendant's contention is that instruction No. 4, given by the trial court on its own motion in the instant case, is subject to the same criticism as stated in Freeburg v. State, *supra*, and further, that instruction No. 4 in the instant case does not go on and limit its application to the operation by the defendant of a motor vehicle, therefore the instruction did not fully cover the situation and as a consequence thereof, the defendant was denied a fair trial and is entitled to reversal of this case.

It will be observed, the instruction in the above-cited case employed the test of visible effect to determine if one was under the influence of intoxicating liquor. Instruction No. 4 given in the instant case does not limit its meaning to the test of visibility. We fail to see wherein the instruction in the instant case bears any relation to that given in the cited case.

The instant case is presented for review in this court upon the transcript alone, without a bill of exceptions.

In Willis v. State, 27 Neb. 98, 42 N. W. 920, this court said: "Where a case is presented upon the transcript alone, without a bill of exceptions, instructions given to the trial jury by the district court will be presumed to be correct, unless they misstate the law and contain propositions which could not be held correct in any possible case made by the proof under the complaint or

information upon which the prosecution was founded, all presumptions being in favor of the regularity of the proceedings of the district court."

In State v. Kastle, 120 Neb. 758, 235 N. W. 458, this court said: "When no bill of exceptions, showing the evidence, is presented on review, instructions that might have been proper under any evidence that might have been legally admissible under the pleadings or information will not be held prejudicial and erroneous. The presumption of law is in favor of the instructions." See cases cited therein.

In the instant case instructions given by the trial court to the jury show the following: Instruction No. 1 informs the jury that this case is a prosecution for unlawfully operating a motor vehicle in the county while under the influence of alcoholic liquor. Instruction No. 3 defines the offense in the language of the statute, wherein it is provided that: "It shall be unlawful for any person to operate * * * any motor vehicle while under the influence of alcoholic liquor * * *." § 39-727, R. S. Supp., 1955.

We believe the applicable rule to be as follows: "Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same." Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672.

In Luster v. State, 148 Neb. 743, 29 N. W. 2d 364, this court said: "In other words, if the charge to the jury in its entirety correctly states the law, that is sufficient." See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

Instruction No. 4, when considered with the other instructions in the case, does not misstate the law. The instruction, when analyzed, is to the effect that if the defendant was found to have been under the influence of alcoholic liquor to such an extent that he appreciably

had lost normal control of his body and mental faculties, naturally it shows that his ability to operate a motor vehicle under such circumstances would not be such as that of a man of ordinary prudence and caution in full possession of his faculties.

We are unable to detect any error by an inspection of the record before us, and the judgment of the district court must therefore be affirmed.

AFFIRMED.

PORFIRIO GUEDEA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
77 N. W. 2d 166

Filed May 25, 1956. No. 33940.

1. **Criminal Law: Appeal and Error.** Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence.
2. ———: ———. The statute makes it the duty of this court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant.
3. ———: ———. A substantial reason for the reduction of the sentence must be warranted by the evidence.
4. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Richard Dittemore and *McGinley, Lane, Powers & McGinley*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle*, for defendant in error.

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

SIMMONS, C. J.

The plaintiff in error, hereinafter called the defendant, was charged with the unlawful operation of a motor vehicle and while so doing caused the death of one Gertrude Gaona. See § 28-403.01, R. S. Supp., 1955.

Defendant pleaded guilty. He offered evidence in mitigation of punishment. He was sentenced to serve not less than 3 nor more than 3½ years in the State Reformatory.

Thereafter he filed an application for an order reducing the sentence, claiming it was grossly excessive. The court denied the application.

The error assigned here is that the trial court abused its discretion in the sentence given and erred in denying the application for a modification of the sentence.

The evidence offered on the hearing for "mitigation of punishment" is here by case stated.

It appears that the county attorney advised the court that the violation involved the operation of a motor vehicle by defendant while under the influence of intoxicating liquor and upon the wrong side of the road. The information charged that while defendant was in the unlawful operation of a motor vehicle he caused it to "collide with a cement bridge abutment."

Defendant's evidence was that at the age of 18 years he enlisted in the U. S. Marines and served 1 year with a combat company in Korea, and that he was honorably discharged. He had never before been arrested on any charge. Friends and relatives testified to his excellent character and reputation. Defendant offered no evidence in explanation of the offense to which he pleaded guilty.

Section 28-403.01, R. S. Supp., 1955, provides for a penalty within the broad range of a fine not exceeding $500; imprisonment in the county jail not exceeding

6 months; imprisonment in the penitentiary for a period of not less than 1 year or more than 10 years; or by both such fine and imprisonment.

Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence. Obviously there is not sufficient record here upon which to base an opinion that the sentence is excessive. Neither is there a record here upon which we can determine a sentence warranted by the evidence.

In Anderson v. State, 26 Neb. 387, 41 N. W. 951, we discussed this statute and there held: "The legislature * * * to prevent the infliction of a penalty upon a party which the evidence does not warrant, has empowered this court to review the evidence in any case pending therein on error, and reduce the sentence and render such a one as is justified by the evidence; * * * the statute makes it the duty of this court, when the proper proceedings are had, to review the evidence, and prevent the imposition of punishment which the evidence will not warrant."

In Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, we had a plea for reduction of sentence. There a similar contention was made to that which was made here. We there held that a substantial reason for the reduction of the sentence must be warranted by the evidence. No such evidence is here. In effect the argument is an appeal for mercy and consideration based on the defendant's military service, past record, and experiences. We had that situation also in Sundahl v. State, *supra,* and for reasons there given held that appeals to sympathy and mercy must be put aside in applying the statutory authority here involved.

The sentence imposed by the trial court is greater than the minimum and much less than the maximum authorized by the act defining the crime and fixing the penalty.

The rule is: "Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Salerno v. State, *ante* p. 99, 75 N. W. 2d 362. See, also, Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698, and cases there cited.

An abuse of discretion does not appear here.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, AND THE DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, APPELLANT, V. ASSOCIATES DISCOUNT CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES.

77 N. W. 2d 215

Filed May 25, 1956. No. 33943.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed if the allegations are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions unless they are supported by and necessarily result from the facts pleaded.
2. ———. Plaintiff may be allowed, on notice and on such terms as to costs as the court may prescribe, to file a supplemental petition alleging facts material to the case occurring after a former petition, and if redundant, scandalous, or irrelevant matter is inserted therein, it may be stricken out on motion of the party prejudiced thereby.
3. ———. For the purposes of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deducible therefrom.
4. ———. Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter.
5. ———. Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court.
6. ———. Under the code system of pleading, it is not necessary

for plaintiff to state a cause of action in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action.

7. ———. A plaintiff has the right to set out his entire statement of facts constituting his alleged cause of action, and where such action is based on a series of acts, which together constitute the allegations of one complete transaction, a portion of the same may not be stricken out against plaintiff's objections.

8. **Constitutional Law: Interest.** Sections 45-114 to 45-158, R. R. S. 1943, are not local or special laws "regulating the interest on money" in violation of Article III, section 18, Constitution of Nebraska.

9. ———: ———. Sections 45-114 to 45-158, R. R. S. 1943, do not violate that part of Article III, section 14, Constitution of Nebraska, which provides "and no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

10. **Usury.** The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible.

11. **Injunction: Parties.** In that connection, section 45-157, R. R. S. 1943, expressly authorizes the State of Nebraska on relation of the Attorney General and the Department of Banking, to bring an action against such persons to enjoin such violations or from doing any act or acts in furtherance thereof, and obtain the appointment of a receiver for the property and business of such violators, and, as provided by section 25-304, R. R. S. 1943, such action may be brought and maintained without joining as plaintiffs the persons for whose benefit it is prosecuted.

12. ———: ———. Where acts sought to be enjoined are threatened or being performed by more than one, all may be joined as defendants.

13. **Equity: Pleading.** The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in a plaintiff's petition. The particular nature of the wrong done by defendant may require the application of different remedies for the enforcement of plaintiff's right, in which event the rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for recovery upon a single primary right.

14. **Usury.** Since usury is generally accompanied by device, sub-

terfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument.

15. ———. A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in price may exceed lawful interest for a loan.

16. ———. In such cases, however, the transaction between the buyer and the seller must be a completed bona fide time price sale agreement, and the foregoing rule does not apply where it is proved that the transaction was not made in good faith but was a device and subterfuge pursued to evade the operation against it of usury statutes.

17. ———. The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. Further, any compensation paid or to be paid for any extension or forbearance of a loan may not exceed the permissible statutory maximum.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, L. ROSS NEWKIRK, and PATRICK W. LYNCH, JUDGES. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson*, for appellant.

Matthews, Kelley & Delehant and *Woods, Aitken & Aitken*, for appellees.

Gross, Welch, Vinardi & Kauffman, amicus curiae.

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

CHAPPELL, J.

Plaintiff, State of Nebraska ex rel. Clarence S. Beck, Attorney General, and the Department of Banking of

the State of Nebraska, brought this action against defendants, Associates Discount Corporation, a foreign corporation, and Jack F. Kemnitz, its resident agent and branch manager. The parties will generally be designated as plaintiff or defendants, or by name as the occasion requires.

The basis of the action was the factually alleged unlawful operation of a loan business in Omaha by defendants without having procured a license, whereby defendants, by means of described devices and subterfuges, have exacted usurious interest from the borrowers.

In its amended and supplemental petition, hereinafter generally called petition, plaintiff prayed for the court to find and adjudge that defendants and each of them have been operating an installment loan business in Nebraska wrongfully and in violation of law; that defendants' method of doing business is a device and subterfuge, engaged in with the intent of evading the usury laws of this state; that temporary and permanent injunctions be granted; that the notes, mortgages, and other instruments of indebtedness taken by defendants be declared void and uncollectible and should be cancelled; that a receiver be appointed to administer the affairs of defendants' business under the order and direction of the court; and for general equitable relief.

Defendants filed a motion to strike a portion of paragraph XI, and all of paragraphs XVII, XVIII, XIX, XX, and XXI of plaintiff's petition, and, subject to prior ruling upon such motion, defendants separately demurred to plaintiff's petition upon the following identical grounds: "1. That the plaintiffs' amended and supplemental petition does not state facts sufficient to constitute a cause of action against this defendant.

"2. That the plaintiff's amended and supplemental petition does not state facts sufficient to constitute a cause of action against this defendant in that the Installment Loan Act, Sections 45-114 to 45-158, both inclusive, Revised Statutes of Nebraska, 1943, as amended, and

particularly Sections 45-137 and 45-138 thereof are violative of Article III, Section 14 of the Nebraska Constitution and therefore void in that said Statutes attempt to amend and are in conflict with Section 45-105 which is a prior act and the new act (Sections 45-114 to 45-158 and Sections 45-137 and 45-138) made no mentions of or reference to or repeal of said Section 45-105.

"3. That the plaintiffs' amended and supplemental petition does not state facts sufficient to constitute a cause of action against this defendant in that the Installment Loan Act, Sections 45-114 to 45-158 both inclusive and particularly Sections 45-137 and 45-138, Revised Statutes of Nebraska, 1943, as amended, are violative of Article III Section 18 of the Nebraska Constitution and therefore void in that said statutes were passed by the Legislature as local or special laws regulating the interest on money.

"4. That several causes of action are improperly joined in said amended and supplemental petition.

"5. That plaintiffs do not have the legal capacity to sue defendants in this action and attempt thereby to secure an adjudication of the validity of various contracts to which plaintiffs are not parties and in which plaintiffs have no right, title or interest.

"6. That there is a defect of parties plaintiff necessary and indispensable to the adjudication of contract rights demanded in plaintiffs' amended and supplemental petition.

"7. That there is a misjoinder of parties defendant."

Thereafter the trial court sitting en banc sustained defendants' motions to strike in toto, and sustained paragraphs 1, 4, 5, 6, and 7, but overruled paragraphs 2 and 3 of defendants' demurrers. Thereupon, plaintiff elected to stand upon its petition, and judgment was rendered against plaintiff and in favor of defendants, and plaintiff's action was dismissed, with costs taxed to plaintiff. Plaintiff then perfected an appeal from the sustaining of defendants' motions to strike and their demurrers, and

from the judgment rendered, assigning: (1) That the trial court erred in sustaining defendants' motion to strike and their demurrers and rendering judgment against plaintiff and in favor of defendants; and (2) that the trial court erred in refusing to give plaintiff a hearing upon its application for and in refusing to grant a temporary injunction and appoint a receiver. We sustain the assignments, and in doing so a temporary injunction is hereby granted and the receiver heretofore appointed by this court is continued in service, all as hereinafter ordered and directed.

"A general demurrer admits all allegations of fact in the pleading to which it is addressed, if the allegations are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions, except if supported by, and necessarily resulting from, the facts pleaded." Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375. As stated in Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923, citing numerous authorities from this jurisdiction: "The allegations of fact contained in the petition must be taken as true under the rule that a general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom." Also, as stated in State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196, citing numerous authorities from this jurisdiction: "Coming then to the demurrer of the remaining defendants, we start with the legal proposition that the demurrer admits the truth of all material facts well pleaded, and the intendments and inferences that fairly and reasonably may be drawn therefrom." Further, as stated in Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240, quoting with approval from Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327: "'A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states

facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.' "

In the light of such authorities and those subsequently cited and discussed, we have examined the admitted allegations in plaintiff's petition. They are in substance as follows: Clarence S. Beck, the duly elected and qualified Attorney General of this state, and the Department of Banking, an executive department of this state, are charged with the administration of laws relating to licensing and supervision of loan companies under sections 45-114 to 45-162, R. R. S. 1943.

Defendant Associates Discount Corporation is an Indiana corporation, qualified to do business in this state as a foreign corporation, with its Nebraska office located at 216 W. O. W. Building, Fourteenth and Farnam Streets, Omaha. The names and addresses of its officers and directors residing in Indiana are set forth. Defendant corporation is a wholly owned subsidiary of Associates Investment Company, an Indiana corporation, with its principal place of business in Associates Building, South Bend, Indiana. Defendant Jack F. Kemnitz is a resident of Omaha and for several years last past has been branch manager and general supervisor of the business of defendant corporation in this state and has aided in the operation of said business in the manner hereinafter set forth. Defendants, without having procured a license to operate an installment loan business in this state, have conducted such business with the intent of evading the usury laws of the state; and have engaged in a device and subterfuge by means of which they have exacted excessive, unlawful, exorbitant, unconscionable, and usurious charges for the making of installment loans to purchasers of automobiles. For the purpose of carrying out such device and subterfuge, defendant corporation purports to be engaged solely in the business of purchasing, at a discount, from auto-

mobile dealers, notes and mortgages covering the sale of automobiles, but in fact none of such contracts represent bona fide sale transactions but constitute direct loans by defendant corporation to the purchasers of such automobiles.

Defendants solicit automobile dealers to finance their purported time sale transactions, and as an inducement and consideration therefor offer and agree to rebate to such dealers a percentage of the charges made to the purchasers, and chattel mortgage and note forms are furnished such dealers by defendants. In the sale of automobiles, purchasers are not quoted agreed time sale prices but only the cash price is mentioned, and such purchasers are then required to sign a note and mortgage in blank.

Thereafter, such blank instruments are delivered to defendant Kemnitz or some other agent of defendant corporation, who call at the place of business of such dealers, and such blank instruments are taken to the office of defendant corporation where the interest and other charges are inserted in such contracts. The interest included in the contracts is clearly in excess of 9 percent per annum, and in addition thereto charges are added for property damage insurance on the automobile, and in most cases also for health and accident, or credit life insurance, or both, although no application is made for such insurance by the borrower and such charges are made without their knowledge or consent. The property damage insurance is placed with Emmco Insurance Company, an Indiana Corporation, which is another wholly owned subsidiary of Associates Investment Company. The charges made for such insurance are in excessive and unreasonable amounts and constitute additional charges for the use of money advanced to the borrower by defendants.

Because there is no contract between the buyer and the seller as to any credit price, defendants control the entire financial transaction, and defendant corporation

is in fact the principal in such financial transaction. However, in order to make the transaction appear to be a bona fide time sale agreement between the buyer and seller, and to further carry out said device and subterfuge, the note and mortgage are made payable to the dealer who in turn purports to endorse same to defendant corporation without recourse.

Also, in order to secure additional excessive, unlawful, and usurious charges, the majority of such loans are made for a period of 1 year, with the first 11 monthly payments being in equal amounts, and the twelfth payment consisting of a large or balloon payment. In most cases, the borrower is unable to make such balloon payment when due, and defendants then make a new loan and require the borrower to sign a new note and mortgage, payable to defendant corporation. Included in said note and mortgage is the amount of the balloon payment together with interest in an excessive and usurious amount, greatly in excess of the interest permitted by law, and in addition thereto, as a condition to the making of the loan, charges are made for property damage insurance on the automobile together with additional charges for health and accident, or credit life insurance, or both, which charges are in excessive and unreasonable amounts and constitute additional charges for the use of the money by the borrower. The new contract usually provides for equal monthly installments, with the final payment being a balloon payment.

Due to the unlawful, exorbitant, and confiscatory charges made upon these loans, the amount applied to the principal balance each year is small, and the loan contract is rewritten numerous times before the borrower is able to make final payment. This method of operation by defendants is contrary to the declared public policy of the State of Nebraska and in violation of the civil and criminal laws of this state, and all loans made by defendants in violation of installment loan laws and statutes are void and uncollectible.

These loans are made to persons of moderate means, including a large number of service men whose circumstances make it necessary for them to secure credit in order to own an automobile for business purposes, to furnish transportation to and from work, and for family use. Due to the unlawful, exorbitant, and confiscatory charges made on such loans, the interest of the borrower in the automobile given as security is reduced to such an extent that it becomes impossible for such borrowers to secure loans from other sources; and "that if a borrower fails to meet the payments demanded by the defendants on such void and unlawful loans the defendants threaten to and do replevin the automobile of such borrower" who is not in a position to defend against the collection methods used by defendants to enforce payment of the unlawful, void, and unconscionable loans. The quoted portion above was that portion of paragraph XI which the trial court struck from plaintiff's petition.

Plaintiff's petition also alleged that in addition to the employment of the aforesaid devices and subterfuges, defendants have violated the provisions of the Installment Loan Act, sections 45-114 to 45-162, R. R. S. 1943, in 10 specified factual particulars too voluminous to here recite, and are continuing to do so, all of which required the appointment of a receiver, and the granting of an injunction.

Plaintiff's amended and supplemental petition also set forth certain facts occurring after the filing of their original petition, all of which allegations were stricken therefrom by the trial court. Such allegations were as follows: The original petition of plaintiff was filed on July 7, 1955, and on the same day the trial court entered a temporary restraining order restraining defendants from "continuing the making of loans at unlawful and usurious rates in the manner described in Plaintiff's Petition or in any other manner contrary to law or from collecting or attempting to collect any of the unlawful and void loans heretofore made." Such order

further fixed July 15, 1955, at 2:30 p. m. as the time for hearing on plaintiff's application for a temporary injunction and for the appointment of a receiver. On that date, plaintiff appeared before the court prepared to offer evidence in support of its application for a temporary injunction and for the appointment of a receiver, but defendants insisted that they were first entitled to be heard on certain motions and demurrers filed to plaintiff's petition.

Plaintiff then filed a motion for an order impounding the books and records of defendants on the ground that they had been violating the temporary restraining order entered by the court. Evidence was introduced by both plaintiff and defendants thereon, and at the conclusion of said hearing the court entered findings that defendants had violated the temporary restraining order and that the delay occasioned in securing the appointment of a receiver was hazardous to the rights of interested parties, and entered an order directing the sheriff of Douglas County to forthwith take and maintain temporary custody until further order of the court of all books, files, papers, notes, mortgages, and other documents pertaining to the loan business of defendants. The court then continued the hearing on plaintiff's application for a temporary injunction and for the appointment of a receiver until July 19, 1955, at 1:30 p. m.

On July 19, 1955, plaintiff appeared before the court, again prepared to offer evidence in support of its application for a temporary injunction and for the appointment of a receiver. However, prior to the introduction of any evidence, defendants made application for return of the books, records, and documents held in custody by the sheriff under the order of court, and for a dissolution of the temporary restraining order, and the court, without a hearing, then entered an order dissolving the temporary restraining order except that portion which restrained defendants from removing any of their records, files, papers, documents, notes, mort-

gages, and other evidences of indebtedness, conditioned upon defendant corporation filing a good and sufficient corporate surety bond in the penal sum of $1,000,000.

Plaintiff was not permitted to present its evidence in support of its application for a temporary injunction and appointment of a receiver, but instead arguments were had on defendants' motion to strike, and on the same day, July 19, 1955, an order was entered overruling 16 of the 17 paragraphs of defendants' motion and sustaining one paragraph thereof, thereby striking one paragraph out of plaintiff's original petition. On July 20, 1955, argument was had on the separate demurrers of defendants to plaintiff's original petition, following which the matter was taken under advisement by the court and plaintiff's application for temporary injunction was continued until further order of the court. A reargument of said demurrers was had by a panel of three judges on September 7, 1955, and the matter was taken under advisement. In the meantime, plaintiff was not granted a hearing upon its application for a temporary injunction and the appointment of a receiver. Immediately after the entry of the order by the court on July 19, 1955, dissolving the temporary restraining order which prohibited defendants from collecting or attempting to collect the void and unlawful loans described in plaintiff's original petition, the defendants entered into a concerted campaign to collect such void and unlawful loans, refusing to accept payment according to the terms of the written instruments but demanding payment of the entire balance, and the borrowers were contacted by letter, telephone, and personal calls, and threatened that unless the loans were paid, their automobiles would be replevined. Since August 4, 1955, some 40 replevin actions have been filed in the district court of Douglas County against such borrowers, and the court docket is becoming clogged with such cases. The statutes of Nebraska do not provide for a redelivery bond in replevin cases, and these borrowers

are unable to secure a return of their automobiles pending the final determination of such replevin actions. The majority of such borrowers require an automobile in order to earn a livelihood for themselves and their families, are unable to defend the actions brought against them, and are compelled to meet the demands of defendants. The bond posted by defendants is ineffective to enable the borrowers to defend against the collection methods of defendants, irreparable injury will be caused unless relief is granted according to the prayer of plaintiff's petition, and defendants will continue to force collection of the void and unlawful loans unless enjoined by this court.

In that connection, the record herein discloses that on September 12, 1955, an order was entered by the trial court sustaining defendants' separate demurrers to plaintiff's original petition, upon the ground that it did not state facts sufficient to constitute a cause of action against defendants. Thereafter, on September 26, 1955, plaintiff filed a motion requesting leave to file instanter the amended and supplemental petition heretofore set forth. After notice and hearing, leave was granted by order entered October 17, 1955, and on that date plaintiff filed its amended and supplemental petition. On October 18, 1955, defendants' motion to strike and separate demurrers thereto, were filed. On November 17, 1955, after hearing thereon October 26, 1955, they were sustained, and plaintiff, having elected to stand on its petition, judgment was rendered in favor of defendants as heretofore recited, and plaintiff appealed to this court. Thereafter, upon application and hearing, this court, on December 3, 1955, granted a temporary restraining order and appointed a receiver, which, upon motion of defendants, showing by the parties, and hearing thereof, we refused to dissolve or set aside. State ex rel. Beck v. Associates Discount Corp., 161 Neb. 410, 73 N. W. 2d 673.

We will first discuss whether or not the trial court

erred in sustaining defendants' motion to strike. Contrary to defendants' contention, that question is before this court on this appeal, and we conclude that the trial court erred in so doing. In that connection, section 25-856, R. R. S. 1943, provides in part: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition * * * alleging facts material to the case, occurring after the former petition * * *." Such section was construed and applied by this court in Flagg v. Flagg, 39 Neb. 229, 58 N. W. 109, and Miles v. Martin, 103 Neb. 261, 171 N. W. 907. In the latter opinion, it is said: "The supplemental petition was only incidental to the granting of complete relief. It was therefore proper to allow it to be filed."

Section 25-833, R. R. S. 1943, provides in part: "If redundant, scandalous or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby; * * *."

In In re Estate of Wise, 144 Neb. 273, 13 N. W. 2d 146, this court held: "For the purposes of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deductible therefrom.

"Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter.

"Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court.

"Under the Code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense.

"A plaintiff has the right to set out his entire statement of facts constituting his alleged cause of action, and where such action is based on a series of acts, which

together constitute the allegation of one complete transaction, a portion of the same may not be stricken out against plaintiff's objection." As said in that opinion, quoting from Lincoln Mortgage & Trust Co. v. Hutchins, 55 Neb. 158, 75 N. W. 538: " 'A party has no absolute right to have his adversary's pleading pruned to suit his fancy.' "

Also, in 41 Am. Jur., Pleading, § 350, p. 530, it is said: "But allegations which are proper and essential to the statement of the plaintiff's cause of action * * * cannot, of course, be stricken for irrelevancy or immateriality. Nor will the court strike allegations which tend more fully to state and explain the claim, although they may not be strictly necessary. And the objectionable part cannot be stricken out where enough will not remain to make a cause of action." Further, in such respect the allegation of facts in a petition with relation to violations of the usury laws by defendants, which are set forth in language such as that used at bar, are not scandalous.

The allegations of plaintiff's petition which were stricken by the trial court were all incidental to the necessity of granting a temporary injunction, the appointment of a receiver, and complete relief. They were erroneously stricken and will be considered by this court in determining whether or not plaintiff's assignments of error should be sustained and judgment for defendants should be reversed.

Since the judgment is reversed and the cause is remanded for trial upon the merits, we deem it necessary to pass upon the constitutional questions raised by defendants' demurrers and discussed in briefs of counsel. In that respect, sections 45-101 to 45-113, R. R. S. 1943, are general statutes which contain the interest and usury provisions relating to all ordinary loans and other specified indebtedness taken yearly or for a shorter period. On the other hand, sections 45-114 to 45-158, R. R. S. 1943, are original, independent, special

statutes complete in themselves, which relate solely to installment loans not exceeding $1,000, and in excess of $1,000. Their purpose and design is to license and control the business of making such installment loans, and to restrict the enforcement and collection of illegal installment loans once they have been made by either licensees or nonlicensees, an all-inclusive and proper classification. Thus, the inhibitory provisions thereof include and apply to all lenders of installment loans, whether they be licensees or nonlicensees. We therefore conclude that sections 45-114 to 45-158, R. R. S. 1943, are not local or special laws "Regulating the interest on money" in violation of Article III, section 18, Constitution of Nebraska. See, Althaus v. State, 99 Neb. 465, 156 N. W. 1038, cited with approvel in Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295, Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197, and Motors Acceptance Corp. v. McLain, 154 Neb. 354, 47 N. W. 2d 919.

Also, being original, independent, special statutes complete in themselves and having relation only to installment loans, a particular subject matter, their original enactment and subsequent amendments were not in conflict with and were not required to amend or repeal, and made no pretense of amending or repealing section 45-105, R. R. S. 1943. Thus, sections 45-114 to 45-158, R. R. S. 1943, do not violate that part of Article III, section 14, Constitution of Nebraska, which provides: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." See Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85.

With respect to installment loans, section 45-114, R. R. S. 1943, provides in part: "The word 'person,' when used in sections 45-114 to 45-155, means individuals, partnerships, associations, banks, trust companies, savings banks, building and loan associations, trusts, corporations, and all other legal entities."

Section 45-128, R. R. S. 1943, provides in part: "Any firm or individual members thereof, partnership or individual members thereof, association or individual members thereof, or corporation or officers thereof, or person, who by any device, subterfuge or pretense whatsoever, shall engage in or continue any of the kinds of business or enterprise permitted to licensees by sections 45-114 to 45-155 without having obtained the license therein required, with intent to evade the provisions of said sections, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be * * *" punished as therein provided.

In that connection also, section 45-155, R. R. S. 1943, which as originally enacted was a part of the same section with what is now section 45-128, R. R. S. 1943, (Laws 1941, c. 90, § 14, p. 350) provides: "Violations of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible."

Section 45-137, R. R. S. 1943, provides in part: "Every licensee hereunder may make loans, not exceeding one thousand dollars in principal amount, and may contract for and receive thereon charges at a rate not exceeding thirty-six per cent per annum on that part of the unpaid principal balance on any loan not in excess of one hundred and fifty dollars, thirty per cent per annum on that part of the principal balance on any loan in excess of one hundred and fifty dollars and not in excess of three hundred dollars, and nine per cent per annum on any remainder of such unpaid principal balance. * * * Charges on loans made under sections 45-114 to 45-155, shall not be paid, deducted or received in advance. Such charges shall not be compounded * * *. In addition to the charges herein provided for, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received. If any amount in excess of the charges permitted by said sections is charged, contracted for or received, except as the result

of an accidental and bona fide error of computation, the contract of loan shall be void, the licensee shall have no right to collect or receive any principal, interest or charges whatsoever and the licensee and the several members, officers, directors, agents and employees thereof, who shall have participated in such violation, shall be guilty of a misdemeanor, and upon conviction thereof shall be * * *" punished as therein provided.

We conclude from clear and unmistakable language used that any person referred to in section 45-128, R. R. S. 1943, includes not only licensees but also nonlicensees, which defendants are admitted to be. In other words, the permissive provisions of the installment loan statutes apply to licensees, but every inhibitory provision therein applies to both licensees and nonlicensees and the officers and employees of either or both. Thus, as provided in section 45-155, R. R. S. 1943, any violation by defendants of sections 45-114 to 45-155, R. R. S. 1943, in connection with any indebtedness, however acquired, renders such entire indebtedness void and uncollectible.

In that connection also, section 45-138, R. R. S. 1943, provides in part: "No licensee shall directly or indirectly charge, contract for or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars. The foregoing prohibition shall also apply to any licensee who permits any person, as borrower or as endorser, guarantor or surety for any borrower, or otherwise, or any husband and wife jointly or severally, to owe directly or contingently or both to the licensee at any time a sum of more than one thousand dollars for principal; * * *. No licensee shall enter into any contract of loan under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than twenty-one calendar months from the date of making such contract, if such contract is not secured

by a bona fide recorded mortgage on real estate owned by the borrower, or under which the borrower agrees to make payment of principal more than thirty-six calendar months from the date of making such contract, if the contract of loan is secured by a bona fide fully recorded mortgage on real estate owned by the borrower. Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment. * * * Any contract of loan made in violation of this paragraph, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest or charges on such loan."

Section 45-139, R. R. S. 1943, provides: "Notwithstanding the provisions of section 45-138 a licensee may require a borrower to insure tangible personal property of a kind usually requiring insurance protection when offered as security for a loan under sections 45-114 to 45-155, against any substantial risk or loss, damage or destruction, for an amount and term and upon conditions which are reasonable and appropriate considering the nature of the property and the amount, maturity, and other circumstances of the loan, and the licensee may be protected by a mortgage clause as the licensee's interest may appear. No other insurance shall be required as a condition precedent to the making of a loan. The premium on the personal property insurance shall not exceed the premium fixed pursuant to law or by the current applicable manual of a recognized standard insurance rating bureau."

Section 45-140, R. R. S. 1943, provides: "The licensee shall, at the time the loan is made, give to the borrower, or if more than one, to one of them, a statement concerning any insurance procured by or through the licensee, which shall include the amount of any pre-

miums which the borrower has paid or is obligated to pay, the amount, the expiration date of the policy, and a concise description of the risks insured. If a borrower procures insurance by or through a licensee, the licensee shall deliver to the borrower within fifteen days after the making of the loan an executed copy of the insurance policy or certificate of insurance."

Section 45-142, R. R. S. 1943, provides in part: "No such person, firm, partnership, corporation or association so licensed shall receive any chattel mortgage * * * signed in blank, but all blank spaces shall be filled in with ink or typewritten or printed with the proper names and amounts, showing the name of the person, firm, partnership, corporation or association by whom the person making the conveyance * * * is employed."

Section 45-143, R. R. S. 1943, provides: "No licensee shall take a power of attorney, or any instrument signed by an attorney in fact and not personally, or any instrument signed in which blanks are left to be filled after execution."

Section 45-145, R. R. S. 1943, provides in part: "Every person, firm, partnership, corporation or association, licensed as provided in sections 45-114 to 45-155 shall, at the time any loan is made, give to the borrower or, if there are two or more borrowers, to one of them, a statement in the English language, on which shall be printed a copy of section 45-137, disclosing in clear and distinct terms (a) the amount and date of the loan, (b) a clear description of the payments required, (c) the type of the security, if any, for the loan, (d) the names and addresses of the licensee and all persons obligated on the note, and (e) the agreed rate of charge."

Section 45-153, R. R. S. 1943, which provides that: "Any person, firm, partnership, corporation or association, or officer or employee thereof, violating any of the provisions of sections 45-138 to 45-145, shall be deemed guilty of a misdemeanor, and upon conviction

thereof shall be * * *" punished as therein provided, also has direct relation to such sections.

With regard thereto, we recently said in Powell v. Edwards, *ante* p. 11, 75 N. W. 2d 122: "This section makes all who violate the inhibitory provisions of the law, whether they be licensees, officers or employees of licensees, or nonlicensees, guilty of a misdemeanor. The language in and of itself is capable of this interpretation and moreover it would be unreasonable to conclude that nonlicensees are free to engage in practices barred to licensees.

"Section 45-154, R. R. S. 1943, provides: 'Any contract of loan, in the making or collection of which any act is done which constitutes a misdemeanor under section 45-153, shall be void and the lender shall have no right to collect or receive any principal, interest or charges whatsoever.'

"If therefore the note in question was conclusively violative of section 45-138, R. R. S. 1943, either in the hands of the plaintiff or in the hands of Securities Acceptance Corporation through the agency of plaintiff then the entire indebtedness was void and uncollectible." Such statement has application here, if, as admitted by defendants, they violated any provisions of sections 45-138 to 45-145, R. R. S. 1943.

Finally, section 45-157, R. R. S. 1943, provides: "Whenever the Department of Banking has reasonable cause to believe that any person is violating or is threatening to or intends to violate sections 45-137 or 45-138, it may, in addition to all actions provided for in this act and without prejudice thereto, enter an order requiring such person to desist or to refrain from such violation. An action may also be brought, on the relation of the Attorney General, and the department, to enjoin such person from engaging in or continuing such violation or from doing any act or acts in furtherance thereof. In any such action an order or judgment may be entered awarding such preliminary or final injunction as may

be deemed proper. In addition to all other means provided by law for the enforcement of a restraining order or injunction, the court, in which such action is brought, shall have power and jurisdiction to impound and appoint a receiver for the property and business of the defendant, including books, papers, documents and records pertaining thereto or so much thereof as the court may deem reasonably necessary to prevent violations of this act through or by means of the use of said property and business. Such receiver, when so appointed and qualified, shall have such powers and duties as to custody, collection, administration, winding up and liquidation of such property and business as shall, from time to time, be conferred upon the said receiver by the court."

The use of the words "any person" and "such person" therein further evidences a deliberate legislative intent to include all persons or parties who violate any of the inhibitory provisions of the installment loan statutes, whether they be licensees or nonlicensees or officers or employees of licensees or nonlicensees, and make them subject to civil and criminal liability for the reasons and in the manner provided therein. That conclusion is in harmony with the public policy clearly enunciated and prescribed by the installment loan statutes. To conclude otherwise would completely emasculate them and permit licensees and nonlicensees to mulch the public at will without statutory prohibition, which the Legislature never intended to permit but clearly sought to prevent.

Defendants' demurrers alleged: "That plaintiffs do not have the legal capacity to sue defendants in this action and attempt thereby to secure an adjudication of the validity of various contracts to which plaintiffs are not parties and in which plaintiffs have no right, title or interest," and "That there is a defect of parties plaintiff necessary and indispensable to the adjudication of contract rights demanded in plaintiffs' amended and

supplemental petition." Such contentions have no merit.

In that connection, the statutory right of plaintiff to maintain this action is specially conferred and expressly authorized by section 45-157, R. R. S. 1943. In such a situation, plaintiff may, as provided by section 25-304, R. R. S. 1943, bring this action "without joining with him, the person for whose benefit it is prosecuted." See Archer v. Musick, 147 Neb. 1018, 25 N. W. 2d 908, 168 A. L. R. 1164. Further, such statutory authority and right is merely a collated expression of the inherent right of the state, which has always existed in the exercise of equity jurisdiction of courts to protect the public by preventing public wrongs arising from repeated, continuous, unlawful acts which are against public policy and result in injury to the public and its welfare. See, In re Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092; State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L. R. A. N. S. 664; State v. Chicago, B. & Q. R. R. Co., 88 Neb. 669, 130 N. W. 295, 34 L. R. A. N. S. 250; State ex rel. Spillman v. Heldt, 115 Neb. 435, 213 N. W. 578; State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N. W. 705; State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co., 121 Neb. 248, 236 N. W. 736. In State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824, this court held: "Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance." See, also, State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692.

The disastrous effects of usury are universally recognized and in every jurisdiction the state has, as a matter of public policy, enacted some measure of protection for its people from the harsh result and injury to them arising from unconscionable and unlawful exaction for the use of money imposed upon its residents, many of whom are obscure, economically distressed, and unable

to protect themselves. The state itself, represented by the Attorney General, has therefore of necessity, in order to protect its people and prevent public wrongs, emerged as the proper party whose duty it is to represent all the public in defense of the state's own sovereignty and bring such actions as that at bar. In doing so, courts have generally recognized the state's right to the equitable remedies of injunction and receivership as a proper and effective method of controlling unlawful lenders under statutes comparable with our own. See, State ex rel. Smith v. McMahon, 128 Kan. 772, 280 P. 906, 66 A. L. R. 1072; State ex rel. Beck v. Basham, 146 Kan. 181, 70 P. 2d 24; State ex rel. Fatzer v. Miller, 176 Kan. 175, 268 P. 2d 964; State ex rel. Fatzer v. Miller, 177 Kan. 324, 279 P. 2d 223; Commonwealth ex rel. Grauman v. Continental Co., Inc., 275 Ky. 238, 121 S. W. 2d 49; State ex rel. Moore v. Gillian, 141 Fla. 707, 193 So. 751; State ex rel. Goff v. O'Neil, 205 Minn. 366, 286 N. W. 316; Gifford v. State (Tex. Civ. App.), 229 S. W. 2d 949.

In such cases as that at bar, plaintiff represents the public, including the borrowers from defendants, for whose benefit the action is prosecuted. Usury in the making of contracts with borrowers is the affirmative basis for the equitable relief sought. To declare such contracts void and uncollectible without cancellation thereof, or, more appropriately, without enjoining their collection, would permit defendants to subsequently use them only for purposes of unlawful harrassment and extortion, which this action sought to enjoin. Equity is not so helpless. Equity will always strive to do complete justice. To declare such contracts void and uncollectible and enjoin their collection if they are void and uncollectible, is but a necessary incident to the primary purpose of this action which by injunction and receivership sought to put an end to continuous violations of the civil and criminal provisions of the installment loan statutes, enforce forfeitures as provided

therein, and avoid a multiplicity of actions. It was entirely unnecessary to make any of such borrowers parties to this action in order to accomplish its purposes. Section 45-157, R. R. S. 1943, and section 25-304, R. R. S. 1943, not only authorized plaintiff to bring this representative action but also made ample provision for granting the remedies sought if deemed proper in the light of the facts and installment loan statutes. Further, all of such borrowers are regarded not as in pari delicto but as in viniculus to defendants, to whom they owe no duty in equity. See, Davis v. Atlantic Finance Co., 160 Ga. 784, 129 S. E. 51; Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810; Horner v. Nitsch, 103 Md. 498, 63 A. 1052; Goble v. O'Connor, 43 Neb. 49, 61 N. W. 131.

Defendants' demurrers also alleged: "That there is a misjoinder of parties defendant." The contention has no merit. In such respect, defendant Jack F. Kemnitz is the resident agent, branch manager, and general supervisor of defendant corporation's business in Nebraska. He aided in the performance and carrying out of the unlawful acts and the unlawful operation of defendant corporation's business, all of which plaintiff sought to enjoin. If, as admitted, he so acted for defendant corporation, he would be equally guilty of violations of the installment loan statutes, both civil and criminal.

In 39 Am. Jur., Nuisances, § 167, p. 437, it is said: "In accordance with the rules applicable in suits for injunctions generally, all persons who contribute to the nuisance complained of may be joined as defendants in a suit to restrain the continuance of the wrong, although they act separately and independently and hence could not be joined as defendants in an action for damages." Also, in Nattinger v. Howard, 102 Neb. 175, 166 N. W. 263, this court approved the statement that: " 'Where the act sought to be enjoined is threatened or being performed by more than one, all may be joined as defendants.' "

Defendants' demurrers also alleged: "That several causes of action are improperly joined in said amended and supplemental petition." The contention has no merit. An examination of plaintiff's petition clearly discloses that the cause of action stated is the right of plaintiff to injunctive and other incidental and related relief in equity in order to prevent continuation of a public wrong by defendants. While it is true that the general scheme adopted by defendants incorporates several different devices and subterfuges, nevertheless each is but a part of a general scheme for exacting unlawful and usurious interest from the public of this state. The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in plaintiff's petition. As stated in 1 Am. Jur., Actions, § 67, p. 458, citing numerous authorities: "Moreover, the particular nature of the wrong done by the defendant may require the application of different remedies for the enforcement of the plaintiff's right, but that does not mean that there are several causes of action. Cases are legion wherein the plaintiff may be entitled to several remedies for the enforcement of a single wrong, in which event the rules governing joinder of causes of action do not preclude him from presenting in the same pleading distinct and sufficient grounds for recovery, upon a single primary right, especially if he is uncertain which ground can be established."

In testing the sufficiency of plaintiff's petition under the admitted facts, or the sufficiency of the evidence to support the relief sought thereby, it must be kept in mind that this is a case involving the violation of usury laws. Therefore, courts must look through the form to the substance of the transaction. Ordinarily, usurious transactions take forms which on their face appear to be legal. Devices, subterfuges, schemes, and circumvention to conceal usury are innumerable. The use of such devices, subterfuges, schemes, and circumvention

by defendants is illustrated by the factual allegations in plaintiff's petition.

The applicable principle and rationale that courts in usury cases must look through the form to the substance of transactions by unlawful money lenders, is patently illustrated by State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N. W. 46, wherein this court said: "The courts in such a case as this are not bound by forms but will look beyond form to the real substance. Looking through the scheme of the defendant to acquire and retain an unlawful and usurious rate of interest for the use of its money, and discerning the real substance of its transactions, we are of the opinion that its transactions pictured in the evidence were not bona fide purchases of rights of action from its customers, but rather were loans of the defendant to its customers. As such they were strongly infected with usury, were unlawful, and were contrary to the public policy of the state." See, also, Cheney v. Eberhardt, 8 Neb. 423, 1 N. W. 197; 55 Am. Jur., Usury, § 14, p. 332; Scott v. Lloyd, 34 U. S. 418, 9 L. Ed. 178. In Simpson v. Penn Discount Corp., 335 Pa. 172, 5 A. 2d 796, the court said: "As usury is generally accompanied by subterfuge and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument."

Also, in Cash Service Co. v. Ward, 118 W. Va. 703, 192 S. E. 344, the concurring opinion, quoting with approval from Crim v. Post, 41 W. Va. 397, 23 S. E. 613, said: " 'A search for usury shall not stop at the mere form of the bargain and contract relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction dealt with as usury if it be such in fact.' "

Defendants argued that the allegations of plaintiff's

petition disclosed that defendant corporation was not engaged in the lending of money but was engaged solely in purchasing time sale contracts on automobiles. In that respect, they contended that their method of doing business had been approved by this court in Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429; Fidelity Finance Co. v. Westfall, 127 Neb. 56, 254 N. W. 710; American Loan Plan v. Frazell, 135 Neb. 718, 283 N. W. 836; and Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855; and that to sustain plaintiff's position would require reversal of such decisions. We do not agree.

The primary rule established in the above-cited cases is that: "A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan."

In such cases, however, the transaction between the buyer and seller must be a completed bona fide time price sale agreement. In Grand Island Finance Co. v. Fowler, *supra,* our opinion makes clear that the sale must be honestly and in good faith executed by the dealer and purchaser for an agreed credit price in excess of a cash price in order to constitute a bona fide time sale transaction, and that if the transaction is in fact a loan for usury, the agreement is unlawful and void.

As recently as Powell v. Edwards, *supra,* citing the aforesaid cases, this court said: "It is also true that a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as tainted with usury. * * *

"These rules however do not apply where it is proved that the transaction was not made in good faith but

that it was a scheme and a device pursued to evade the operation against it of the usury statute.

"The case of Grand Island Finance Co. v. Fowler, *supra,* sustains the validity of transactions made in good faith. It may well be said also to condemn those wherein it has been proved that it was a scheme and device to evade the usury statutes."

Plaintiff's petition discloses that the method of doing business by defendants was not in good faith but was a scheme and a device to make the transactions appear to be bona fide time sale transactions, when in fact they were loans for usury, in violation of the installment loan statutes. In such respect, numerous authorities, including those involving defendants' parent corporation, support those conclusions. See, Jackson v. Commercial Credit Corp., 90 Ga. App. 352, 83 S. E. 2d 76; United Tire & Investment Co. v. Trone, 189 Okl. 120, 113 P. 2d 977; White v. Disher, 232 N. C. 260, 59 S. E. 2d 798; Seebold v. Eustermann, 216 Minn. 566, 13 N. W. 2d 739, 152 A. L. R. 585; Associates Investment Co. v. Thomas (Tex. Civ. App.), 210 S. W. 2d 413; Associates Investment Co. v. Baker (Tex. Civ. App.), 221 S. W. 2d 363; Associates Investment Co. v. Hill (Tex. Civ. App.), 221 S. W. 2d 365; Associates Investment Co. v. Sosa (Tex. Civ. App.), 241 S. W. 2d 703. In Daniel v. First National Bank of Birmingham, 227 F. 2d 353, on rehearing at 228 F. 2d 803, the court denied rehearing and said: "It seems to us that in reality what the Bank is asking this Court to hold is that probably the most numerous class of persons in need of protection from the state and national laws against usury are removed from that protection by the simple expedient of using the term 'time price' as a cloak to conceal usury. That, we of course will not do."

Section 45-143, R. R. S. 1943, specifically provides in part: "No licensee shall take * * * any instrument signed in which blanks are left to be filled after execution." See, also, section 45-142, R. R. S. 1943. Herein,

defendants furnished the dealer with blank forms which the borrower signed in blank without having any agreed time sale price with the dealer. Thereafter, defendants filled in the blanks with usurious charges without the borrower's knowledge or consent, and subsequently rebated a part thereof to the dealer, all of which made it a tripartite loan transaction and a violation of the installment loan statutes.

In addition to the usurious charges directly made, defendants contracted for and received further usurious interest by means of a scheme or device whereby excessive and unlawful usurious charges were added for property damage insurance on the borrower's automobile, and for credit life, health, and accident insurance without application therefor and without the knowledge or consent of the borrower. Section 45-139, R. R. S. 1943, provides that a licensee may require a borrower to insure tangible personal property when offered as security for a loan for an amount and term and upon conditions which are reasonable and appropriate, but premiums therefor cannot exceed those fixed by law or current applicable standard manual rates, but, "No other insurance shall be required as a condition precedent to the making of a loan" and, as provided by section 45-141, R. R. S. 1943, "The licensee shall not require the purchasing of insurance from the licensee as a condition precedent to the making of the loan, and shall not decline existing insurance where such existing insurance is provided by an insurance company duly licensed by this state." Further, section 45-137, R. R. S. 1943, provides in part: "In addition to the charges herein provided for, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received."

In that connection, it will be remembered that defendant corporation and Emmco Insurance Company, a corporation, are both wholly owned subsidiaries of Associates Investment Company. In the light of the fore-

going-admitted facts and law, it is conclusive that defendants, by use of their insurance device and subterfuge, were charging and collecting additional compensation for money loaned in violation of the installment loan statute. See, section 45-134, R. R. S. 1943, defining interest; Hubachek's Annotations on Small Loan Laws, p. 156, citing authorities; Strickler v. State Auto Finance Co., 220 Ark. 565, 249 S. W. 2d 307; Tribble v. State, 89 Ga. App. 593, 80 S. E. 2d 711; Peebles v. State, 87 Ga. App. 649, 75 S. E. 2d 35; Texas Finance & Thrift Association v. State (Tex. Civ. App.), 224 S. W. 2d 522; Missouri Valley Life Ins. Co. v. Kittle (8 C. C. A. Neb.), 2 F. 113; Miller v. Life Ins. Co., 118 N. C. 612, 24 S. E. 484, 54 Am. S. R. 741.

Section 45-138, R. R. S. 1943, provides in part: "No licensee shall enter into any contract of loan under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than twenty-one calendar months from the date of making such contract, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, or under which the borrower agrees to make payment of principle more than thirty-six calendar months from the date of making such contract, if the contract of loan is secured by a bona fide duly recorded mortgage on real estate owned by the borrower. Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment."

In that regard, the majority of defendants' contracts were made for a period of 1 year, with the first 11 payments in equal amounts, and the twelfth consisting of a large balloon payment. Also, when such balloon payment became due, defendants required the borrowers to sign a new installment note and mortgage payable to defendant corporation, which also contained usurious

charges, in violation of the installment loan statutes. In that respect, defendants argued that the refinancing of the original contracts did not constitute loans but were rescheduling or forbearance of the original contracts which were not affected thereby and could be purged of usury by credit or waiver of interest above 9 percent. We held otherwise in State ex rel. Beck v. Associates Discount Corp., *supra*.

We conclude that such claimed rescheduling or forbearance was simply a renewal or substitute for the original contract which was the purported consideration therefor, and that both were void and uncollectible as in violation of the installment loan statutes. Associates Discount Corp. v. Ruddock (Miss.), 81 So. 2d 249, involved the identical corporation that is defendant herein. The facts therein with regard to rewritten contracts were almost identical with those at bar except that validity of the original contract was not in question. Under statutes comparable with our own, and in answer to the argument that the original contract was not affected by the usurious charges in the rewritten contract, the court, quoting with approval from Chandlee v. Tharp, 161 Miss. 623, 137 So. 540, 78 A. L. R. 445, said: "It is true that the contract here involved was not usurious at its inception, but, when the creditor subsequently received, indirectly, more than 20 per cent per annum interest, it conferred upon the debtor the right to declare all the principal forfeited, and to recover back all payments made on the principal, as well as all usurious interest paid." See, also, 55 Am. Jur., Usury, § 96, p. 390, wherein it is said, citing numerous authorities, among which were Knox v. Williams, 24 Neb. 630, 39 N. W. 786, 8 Am. S. R. 220, and Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. S. R. 518: "Since the usurious character of a transaction is determined as of the date of its inception, if a contract is usurious in its inception no subsequent transaction will cure it. Hence, where a usurious contract is renewed by the giving of

a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. The taint attaches to all consecutive obligations or securities growing out of the original usurious transaction, and none of the descendant obligations, however remote, are free from it if the descent can be traced." Further, the compensation paid or to be paid for any extension or forbearance of a loan may not exceed the permissible statutory maximum.

In the case at bar, this court entered a temporary restraining order and appointed a receiver in order to protect the subject matter of the litigation. Thereupon, defendants filed motions to direct the clerk of this court to withhold approval of the receiver's bond and to dissolve the temporary restraining order. After showing made by the parties and hearing, this court, in State ex rel. Beck v. Associates Discount Corp., *supra,* rendered an opinion overruling such motions. In the opinion we said with reference to the restraining order: "The order contemplates, in the form in which it was drawn, that defendants are restrained and enjoined from performing the acts therein set out until the application for a temporary injunction can be heard when the appeal is heard on its merits. * * * The order purports to hold the subject of the action in statu quo until the merits of plaintiff's claim to a temporary injunction can be heard de novo on the appeal."

Here it is assigned that the trial court erred in refusing to grant a hearing upon plaintiff's application therefor and in refusing to grant a temporary injunction and appoint a receiver. We sustain the assignment. In doing so, we hereby grant a temporary injunction without requiring plaintiff to furnish bond (section 24-334, R. S. Supp., 1955), and upon like conditions and with like requirements as those contained in our original temporary restraining order entered herein, and the trial court is hereby ordered and directed

to keep such temporary injunction in full force and effect until this cause is disposed of upon the merits, and until time for appeal from any judgment or final order rendered therein has fully elapsed. Likewise, as a remedy ancillary thereto, we hereby order and direct that the receiver heretofore appointed and qualified by this court shall continue to act as such with all the powers and duties contained in the order of this court heretofore entered, until this cause is disposed of upon the merits and until time for appeal from any judgment or final order rendered therein has fully elapsed.

In that connection, Article V, section 2, Constitution of Nebraska, gives this court "such appellate jurisdiction as may be provided by law." Section 24-204, R. R. S. 1943, provides that this court "shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of the district court, in all matters of law, fact or equity, where the rules of law or the principles of equity appear from the files, exhibits or records of said court to have been erroneously determined." Section 25-1063, R. R. S. 1943, provides, among other things, that a temporary injunction "may also be granted in any case where it is specially provided by statute" and section 25-1081, R. R. S. 1943, provides that: "A receiver may be appointed by the Supreme Court or the district court or by the judge of either * * * (4) in all cases provided for by special statutes * * *." In such respects, section 45-157, R. R. S. 1943, specially authorizes the granting of a temporary injunction and the appointment of a receiver, and section 25-1064, R. S. Supp., 1955, specifically provides that: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the Supreme Court or any judge thereof * * *."

It is in the light of such authorities, together with the admitted allegations of plaintiff's petition, the rec-

ord, and showing by affidavits therein, and our former opinion in State ex rel. Beck v. Associates Discount Corp., *supra,* that we have granted a temporary injunction and continued the receiver, all as heretofore ordered and directed, deeming such action as necessary and indispensable under the circumstances in order to maintain the statu quo and protect the subject matter in litigation pending ultimate disposition of the cause upon its merits.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions for trial upon the merits in conformity with this opinion. All costs are taxed to defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF EARL HOUK AND FRANK WOODROW.
EARL HOUK ET AL., APPELLEES, V. RAY PEAKE ET AL., APPELLANTS, TRANSIT, INC., ET AL., INTERVENORS-APPELLEES.

IN RE APPLICATION OF EARL HOUK.
EARL HOUK ET AL., APPELLEES, V. RAY PEAKE ET AL., APPELLANTS, W. W. BELKLEY, INTERVENOR-APPELLEE.

77 N. W. 2d 310

Filed June 1, 1956. Nos. 33882, 33883.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity and such proceedings are administrative and legislative in character.
3. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State

Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

4. **Public Service Commissions: Motor Carriers.** The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.

5. ———: ———. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers already in the area; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of such existing carriers contrary to public interest.

6. **Public Service Commissions.** 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.

7. **Public Service Commissions: Motor Carriers.** The term "willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure of which complaint is made.

8. ———: ———. Where there is competent evidence which, if believed, is sufficient to sustain the finding of the Nebraska State Railway Commission that there was not a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it, an order based on such finding is not unreasonable or arbitrary.

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

Viren, Emmert & Hilmes, for appellants.

Robert S. Stauffer, for appellees.

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

CHAPPELL, J.

This opinion involves two appeals from separate orders rendered in separate proceedings by the Nebraska State Railway Commission, hereinafter called the commission. In this court the appeals were separately docketed but consolidated for briefing, argument, and decision. They will be generally referred to as dockets No. 33882 and No. 33883, and will be decided separately in that order.

On December 2, 1953, Earl Houk and Frank Woodrow, partners, doing business as Western Transport Service, hereinafter called applicant, filed an application, No. M-6859, supplement 3, seeking to extend the territorial scope of its existing certificate of convenience and necessity to include the transportation of petroleum products in bulk "between all points and places in Nebraska, located on and west of U. S. highway No. 183" alleging that the proposed service was "required by the present or future public convenience and necessity" because "There are insufficient motor carriers domiciled in and performing service in the western part of Nebraska. The recent program for installation of pipe line heads will increase the need and demand."

On January 11, 1954, Wheeler Transport Service, Incorporated, Ray Peake, doing business as Peake Transport Service, and Charles D. Doher, doing business as Doher Transport Company, hereinafter called protestants, or Wheeler, Peake, and Doher, as the occasion requires, filed written protest alleging that present and future public convenience and necessity did not require the service proposed by applicant; that as holders of certificates of public convenience and necessity, protestants are ready, willing, and able to perform such proposed service; and that to grant the application would impair their ability to operate in conformity with their certificates of public convenience and necessity.

Hearing upon the application was held by an examiner on January 22, 1954, and on September 9, 1954, he filed

a report recommending denial of the application. Exceptions thereto were filed by applicant alleging that the examiner's report was not sustained by the evidence but was contrary thereto and contrary to law. Hearing thereon was had by the commission on October 30, 1954, and on April 7, 1955, it entered an order sustaining the exceptions in part and overruling the examiner's report in part. In doing so, the commission enlarged applicant's points of origin, but denied the application insofar as it pertained to destination territory, thereby restricting applicant's new certificate to the same destinations as originally authorized. The order found that present and future public convenience and necessity required such extensions because of the ever-shifting source of supply of petroleum products over which the commission had no control, which did not result in the placing of additional carriers in the field, or disturb the competitive situation, but resulted in continuity of dependable service to the destination area. The order found that applicant was fit, willing, and able to properly perform the service proposed and to conform with sections 75-222 to 75-250, R. R. S. 1943, and with orders, rules, and regulations of the commission. Thereupon the order revoked applicant's prior certificate, and, consolidating it with the extended authority, issued a new certificate.

Thereafter protestants filed a motion for rehearing upon the grounds that the order of April 7, 1955, was arbitrary, unreasonable, and not sustained by the evidence, but was contrary thereto and contrary to law. Hearing thereon was had by the commission on June 1, 1955, and on June 10, 1955, the motion was overruled. Therefrom protestants appealed to this court, assigning that for reasons comparable with those contained in their motion for rehearing, the order of April 7, 1955, authorizing the issuance of the extended certificate of public convenience and necessity to applicant, was

erroneous. We conclude that the assignment should not be sustained.

In Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99, this court held that: "Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

"The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity and such proceedings are administrative and legislative in character.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

"The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future convenience and necessity.

"In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.

"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 the light of such rules and others hereinafter dis-

cussed, we have examined the record in docket No. 33882, and summarize the evidence as follows: Applicant's original authority was to transport "(a) * * * Petroleum products in bulk * * * Between Superior and Scottsbluff, Nebraska, on the one hand, and, on the other hand, Venango, Big Springs and Lorenzo, and points and places located within a territory bounded on the west by the Nebraska-Wyoming state line; on the south by US No. 30; on the east by Nebraska No. 10 to its junction with Nebraska No. 2; thence west via Nebraska No. 2 to its junction with Nebraska No. 27; thence via Nebraska No. 27 to the Nebraska-South Dakota state line, and on the north Nebraska-South Dakota state line, including points and places located on said boundaries, all over irregular routes. * * * (b) Crude oil, between points and places within a 60-mile radius of Gurley, Nebraska, over irregular routes."

The extended authority granted was transportation of "Petroleum products in bulk * * * A. From all producing, refining, distributing and loading points within the State of Nebraska as points of origin, to Venango, Big Springs, and Lorenzo, and to points and places located within" the identical destination territory as that authorized in applicant's original authority. Also, the crude oil territory remained the same as that in applicant's original authority.

Applicant has been successfully engaged in transporting petroleum and petroleum products in bulk in tank trucks in western Nebraska since 1934, and is now conducting such operations in that field pursuant to its certificates issued by the Nebraska State Railway Commission and the Interstate Commerce Commission. Thus applicant is not a new carrier claiming the right to service destination territory not theretofore served by it. There is substantial competent evidence that applicant is fit, willing, and able to perform the proposed service. As a matter of fact, that is conceded by protestants. Applicant has terminal facilities and an office at Scotts-

bluff where it has adequate equipment and employs full-time a bookkeeper office manager, 4 mechanics, 10 drivers, and a foreman supervisor. Applicant has been requested to make many hauls which it was not authorized to make. It is interested primarily in obtaining additional points of origin because of the ever-shifting sources of petroleum supply.

In such respect, new production of oil is now mainly in the western quarter of this state, particularly in Cheyenne, Kimball, Banner, and Morrill counties, all in applicant's destination territory, but the oil drilling territory is rapidly expanding. This is illustrated by the fact that without dispute two large oil companies planned to drill 160 oil wells in Nebraska during 1954 and numerous smaller companies would drill wildcat wells. Further, the Wyoming-Nebraska Pipe Line Company planned in 1954 to build an oil pipe line from Cheyenne eastward with terminals at North Platte, Sidney, and elsewhere in applicant's destination territory from which petroleum products will be transported to points therein.

The branch manager of the California Company, who lives at Scottsbluff, appeared as a witness for applicant, as authorized by his superiors. He has company responsibility for supply, distribution, ordering, collection, hiring of transportation facilities, and generally overseeing the operation of its refined petroleum products in the portion of western Nebraska involved in this application, the Black Hills area of South Dakota, and the eastern edge of Wyoming. He uses motor carriers exclusively and has used and needs the service of applicant which has been satisfactory. He was familiar with the proposed pipe line, and, when constructed, his company intends to expand along the pipe line and patronize it, which will require motor carrier service from the pipe line terminals to his company's many enumerated jobber destinations in western Nebraska and east to Cozad and Kearney. His company contem-

plates also a future need for common carrier service for transportation of petroleum products from Chadron and Scottsbluff. For such reasons, his company needs a western motor carrier with broad authority, and because of such need, supported the application. He testified that protestants never had solicited any business from him or contacted him, and had never transported petroleum products for his company in his field of operations. The same was true of Transit, Inc., who intervened herein but did not appeal to this court. He testified that his company was interested primarily in being able to secure adequate transportation services, but admitted that he listened to the wishes of the company's jobbers in that respect.

The wholesale representative and general manager for Skelly Oil Company at Scottsbluff also testified as a witness for applicant. His territory was all of western Nebraska as far east as Valentine on the north and Gothenburg on the south going east. Only a small portion of such territory was outside of applicant's destination territory. His company has used applicant's transportation service interstate since 1949, which has been satisfactory. When the pipe line is constructed, his company will require that service for intrastate transportation from the pipe line terminals to its jobbers at North Platte, Ogallala, Brule, Chappell, Sidney, Kimball, Gurley, Bayard, Scottsbluff, Minatare, Chadron, Alliance, Broadwater, and Oshkosh, all in applicant's destination territory. His company also has a program of expansion in western Nebraska. He has never used and has never been solicited to use the services of protestants in his territory, and knew only of their services in eastern Nebraska. He also testified that his company was primarily interested in having adequate transportation service by any person who would satisfactorily perform it.

On the other hand, protestant Wheeler has authority to transport petroleum products in bulk "From all pro-

ducing, refining and loading points in Nebraska, on the one hand, and, on the other hand, all points and places within a 175-mile radius of Platte Center, Nebraska, as points of destination, and return of rejected shipments, over irregular routes." In that respect, a small part of his destination territory concurrently overlaps applicant's existing destination territory, which was not extended. Wheeler serves no points of origin west thereof. He maintains a terminal at Genoa and a driver's home office at Madison, and serves intrastate from Superior and Omaha. If the pipe line terminal was constructed at North Platte, he would, if necessary, maintain terminal facilities, acquire additional equipment, and seek transportation therefrom. Assuming for purposes of argument only that the commission gave no consideration to the authority of Wheeler, it would make no difference in this case. Under his present authority, he has not and could not render any service west of his destination territory. Because his destination territory concurrently overlaps only a small portion of applicant's destination territory, he could, if necessary, provide such a small part of the proposed service that it would be of little benefit to the public and little if any detriment to him. In other words, this is not a case wherein applicant was a newcomer in an authorized field already occupied by Wheeler.

Transit, Inc., which has intrastate authority to transport petroleum products in bulk from all refining, distributing, and loading points in Nebraska to all points within a 300-mile radius of Palisade, intervened, and its traffic manager testified in its behalf in this proceeding, but such intervenor did not appeal or make any appearance in this court. Further, he gave no evidence which could be helpful to protestants who did appeal. It has land upon which it could construct terminal facilities at Fairmont, but business did not warrant construction there. If sufficient volume of profitable traffic developed after construction of the pipe line, it would

be glad to construct a terminal at North Platte or Sidney, but had made no plans to do so. His company had no terminal facilities or relay points west of U. S. Highway No. 183. It had never served the refinery at Scottsbluff within the last 3 years, and has never provided service from the Chadron refinery. His company has never been in competition with applicant, but he thought that it would be if the extension were granted.

On the other hand, Doher offered no testimony in this proceeding. He did testify in the order to show cause and transfer application, docket No. 33883, hereinafter discussed. Conceding for purpose of argument only that his testimony could be properly considered in this proceeding, it would not change the result. The extent of his authority is not only equivocal but in fact is in litigation in this court and cannot yet be ascertained. His original authority was from all producing, refining, and distributing points in Nebraska to places within a 50-mile radius of Omaha and a 50-mile radius of Lincoln. He claims to have solicited business in western Nebraska, but there is no competent evidence that in recent years he ever operated in that territory. He operates only five units, but in the event the pipe line is constructed at North Platte and his supplemental extended authority is given validity, he would be willing, if needed, to purchase equipment and conduct transportation from it.

Peake has headquarters at Chester with relay points at Falls City, Wahoo, and York. He has statewide intrastate authority to transport petroleum and petroleum products in bulk in tank trucks. The record discloses that he has provided some limited service to a few points in the east end of applicant's destination territory, but he maintains no terminals or relay points in western Nebraska, and most of his business originates in Omaha and terminates east of U. S. Highway No. 183, without any appreciable competition with applicant. If terminals are opened west thereof and

business conditions demanded it, he intended to acquire terminal facilities and equipment and solicit the traffic.

In In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, relied upon by protestants, the order of the commission increased the specific scope of applicant's destination area where adequate and satisfactory transportation service already existed. In that opinion we said: "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier *in the field.* Obviously the existence of an *adequate and satisfactory* service by motor carriers *already in the area* is complete negation of a public need and demand for added service by another carrier." (Italics supplied.) The converse thereof exists in the case at bar. Herein, applicant's existing destination area has not been enlarged and it is territory which has been theretofore satisfactorily served by applicant in a field not occupied by or adequately and satisfactorily served by protestants. A small portion of such territory has been served at times few in number by two protestants who never have actually occupied applicant's field of destination but would do so if future business then made it necessary and profitable.

As recently as Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464, this court used language applicable here when we said: "In this instance there appears no order of the commission requiring the existing carriers to provide adequate service. Such an order was not required for here the certified carriers able to render adequate service clearly indicated an unwillingness to furnish the required service except under conditions as to time of service, cost, and adequacy which the carriers desired to control or unless otherwise they could find assurance of profitable operations. The commission accepted the alternative and issued a certificate to an applicant found, and shown without dispute, to be fit,

willing, and able properly to perform the service required by the shipping public. Its decision in this regard cannot be held to be unreasonable or arbitrary."

For reasons heretofore stated, we conclude that the order of the commission in docket No. 33882, which extended applicant's points of origin, was not arbitrary or unreasonable. Therefore, it should be and hereby is affirmed, with all costs taxed to protestants.

We turn then to docket No. 33883. In that regard, on February 4, 1954, Earl Houk, doing business as Western Nebraska Transport Service, filed application No. M-10364 with the commission seeking to acquire the operating rights and authority of Earl Houk and Frank Woodrow, doing business as Western Transport Service, which authority had been granted in application No. M-6859, supplement 2.

On July 14, 1954, Wheeler, Peake, and Doher filed written protests upon grounds identical in effect with those contained in their protests filed in docket No. 33882, heretofore disposed of. They also filed an application for an order to show cause and a petition in intervention in support thereof, alleging that the certificate held by Earl Houk and Frank Woodrow, doing business as Western Transport Service, was dormant and should be cancelled for failure to conduct operations within the scope of their authority and in violation of orders, rules, and regulations of the commission and the Motor Carrier Act.

Due notice was given, and thereafter on July 27, 1954, a hearing was had upon the application and order to show cause. Thereafter, on December 3, 1954, a consolidated report of the examiner recommended: (1) That the order to show cause should be vacated; and (2) that the transfer application should be granted. In the light of authorities cited and evidence received, the examiner found that there had not been any willful failure to perform the services authorized; that the certificate of Earl Houk and Frank Woodrow, doing business as Western Transport Service, had not become dormant by in-

activity; that applicant was fit, willing, and able to perform the services; and that the proposed transfer of the certificate, being consistent with public interest, should be granted.

On December 9, 1954, protestants filed exceptions to the report of the examiner upon the ground that it was not sustained by the evidence but was contrary thereto and contrary to law. On April 7, 1955, after hearing thereon, the commission entered a consolidated order overruling protestant's exceptions to the examiner's report, and approved it as modified.

Thereafter, protestants filed a motion for rehearing upon the ground that the order of April 7, 1955, aforesaid, was not sustained by the evidence but was contrary thereto and contrary to law. After hearing thereon, the motion was overruled on June 10, 1955, and protestants appealed to this court assigning that the vacation of the order to show cause was arbitrary and unreasonable, and that the transfer of the certificate was void, unreasonable, arbitrary, and contrary to law, because it was issued without notice and hearing as required by section 75-240.02, R. S. Supp., 1955. We conclude that the assignment has no merit.

Section 75-240.02, R. S. Supp., 1955, provides in part: "Approval of such transfer * * * either in whole or in part, may be given, only upon findings by the commission, after notice and hearing, that such transfer * * * will be consistent with the public interest, will not unduly restrict competition and that the applicant transferee * * * is fit, willing, and able to properly perform the service proposed; Provided, that if any of the certificates * * * proposed to be transferred * * * are dormant, the commission may approve an application of transfer * * * of any such certificates * * * only upon the basis of proof of and a finding that the transfer * * * of such certificates * * * is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230; and pro-

vided further, that if the proposed transfer * * * of any such certificates * * * will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the transferor * * * or * * * will tend to enlarge competition over that then existing, the commission may approve such an application for transfer * * * only upon the basis of proof of and a finding that the proposed transfer * * * of the certificates * * * is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230."

In that connection, the record discloses that at the time of the hearing by the examiner on transfer application No. M-10364 and the order to show cause filed therein by protestants, no order had yet been entered by the commission although notice and full hearing had been had upon extension application No. M-6859, supplement 3, docket No. 33882, heretofore disposed of. Therefore, at the opening of the hearing by the examiner on transfer application No. M-10364 and the order to show cause therein, counsel for applicant moved that the extended authority, if any such was granted as a result of extension application No. M-6859, supplement 3, should "be included in the transfer of the authority in the docket now in hearing."

Thereat, counsel for protestants, who had due notice of such hearing and were present thereat, objected but did so only upon the stated ground that the "order to show cause could not go against an application which has not been granted. And that will have to stand solely upon its own merits. I realize, of course, the Examiner can't rule on it at this time. I suggest that he reserve the ruling on it. I don't know how he could possibly rule on it if they deny it." Thereupon the examiner took applicant's motion under advisement, but the record discloses that throughout the proceedings full inquiry was made by all the parties with regard to the transfer

of the proposed extension authority without any objection by protestants.

The consolidated order of the commission overruled exceptions to the examiner's report, but modified same by including and consolidating therein the extended authority granted by the commission in application No. M-6859, supplement 3, docket No. 33882 herein. The order recited that protestants had notice and appeared at the hearing in opposition to both the extension and transfer applications. It pointed out that it had been the policy of the commission to revoke operating rights held by an applicant for an extension and to consolidate the authority contained therein with the additional authority granted when such operating rights were mutually and necessarily interdependent. Therefore, the authority in application No. M-6859, supplement 2, was revoked and cancelled, and a consolidated certificate of public convenience and necessity was issued to applicant, including the extended authority theretofore granted in application No. M-6859, supplement 3. The commission indicated in the order that to do otherwise would nullify the order granting the extension, which was predicated on a finding that such service was required by present and future public convenience and necessity, and violate the very purpose for which the applications were filed and hearing was had whereat, after due notice, protestants had appeared and fully presented their objections. The commission's order vacated the order to show cause, cancelled transferor's original certificate, transferred the consolidated authority, and issued a new certificate upon findings that applicant was fit, willing, and able properly to perform the service and conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and with the rules and regulations of the commission; and that the proposed acquisition would be consistent with the public interest and would not unduly restrict competition or result in a new or different service or operation as concerns territorial scope.

The record supports, and in fact it is conceded, that applicant was fit, willing, and able to perform the extended service, and we have already affirmatively disposed of the questions of present and future public convenience and necessity, public interest, competition, and type of service as concerns territorial scope. There remain then only the questions of notice and dormancy raised by protestants in this proceeding.

With regard to the question of notice, it is clear of course that notice and hearing is required by section 75-240.02, R. S. Supp., 1955. It is equally clear that In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413, relied upon by protestants, which involved an ex parte order entered without any notice to interested parties, has no application or controlling force here. In this proceeding protestants actually had notice and subsequently appeared at the hearing wherein their objections were fully presented and considered. To require any further notice and hearing would be a futile gesture. Protestants' contention with regard to want of notice has no merit.

Section 75-238, R. R. S. 1943, provides in part: "Any such * * * certificate may * * * upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such * * * certificate."

This court has held that: "Where there is competent evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it had occurred, an order based on such finding is not unreasonable or arbitrary.

"The term 'willful failure,' as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of." Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386. See, also, Abler Transfer Co. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667; In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718; Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363.

Conversely, by analogy from such authorities, it was not arbitrary and unreasonable for the commission to conclude that transferor's certificate of convenience and necessity was not dormant and had not been abandoned when it was shown by competent evidence, as appears in this case, that the transferor held itself out to render the authorized service, owned and operated adequate motor truck equipment, maintained terminal facilities, solicited business, actually performed satisfactory service in the territory assigned, and had not willfully failed to comply with the provisions of sections 75-222 to 75-250, R. R. S. 1943, or with any lawful order, rule, or regulation of the commission or any term, condition, or limitation of its certificate.

In that regard, protestants argued that the applicant transferor, *as a partnership,* owned no motor truck equipment, performed no services, failed to solicit new business, and did not hold itself out to the public to render service. Such contention has no merit because the certificate to be transferred was not issued to the partnership but was issued to Earl Houk and Frank Woodrow, doing business as Western Transport Service. The trucking equipment was actually owned by the individuals and leased to the partnership with commission approval. The operations were conducted by the individuals under the trade name of Western Transport Service, and the operations, as well as the books and records thereof,

were regularly inspected by officials of the commission who registered no complaint.

Protestants also argued that the operations conducted by transferor were either exempt under the Motor Carrier Act or were movements in interstate commerce. In that respect, a large portion of transferor's services originated at some points in Scottsbluff with destination at some other points in Scottsbluff or vicinity. In such respect, protestants argued that, as provided by section 75-224, R. R. S. 1943, such operations within that city and vicinity were exempt from the operation of sections 75-222 to 75-250, R. R. S. 1943, and, not being required to have a certificate to so operate, it could not be held that applicant transferor had operated pursuant to its certificate. Such contention is not only based upon false logic but also overlooks the fact that transferor had a certificate and thereunder solicited and held itself out to perform service, and, as shown by the record, actually rendered services from Scottsbluff to other points in its destination territory when opportunity was afforded.

On the other hand, a large portion of transferor's service was from Grant lease at Harrisburg, Nebraska, to Enders station, about 10 miles south of Kimball, Nebraska, and from Henshaw lease at Harrisburg to Enders station for the Platte pipe line transmission. Contrary to protestants' contention, the record in this proceeding shows by affirmative testimony that such operations were intrastate, being from points in Nebraska to points in Nebraska, and no authority is cited by protestants which would require a conclusion that they were interstate. In any event, under the circumstances in this record, transferor held an interstate certificate and the result would be the same.

For reasons heretofore stated, we conclude that the order of the commission in docket No. 33883, which vacated the order to show cause and transferred the extended authority to applicant, was not arbitrary and un-

reasonable. It should be and hereby is affirmed, with all costs taxed to protestants.

AFFIRMED.

CLARENCE H. BENEDICT, APPELLEE, V. ANDREW ANDERSEN, APPELLANT.
77 N. W. 2d 320

Filed June 1, 1956. No. 33930.

1. **Trial.** In determining the sufficiency of evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence.
2. **Automobiles: Negligence.** When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.
3. ———: ———. The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the moment of an accident, and thus contributed to cause the accident.

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

Fraser, Connolly, Crofoot & Wenstrand and *Robert G. Fraser, for* appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries, and hospital and medical expenses, by Clarence H. Benedict, plaintiff and appellee, against Andrew Ander-

sen, defendant and appellant, on account of alleged negligence of the defendant.

The action was tried to a jury. A verdict was returned in favor of plaintiff for $11,109.80. Judgment was rendered on the verdict. Thereafter in due time an alternative motion for new trial or for judgment notwithstanding the verdict was filed by the defendant. This motion was overruled. From the judgment and the order overruling the alternative motion for new trial or for judgment notwithstanding the verdict the defendant has appealed.

As ground for action, to the extent necessary to set it forth herein, the plaintiff pleaded in his petition that at or about 12:10 a. m., on or about August 10, 1953, he was walking in an easterly direction on a graveled road known as Harrison Street at a point about three-fourths of a mile south of Ralston, Nebraska; that he reached Eighty-fourth Street which is a traveled highway; and that at the time he did so the defendant who was driving a Ford automobile in a northerly direction on Eighty-fourth Street, negligently, carelessly, and recklessly drove the automobile so as to strike plaintiff causing serious and permanent injuries. Numerous grounds of negligence were alleged but in the light of the record only the following require mention here: That the defendant failed to keep a proper lookout for pedestrians at Eighty-fourth and Harrison Streets; that he failed to keep his automobile under proper control; that he failed to swerve his automobile in time to avoid striking the plaintiff; and that he failed to yield the right-of-way.

It should be noted here that there is a variance between plaintiff's petition and his proof as to the direction he was moving at the time he was struck. The petition states that he was moving in an easterly direction whereas his proof is that he was moving in a northerly direction. Plaintiff's pleaded theory instead of his proved theory was submitted by the instructions. Plaintiff did

not amend or seek to amend his petition to conform to the proof. No objection was taken to the variance on the trial. No controlling significance will therefore be attached to it here. It is mentioned only in order that confusion may not flow from a comparison of the evidence hereinafter to be considered with plaintiff's cause of action as pleaded in his petition.

To the petition the defendant filed an answer. To the extent necessary to review it herein the defendant admitted the occurrence, its approximate location, and that plaintiff sustained injuries. He denied that he was guilty of negligence. Affirmatively it was pleaded that the accident came about by reason of negligence on the part of plaintiff in that he negligently and in disregard of his own safety walked from a place of safety diagonally in a southeasterly direction near the intersection of Eighty-fourth and Harrison Streets into the lane in which defendant was properly driving and was on that account struck by defendant's automobile.

For reply the plaintiff filed a general denial. Further replying it was pleaded that even if the plaintiff was guilty of contributory negligence still the defendant in the exercise of ordinary care could have avoided the accident and therefore the defense of contributory negligence was not available to the defendant.

By assignments of error the defendant asserts numerous grounds for reversal of the judgment of the district court. The one requiring first consideration is that he was entitled to have his motion for judgment notwithstanding the verdict sustained. The determination upon this assignment must depend upon the evidence of the plaintiff with the reasonable inferences to be drawn therefrom viewed in the light most favorable to him, together with the evidence of the defendant, if any, tending to support plaintiff's position with the reasonable inferences to be drawn therefrom also in the light most favorable to the plaintiff.

It is the rule that in determining the sufficiency of

evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; Dyer v. Ilg, 156 Neb. 568, 57 N. W. 2d 84; Horton v. Maruska, 158 Neb. 723, 64 N. W. 2d 734; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The evidence discloses that Eighty-fourth Street at the location involved here is a highway outside any village or city limits. It extends northward from Papillion, Nebraska, to Ralston, Nebraska. It has a hard surface referred to as black-top. The paved width is about 20 feet. It has two lanes, one for northbound and one for southbound vehicular traffic. Harrison Street is a highway extending east and west. Its surface is gravel. It has lanes for eastbound and westbound traffic. The width of the driving area is also about 20 feet or a little more. These two highways intersect at a distance estimated by different witnesses at from one-fourth to three-fourths of a mile south of the west side of Ralston.

The plaintiff testified substantially that on the night in question he was taken in an automobile by two unknown men to a point about one and one-half blocks west of the intersection of Eighty-fourth and Harrison Streets where he was robbed, after which the two men departed in the automobile and left him in that location. He further testified that after he was so left he walked eastward to Eighty-fourth Street, then southward for about two blocks when he turned and walked north just off the east edge of the paving or black-top on Eighty-fourth Street; that he observed an automobile coming from the south on Eighty-fourth Street, which as it turned out was the automobile owned and operated by the defendant; that he was at or near the intersection of Eighty-fourth and Harrison Streets when he saw the

automobile in question; and that in an attempt to cause it to stop he stepped with his left foot out onto the pavement, waved his right hand, and was struck. From this time on he had no recollection of what occurred for several weeks.

The evidence discloses that after this collision the plaintiff was prone near the center of Harrison Street and according to estimates of witnesses from 4 to 15 feet east of the east edge of the black-top in Eighty-fourth Street, and the defendant's automobile came to rest headed north about even with the south edge of Harrison Street and according to the testimony of the defendant with the right wheels off and the left wheels on the black-top.

There is no other direct testimony as to how the accident came about except that of the defendant. There is nothing in this which directly or by inference supports the testimony of the plaintiff. His version, which conforms to the description by plaintiff of his movements as contained in his petition, is, in brief detail, that he was traveling northward on his right side of the highway at from 40 to 41 miles an hour when he saw the plaintiff moving from the west side of Eighty-fourth Street in a southeasterly direction toward the east side waving his hands; that defendant took his foot off the gas and sounded his horn; that the plaintiff stopped momentarily at about the center of Eighty-fourth Street and then stepped directly into the path of the automobile; and that the defendant applied his brakes but was unable to stop without striking the plaintiff.

The only evidence other than the testimony of the plaintiff from which any inference as to causation may be drawn is evidence of marks on the highway and the position of defendant's automobile after the accident.

As pointed out the evidence of the defendant discloses that the right wheels of the automobile were off the black-top to the east. An estimate given was that the automobile was about half off and half on the black-

top. There is testimony that there was a tire mark extending southward from the left front wheel for a distance of 54 feet. There is no apparent contention that this mark was not made by the wheel or wheels of defendant's automobile as a result of the application of brakes. This testimony is visually supported by a photographic exhibit which is in evidence. This exhibit discloses the described tire mark. It also discloses a practically parallel tire mark to the right. The two marks together disclose that the brakes were applied while the defendant's automobile was in its proper driving lane and entirely on the black-top. It appears that with the application of brakes the automobile swerved to the right, thus in probability causing its right side to leave the black-top to the east.

It appears that a reasonable inference related to this accident which may be drawn from this evidence is that the defendant saw the plaintiff on the highway in front of him and that he was unable to stop in time to avoid striking the plaintiff. This substantially is the explanation given by the defendant. Any contrary inference would be but speculation and conjecture.

It is difficult to see in the light of the evidence, under the evidentiary theory of either the plaintiff or the defendant, how it may be said that the defendant was guilty of negligence. On his own evidence the plaintiff observed the defendant coming along the highway. There is no evidence that defendant was not moving in a proper manner and at a proper speed. In the light of this observation plaintiff voluntarily placed himself in the path of the automobile. There is no evidence from which a reasonable inference could flow that the defendant had time and opportunity in the exercise of ordinary care to avoid the accident. On the evidence of the defendant coupled with the evidence of plaintiff it appears that plaintiff saw the approach of the automobile and stepped into its path under circumstances which did not allow the defendant time and

opportunity in the exercise of ordinary care to avoid the accident.

Assuming however that the defendant was shown to be guilty of negligence it must be said that the plaintiff may not recover in this case, and accordingly, the defendant's motion for judgment notwithstanding the verdict should have been sustained.

Immediately prior to the accident in this case, on the evidentiary theory of either or both of the parties, the plaintiff was in a place of safety and was aware of the approach of the defendant's automobile, and despite this he suddenly moved from his place of safety into the path of defendant's automobile.

The legal principle applicable to this situation is stated in Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N. W. 2d 509, as follows: "When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." See, also, Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727; Davis v. Dennert, *ante* p. 65, 75 N. W. 2d 112.

Under such circumstances a party may not recover on the ground that the other party had a last clear chance to avoid striking him. The rule is as follows: "The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident." Hughes v. Omaha & C. B. St. Ry. Co., *supra.*

Under these rules the plaintiff is barred from a recovery by reason of his own contributory negligence which as a matter of law was more than slight. This conclusion renders unnecessary a consideration of any of the other assignments of error.

The judgment of the district court is reversed and

the cause remanded with directions to render judgment notwithstanding the verdict in favor of defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE D. WENDEL, APPELLANT, V. MELVIN CARLSON, APPELLEE.

77 N. W. 2d 212

Filed June 1, 1956. No. 33972.

1. **Negligence.** If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue, and such burden does not shift during the trial of the case. However, if the evidence adduced by plaintiff tends to prove that issue, defendant is entitled to the benefit thereof.
2. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Automobiles: Negligence.** The driver of an automobile entering an intersection of two streets or highways is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.
4. ———: ———. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.
5. ———: ———. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery.

APPEAL from the district court for Dixon County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Mark J. Ryan and *Verzani & Verzani*, for appellant.

Deutsch & Jewell and *C. M. Kingsbury,* for appellee.

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

CHAPPELL, J.

Plaintiff, George D. Wendel, brought this action against defendant, Melvin Carlson, seeking to recover damages for personal injuries alleged to have been proximately caused by negligence of defendant when a Ford truck driven by defendant from the west and a borrowed Chevrolet car driven by plaintiff from the south, collided at an intersection of county roads. Defendant traversed the allegations of plaintiff's petition by answer and cross-petition, denying generally and alleging that while driving at a lawful speed, defendant entered the intersection first and had traveled almost the entire width thereof on his right side when plaintiff negligently drove his car into the intersection against defendant's truck, proximately causing damages thereto and personal injuries to defendant. Defendant prayed for dismissal of plaintiff's action and judgment for damages.

Upon trial to a jury, and at conclusion of plaintiff's evidence, defendant moved for a directed verdict in favor of defendant and against plaintiff on his petition, upon the grounds that the evidence was insufficient to sustain a verdict for plaintiff, and that plaintiff was guilty of more than slight negligence directly and proximately contributing to the accident, which as a matter of law precluded his recovery. Thereupon the trial court sustained defendant's motion to direct a verdict, which found in favor of defendant and against plaintiff on his petition and against defendant on his cross-petition. Judgment was rendered accordingly. Thereafter, plaintiff's motion for new trial was overruled and he appealed, assigning in effect that the verdict and judgment in favor of defendant were contrary to the evidence and law. We conclude that the assignment should not be sustained.

Summarized, the material and relevant evidence adduced in plaintiff's behalf was as follows: The accident occurred about 7 a. m., November 4, 1954. It was a clear morning with the sun just coming up. The graded and graveled road, running north and south, was 22 feet wide from shoulder to shoulder. The road running east and west was 20 feet wide from shoulder to shoulder and graveled up to a short distance east of the intersection. From an examination of skid marks and glass on the graveled intersection, it appeared that the collision occurred on the east line of the north and south road about 10 feet south of the north line of the east and west road. At that point, which was evidently in the east central portion of the intersection, the right front corner of defendant's truck collided with the left front wheel of plaintiff's car with damage continuing back to the left front door. After the collision, both the truck and car stopped, headed north. Defendant's truck was lying on its right side in the east ditch, and plaintiff's car still stood upright on its four wheels, 4 or 5 feet east of the truck where plaintiff's car had pushed over the corner brace fence post at the northeast corner of the intersection.

As plaintiff approached the intersection with which he was very familiar, he was driving from the south toward the north on the right side of the road at a speed of between 30 and 35 miles an hour. Admittedly, plaintiff had a clear view and could have seen any cars approaching the intersection from either his right or left for about a quarter of a mile. However, he first testified that as he approached the intersection he looked right and straight ahead, maybe a little bit to the left, but he later positively testified that he only looked to his right and never looked to his left at any time. Plaintiff admitted that if he had looked, he could have seen defendant's truck approaching from his left and avoided the collision, but plaintiff never looked in that direction and never did see defendant's truck. Further,

plaintiff only remembered just going over to the intersection. He did not remember entering the intersection, and did not even see the impact or know in what part of the intersection the collision occurred.

In the light of such evidence, the question for determination is whether or not plaintiff was guilty of contributory negligence more than slight as a matter of law which barred his recovery. We conclude that he was. Authorities relied upon by plaintiff are clearly distinguishable both upon the facts and applicable controlling rules of law. To discuss them at length here would serve no useful purpose.

In that regard, it is elementary that if contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue, and such burden does not shift during the trial of the case. However, if the evidence adduced by plaintiff tends to prove that issue, defendant is entitled to the benefit thereof.

In Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491, this court held: "A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

"The driver of an automobile entering an intersection of two streets or highways is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.

"A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.

"The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery." See, also, Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885; Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235. Such rules are applicable and controlling here.

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

AFFIRMED.

EVERT L. ULDRICH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
77 N. W. 2d 305

Filed June 1, 1956. No. 33973.

1. **Criminal Law.** The word "or," when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative.
2. **Criminal Law: Automobiles.** Section 39-727, R. S. Supp., 1955, defines one crime.
3. **Automobiles: Intoxicating Liquors.** The phrase "under the influence of alcoholic liquor" as used in section 39-727, R. S. Supp., 1955, is substantially synonymous with "intoxicated," "intoxication," or "drunkenness," and with "in an intoxicated condition" and "in a drunken or partly drunken condition."
4. ———: ———. An instruction that a person is "under the influence of alcoholic liquor if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties" when given where a person is charged with the crime defined in section 39-727, R. S. Supp., 1955, held not to be an erroneous instruction.
5. **Trial: Appeal and Error.** Where instructions, considered as a whole, state the law fully and correctly, error will not be predi-

cated therein merely because a separate instruction, considered by itself, might be subject to criticism.

ERROR to the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Albert L. Detmer and *Ernest A. Hubka,* for plaintiff in error.

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

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

MESSMORE, J.

This is a criminal action originally instituted in the county court of Jefferson County where the State of Nebraska was plaintiff and Evert L. Uldrich was defendant. The complaint filed in said court set forth the charge as follows: Defendant did then and there unlawfully operate or was the person in actual physical control of a motor vehicle, in said county, while he the said defendant was under the influence of alcoholic liquor. In that court defendant was tried and convicted of the offense as charged against him. From this conviction he appealed to the district court. He was tried in the district court on November 14, 1955. The jury returned a verdict finding him guilty as charged. The defendant filed a motion for new trial. This motion was overruled on December 14, 1955. On the same day, he was sentenced to imprisonment in the county jail of Jefferson County for a period of 3 months, and to pay a fine of $100 and the costs of prosecution, and was prohibited to drive any motor vehicle for any purpose for a period of 6 months from the date of his final discharge from the county jail or the date of payment or satisfaction of such fine, whichever was the later. His operator's license was revoked for a like period. From this judgment and sentence, the defendant has come to this court by petition in error, but will be referred to hereinafter

as the defendant. The State of Nebraska is defendant in error, and will be referred to as the State.

The defendant sets forth several assignments of error. We will take up the assignments of error deemed necessary to determine this appeal separately.

The record discloses that Leo M. Sebek and his wife, on the evening of July 28, 1955, drove from Beatrice to Fairbury for the purpose of delivering a passenger to the Rock Island depot to catch a train. The train was late. They started home about 12:15 a. m., July 29, 1955, and when traveling west on Fifth Street they saw a car parked parallel in the center of the street. They passed this car and proceeded to Fifth and E Streets to turn north. The car that was parked followed them. This car later was determined to be the car owned and driven by the defendant. As both cars proceeded up a hill, the defendant's car, in endeavoring to pass the Sebek car, bumped the rear fender of the Sebek car, and in pulling into the lane ahead of the Sebek car, struck the left front fender. The defendant then stopped at a stop sign. His car started to roll backwards down the hill. Sebek backed his car so that the defendant's car would not strike it again. The defendant got out of his car and walked behind it as it rolled down the hill. The car made a circular turn to the west side of the street and stopped when it hit the curb. The defendant staggered over toward the Sebek car and inquired of Mr. Sebek as to why he struck the defendant's car. Sebek informed the defendant that he was the one whose car was hit. The police were called and came to the scene of the accident in a short period of time.

Sebek's wife corroborated his testimony in all particulars. It was the opinion of both that the defendant was in an intoxicated condition.

Three police officers who were at the scene of the accident testified that the defendant staggered; that his speech was blurred; that his tongue was thick; that the odor of alcohol was on his breath; that he was uncertain

as to what he was saying; and that he was in an intoxicated condition.

The defendant offered no evidence. The evidence that the defendant was driving a motor vehicle while under the influence of alcoholic liquor on the date in question stands uncontradicted.

The defendant predicates error on the trial court's failure to sustain the defendant's motion for dismissal of the plaintiff's complaint at the close of plaintiff's evidence and after the plaintiff rested, for the reason that the complaint failed to allege sufficient facts to constitute a criminal offense under the laws of Nebraska against the defendant.

The defendant directs attention to section 39-727, R. S. 1943, wherein such section provided in part as follows: "It shall be unlawful for any person to operate any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime, and, upon conviction thereof, shall be punished as follows: * * *."

The defendant further states that after 1949, said section provided in part as follows: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: * * *." See § 39-727, R. S. Supp., 1955.

The defendant argues that prior to 1949, the crime of operating a motor vehicle while under the influence of alcoholic liquor was a criminal offense in itself; that subsequent to 1949, by legislative action, section 39-727 read in part as follows: "It shall be unlawful for any person to * * * be in the actual physical control of any

motor vehicle while under the influence of alcoholic liquor or of any drug"; and that therefore two crimes are stated in said section of the statutes.

The defendant cites 61 C. J. S., Motor Vehicles, § 628, p. 721, as follows: "A statute making it an offense for one under the influence of intoxicating liquor to operate or be in actual physical control of any motor vehicle has been held to create two separate offenses, one for operating the vehicle and another for being in actual physical control of the vehicle. Actual physical control within such a statute has been held to have a broader meaning than an ability to stop the vehicle."

Two cases are referred to under the notes with reference to the above citation: State v. Wilgus, 31 Ohio O. 443, in which reference was made to a statute which provided in part as follows: "No person who is under the influence of intoxicating liquor * * * shall operate or be in actual physical control of any vehicle * * * within this state." The court said: "* * * the word 'or' appears between the words 'no person who is under the influence of intoxicating liquor shall operate' and the words 'be in actual physical control.' Words and Phrases define the word 'or' as follows: 'Word "or" used in the Statute imports choice between two alternatives, and as ordinarily used means one or the other of two but not both.' Page 63, Words and Phrases." The court also said that the word "or" used in the statute was disjunctive and not conjunctive, and that two separate and distinct offenses were defined by said section.

The case of State v. Webb, 78 Ariz. 8, 274 P. 2d 338, followed the afore-cited case. However, the question of including in the complaint both phases or parts of the statute connected with the disjunctive "or" was not involved or decided.

We are not in accord with the defendant's contention and believe the following to be applicable.

In Commonwealth v. Jordan, 310 Mass. 85, 37 N. E. 2d 123, 137 A. L. R. 474, it was held that the word "oper-

ates," as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor, referred to the actual physical handling of the controls of the vehicle while under the influence of intoxicating liquor.

In Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698, this court, quoting from Smith v. R. F. Brodegaard & Co., 77 Ga. App. 661, 49 S. E. 2d 500, said: " 'The word "or", when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative.' 46 C. J., 1125 (4). This rule of construction has been recognized and applied by our courts in both criminal cases and civil cases." See, also, Wilson v. State, 153 Tex. Cr. 270, 219 S. W. 2d 86; Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N. W. 2d 700; McMahon v. State, 70 Neb. 722, 97 N. W. 1035.

In Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422, this court, in speaking with reference to section 39-727, R. S. Supp., 1949, which is now section 39-727, R. S. Supp., 1955, said: "It is noted that the statute defines one crime."

In the light of the authorities held to be applicable to the contention raised by the defendant, we conclude that the defendant's contention is without merit.

The defendant offered an instruction defining the word "intoxication." This instruction was based on the case of Freeburg v. State, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E 1101. The defendant contends the offered instruction should have been given by the trial court for the reason that there is an essential difference between "under the influence of intoxicating liquor" and "intoxication" because "intoxication" means a greater degree of impairment of the faculties than "under the influence of intoxicating liquor."

The trial court, on its own motion, gave instruction No. 8 which reads as follows: "You are instructed that

a person is 'under the influence of alcoholic liquor' if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties."

In Freeburg v. State, *supra,* it is said: " 'The word "intoxicated" is synonymous with "drunk," and in the Standard Dictionary "drunk" is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, * * *.' "

In 61 C. J. S., Motor Vehicles, § 625, p. 718, it is said: "The phrase 'under the influence of liquor' as used in the statutes under consideration is a very elastic term and has been construed as being substantially synonymous with such words as 'intoxicated,' 'intoxication,' or 'drunkenness,' and with the terms 'in an intoxicated condition' and 'in a drunken or partly drunken condition,' * * *."

We find no prejudicial error in the giving of instruction No. 8.

The defendant predicates error on the trial court giving instruction No. 7. This instruction sets forth the elements of the offense charged which the State must prove beyond a reasonable doubt. The instruction does recite, in the last paragraph thereof, the following: "On the other hand, if you have a reasonable doubt as to the truth of all or any of said propositions, or if you find that the State has failed to establish said propositions or any of them by evidence beyond a reasonable doubt, then in that case it would be your duty to find the defendant not guilty of said offense." The defendant argues that the question the jury had to decide was, did the State prove beyond a reasonable doubt that the defendant committed the crime as charged?

The defendant cites Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. R. 835, wherein the court held that in a criminal case on a plea of not guilty, the jury to convict must find from the evidence beyond a reason-

able doubt that the defendant is guilty, and the court has no right to say which allegations are uncontradicted.

The defendant argues that there is no rule that requires the jury to have a reasonable doubt as to believing the truth of all or any of said propositions as given in instruction No. 7 by the trial court.

Instruction No. 5 is a complete instruction defining reasonable doubt. No objection was made to the giving of instruction No. 5. It is very similar to the instruction on this subject approved in Owens v. State, 152 Neb. 841, 43 N. W. 2d 168. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism. See, Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374; Dwoskin v. State, 161 Neb. 793, 74 N. W. 2d 847.

The defendant contends that the sentence was excessive. The evidence discloses that the defendant was in a highly intoxicated condition. Competent police officers, two with many years of experience, had observed many individuals in this condition. While the defendant states that there was not much traffic, the fact remains that the defendant was driving his car within the city limits of a large town and on a street which was used to arrive at a main highway. He paid no attention to his car after he stopped at the stop sign, permitted it to roll downhill on the wrong side of the street, staggered along behind it, left it, and went over to talk to Sebek. In construing this law, we cannot ignore its manifest purpose. Each year, as a result of traffic accidents upon Nebraska highways, persons are killed, maimed, and crippled, and thousands of dollars worth of property destroyed. A significant portion of this appalling and tragic loss is attributable to the drunken driver, and the seriousness of operating a motor vehicle while under the influence of intoxicating liquor cannot be ignored or overlooked. The Legisla-

ture considered it necessary to increase the penalties for this offense in 1953. The defendant had ample opportunity to explain his conduct during the trial of this case and to furnish any extenuating circumstances favorable to him, but he elected not to be subjected to questioning. There is nothing in the record to show an abuse of discretion exercised by the trial court, and the sentence is within the limits prescribed by law. The applicable rule is: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576. We find no reason or justification for interfering with the sentence imposed. The defendant's contention is without merit.

Other assignments of error contended for by the defendant are without merit and need not be discussed.

Finding no error in the record prejudicial to the defendant, we conclude the judgment should be and is hereby affirmed.

AFFIRMED.

MOSE M. NEUSBAUM ET AL., APPELLANTS, V. CHICAGO AND NORTHWESTERN RAILWAY COMPANY, APPELLEE.
77 N. W. 2d 299

Filed June 8, 1956. No. 33928.

1. **Railroads: Automobiles.** It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence.
2. ———: ———. If the operator of an automobile is familiar with a railroad crossing and the surrounding conditions, it is

his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted.

3. ———: ———. Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given.

APPEAL from the district court of Dawes County: EARL L. MEYER, JUDGE. *Affirmed.*

R. R. Wellington and *Charles A. Fisher,* for appellants.

Neely, Otis & Neely and *Ernest M. Johnson,* for appellee.

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

SIMMONS, C. J.

This is an action for damages suffered by plaintiff Neusbaum in a crossing accident when a train of defendant struck a truck in which plaintiff Neusbaum was riding. At the close of plaintiffs' case-in-chief the trial court sustained a motion made by defendant and dismissed plaintiffs' action. Plaintiffs appeal. We affirm the judgment of the trial court.

We state the evidence in the light of the established and often repeated rule that in determining such a motion the plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can be reasonably deduced from the evidence.

At the place of the accident the tracks of the defendant ran generally east and west. They consisted of a main-line track and to the north thereof a sidetrack with a distance of 6 or 7 feet between the two tracks.

The roadway ran generally from the north to the south, with a slight downgrade to the tracks and at an angle to the southeast. It was a graveled road with

a traveled portion at least 16 feet in width.

To the west of the road and north of the tracks, at the location important here, there was an elevation in the ground. Upon that there was a woven wire fence parallel with the road. Weeds had gathered behind the fence so that for a few feet the view to the west along the defendant's right-of-way was obstructed to a height of about 7 feet above the traveled surface of the road.

The accident happened about 10 a. m. on the morning of November 15, 1951. The sky was cloudy, visibility was good, and there was a wind of 20 to 25 miles an hour.

Plaintiff Neusbaum was an employee of the University of Nebraska, and at the time was engaged in cattle feeding on the Fort Robinson reservation. He and the foreman drove in a southeasterly direction along the road going to cattle enclosures south of the defendant's tracks. They were in a light truck. The foreman was driving. The truck had an enclosed cab. Plaintiff was riding on the right side. The window in the door on that side was closed. The window in the door on the driver's side was partly open.

Both the driver and the plaintiff Neusbaum were well acquainted with the crossing and the general physical characteristics of the land, the fence, the tracks, and the road at that point. They had used that road many times.

The truck stopped with a distance between the bumper and the north rail of the main track of 25 feet, and a distance between that rail and the driver and plaintiff Neusbaum of 33 feet. At that point both the plaintiff Neusbaum and the driver looked to the west. Their visibility of defendant's tracks—being obscured by the weeds—was then about 60 to 80 feet. They heard neither whistle, nor bell, nor sound of a train. They did not see the train.

The driver testified that when down to or on the

side track there was visibility several hundred feet to the west. The plaintiffs' witness, who testified from measurements, stated that if the truck had been on or "approaching" the side track the vision would have been unobstructed.

Having looked and listened as above stated, the driver started across the tracks at a speed of from 3 to 5 miles per hour. The truck could have been stopped in 10 feet. Both driver and plaintiff Neusbaum testified that they never again looked to the west.

The driver testified that he did not look or "I would have seen him when I was on the side track there."

Defendant's train was powered by a steam engine. The truck was hit on the hood on the right side above the right front wheel.

Plaintiffs claim that the issue of proximate cause and contributory negligence were jury questions.

Plaintiffs here base their claim of negligence on two primary facts which they submit the evidence sustains. The first is the claimed negligence of the defendant in permitting the weeds to accumulate along a fence on its right-of-way. The second is the claimed failure to ring a bell or sound a whistle in compliance with section 74-573, R. R. S. 1943. However, the decision here turns on the question of the negligence of the driver of the truck and the negligence of the plaintiff Neusbaum who was riding therein.

In Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161, we stated this rule: "It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence."

The above rule was followed verbatim in McQuin v. Missouri P. R. R. Corp., 122 Neb. 423, 240 N. W. 515,

and in Mundt v. Chicago, R. I. & P. R. R. Co., 136 Neb. 478, 286 N. W. 691.

In Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679, we restated this rule: "If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted."

But plaintiffs say that those rules deal with the driver of a car and not one who is riding with a driver. They cite decisions dealing with guest cases and imputed negligence. This is not a guest case in that sense. Here plaintiff Neusbaum and the driver were coemployees of the University of Nebraska. The government of the United States owned the truck. They were on a mission to feed and care for cattle. This distinction is pointed out in Kepler v. Chicago, St. P., M. & O. Ry. Co., *supra*. There we said of that case: "The case differs from those in the books where two persons induced by the same considerations drive together in the vehicle of one of them to accomplish an end of common interest."

Seiffert v. Hines, 108 Neb. 62, 187 N. W. 108, is quite comparable to this case. There the rider was killed. Plaintiff was the administrator of his estate. There it was claimed that the negligence of the driver could not be imputed to plaintiff's intestate. There the deceased and the driver were coemployees. There the deceased was familiar with the track in question. There the deceased had a clear opportunity of seeing the approaching train and a "better opportunity" than the driver. These conditions exist in the instant case. We there held, applicable here, that: "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."

Moreland v. Chicago & N. W. Ry. Co., 117 Neb. 456, 220 N. W. 692, was a rider case. We there held: "Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given."

We have analyzed the cases cited by plaintiffs and defendant. Rules stated in the opinions must be read in the light of the factual situations presented. For instance, in McQuin v. Missouri P. R. R. Corp., *supra,* the accident happened on a dark night. We there pointed out the difference in that situation and those that occurred in the daylight. We do not deem it necessary to cite or discuss other cases.

We find no basis upon which plaintiffs can be held to have a right to prevail.

The judgment of the trial court is affirmed.

AFFIRMED.

THEODORE M. HANSEN ET AL., APPELLEES, V. E. L. BRUCE CO., A CORPORATION, APPELLANT.
77 N. W. 2d 458

Filed June 8, 1956. No. 33931.

1. **Contracts: Evidence.** In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties.
2. **Contracts.** A written contract expressed by clear and unambiguous language is not subject to interpretation or construction.
3. ———. The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents.
4. ———. The entire contract must be regarded with a conscious effort to give effect to every part of it without disproportionate

emphasis upon one to the neglect of other provisions.

5. **Assignments: Contracts.** An assignment of a contract does not create a contractual obligation between the assignee and the other party to the contract.

6. ———: ———. An assignee of a contract generally acquires no greater right than that possessed by the assignor. The assignee stands in the place of the assignor and he cannot sue if the assignor could not have maintained an action.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Smith & Smith, for appellees.

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

BOSLAUGH, J.

The objective of this litigation is the recovery of damages from appellant on its written guaranty of the performance by Beal Terminix Company of the obligations of a contract executed by H. J. Erhorn and the Beal Terminix Company resulting from its failure to perform the contract as it is alleged by appellees who are assignees of H. J. Erhorn.

The substance of the petition is that:

H. J. Erhorn made a contract about May 22, 1945, with Lloyd A. Beal, doing business as Beal Terminix Company, for the insulation of a house located at 2615 North Forty-fifth Street, Omaha, Nebraska, against attack of subterranean termites. Appellant about June 13, 1945, by endorsement written on the contract guaranteed the fulfillment of it by Lloyd A. Beal. A copy of the contract and guaranty is made a part of and attached to the petition. Appellees purchased the house and the real estate on which it is located about May 28, 1947, from Erhorn and he, as a part of the transaction, orally assigned the insulation contract and the guaranty of appellant to appellees. Appellees performed the

obligations of the contract required of them and they continued the contract in force and effect to June 13, 1952. Beal made frequent and repeated applications of Terminix to the house pursuant to the contract during the period between May 28, 1947, and March 1952, but termites existed in the house during that period, continued to exist therein, and have during that time worked and continued to work in the house and its substance and strength have been injured. Beal has not satisfied the terms of the contract by him required to be performed. He did not and has not insulated the house against attack of subterranean termites. The additional applications of Terminix made by Beal as found necessary upon reinspection of the house did not and have not insulated the house against subterranean termites. The house, because of the foregoing matters, was damaged in a named amount for which judgment was asked.

The execution and delivery of the contract and guaranty and the fact that Beal made frequent and repeated applications of Terminix to the house at 2615 North Forty-fifth Street, Omaha, Nebraska, between May 28, 1947, and March 19, 1952, were admitted by the answer of appellant. Appellant therein alleged that the Terminix was applied to the house at various times between June 13, 1945, and March 19, 1952, in accordance with the requirements of the treating technique developed by E. L. Bruce Co., and that the contract was in all respects performed by Beal.

Appellant tested the sufficiency of the evidence to support a verdict for appellees at the close of the evidence by a motion for an instructed verdict for it. The motion was overruled. A verdict and judgment for appellees was the result of the trial of the case. Appellant by motion asked the court to disregard the verdict and render a judgment for it or, in the alternative, for a new trial. The requests were denied and this appeal was taken.

H. J. Erhorn, hereafter called Erhorn, was and had been for about 25 years engaged in selling real estate, building and selling new houses, and buying and remodeling older houses and selling them. He built the house concerned in this cause about 5 years before he sold it in May of 1947 to appellees. It will be referred to herein as the Hansen house. He had constructed two other houses at an earlier time before the Hansen house was built, one on either side of it. The two houses he first built at this location became infested with termites. He had trouble with them and he learned how to recognize the presence of termites. He made a study of subterranean termites. He read all the material he could secure on the subject including publications issued and distributed by the United States. Erhorn occupied the Hansen house as his home and sometime before May 22, 1945, he discovered there were termites in the house where a sill joined the top of a concrete block of the foundation and he also observed a yellow canal or tube at or near that location that had been constructed by termites as a passageway for them. It was made up the side of a basement window and extended about halfway along the north wall. He had been on the alert for the presence of termites because of the infestation in the other two houses.

He soon thereafter contacted the Beal Terminix Company, owned by Lloyd A. Beal and hereafter referred to as Beal, and "talked about treating them." When Erhorn first communicated with Beal he asked for an estimate of the cost of treating the house. Later Beal went to the Hansen house and talked with Mrs. Erhorn. Erhorn was not present. Mrs. Erhorn said she wanted an estimate of the cost of treating the house. Beal inspected the house and made a written report. He told Mrs. Erhorn of the termite infestation and the damage he found. She asked Beal to give her a price for treating the house. He made a computation and quoted her a figure. There was further conversation concerning the

repair of the damage. She said Erhorn was a contractor and he would do all the work except the treatment of the house. Beal used a printed form, filled in the blanks, signed it, and Mrs. Erhorn signed the name of her husband to it and indicated thereon that she had signed her husband's name for him. This is the contract on which this case is based. It is dated May 22, 1945, and its terms became effective June 13, 1945. Erhorn approved what his wife had done and said concerning it: "I made a contract with them (Beal) to treat the termites."

Soon after May 22, 1945, Beal, pursuant to the contract, applied Terminix to the house as provided and required by the treating technique developed by appellant. Erhorn said he was present at least a part of the time and that "it took about two days to treat the house." Beal visited the house later while Erhorn occupied and owned it for the purposes defined in and as performance of the contract. Erhorn said that after the treatment he made frequent check on the house, that he looked for termites, and that he was continuously alert as to the condition of the house until he sold it. Erhorn testified as a witness for appellees that he was satisfied with the way the contract was performed by Beal from the time it was made until the house was sold and conveyed to appellees.

Appellees bought the house from Erhorn May 28, 1947. They went through it and examined it probably three times before they bought it. They knew that the house had been infested with termites but appellees said Erhorn told them it had been treated and they thought it was a wise purchase because if it had been treated "there were precautionary methods taken against subterranean termites." They saw and carefully read the contract between Beal and Erhorn for the treatment of the house before the purchase of it was made and Erhorn told them the contract would go in with the sale of the house. The contract was surrendered to appellees

when the transaction for the purchase of the house was completed and it was conveyed to them. Appellees did not have an inspection of the house made for termites when they bought it, neither have they had an inspection or any treatment of the house since March 21, 1952. They paid the amounts required to keep the contract in effect from June 13, 1947, to June 12, 1952. It was terminated on the last date by appellees. Erhorn talked with appellees about termites during the negotiations for the sale of the house and he said he told them the whole story. He showed them the contract with Beal, told appellees the house had been treated for termites, and that he had a yearly contract for inspection and retreatment. He advised appellees to continue the inspection and treatment and he said the deal was made on that basis. He told them when he sold the house the contract would go along with the sale and when he closed the sale of the house to appellees he delivered the contract to them with the intention thereby to relinquish all his right, title, and interest in it.

Beal made on an average about 3 or 4 inspections of the house each year after the appellees purchased it, generally at their request, and on many occasions he applied Terminix to a part or parts of the house. This was done on occasions not because he found evidence of live termites but because it was requested by appellees. The last inspection was made by Beal March 21, 1952. The notice of appellees terminating the contract was dated June 10, 1952. There was no claim that Beal defaulted in the matter of inspection or in making additional applications of Terminix to the house after inspection when found necessary. There is no proof that Beal did not apply Terminix to the house in accordance with the treating technique developed by appellant. The evidence that he did so is not disputed. Appellees disclaim any communication with Beal or anyone representing him concerning the contract before they made and completed the transaction for the purchase of the

house. The first contact they or either of them had with Beal or anyone employed by or acting for him was about a year after the purchase of the house.

The contract by virtue of which appellees claim the right to recover damages in this action is characterized in its caption as a Terminix service contract. It relates that Beal Terminix Company is licensed under U. S. Letters Patents by E. L. Bruce Co., Memphis, Tenn., manufacturers of Terminix. The relevant provisions of the contract are these: "The Undersigned Terminix Licensee hereby contracts to insulate the building (or buildings) listed below, against the attack of subterranean termites, by applying Terminix in accordance with the requirements of the treating technique developed by E. L. Bruce Co., for the sum of: Two Hundred Six and 20/100 Dollars * * * The Undersigned warrants that any additional applications of Terminix to insulate against the attack of subterranean termites, found necessary upon re-inspection, shall be performed at no additional cost. This warranty is effective for one year from the date of the original insulation. * * * The Undersigned agrees to extend this warranty from year to year for the sum of $12.20, payable annually on or before each anniversary of the Contract. The Purchaser reserves the right to terminate this agreement as of any anniversary date by giving advance written notice to the Undersigned; the Undersigned reserves the right to terminate this agreement as of the fifth or any later anniversary date. * * * The purchaser's guaranty copy of this contract will be executed and issued by E. L. Bruce Co. upon receipt of notice from the Undersigned Licensee that the contract price has been paid in full." The guaranty on which this action is founded, omitting the signature and provisions unimportant to this case, is as follows: "E. L. Bruce Co. hereby guarantees fulfillment of the terms of this contract by its Licensee * * *."

If the contract is not burdened with ambiguity, if

it was not inspired by fraud, or if it was not induced by mutual mistake, what the contract made by Erhorn and Beal was must be decided by the language of the instrument which evidences it. There is no claim of fraud, mistake, or ambiguity. Appellees say the contract is clear and a contract written in clear and unambiguous language is not subject to interpretation. This may be accepted as an area of agreement. In the recent case of Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, the long-established doctrine of this court was reiterated and applied: "In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties." See, also, Frentzel v. Siebrandt, 161 Neb. 505, 73 N. W. 2d 652. The contract must be interpreted as any other written agreement in accordance with its general scope, its design, and the intention of the parties at the time it was made as described by the whole instrument. In Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780, it is said: "The entire contract must be regarded with a conscious effort to give effect to every part of it without disproportionate emphasis upon one to the neglect of other provisions."

The hypothesis of appellees is that Beal contracted unqualifiedly to insulate the Hansen house against attack of subterranean termites and that appellant guaranteed that Beal would in any event perform that obligation. Appellees make this clear beyond doubt by their emphasized statements that Beal agreed to insulate against attack of termites; that the contract is clear and there is no need for interpretation; that the key word in the contract is "insulate"; that it has a definite meaning in the law—to isolate so as to have no dependence or association with surrounding objects; and that therefore the contract was that Beal would detach and isolate the house from this "assailing" or "setting to work upon" by termites.

Appellees assert the foundation for their case by separating from their context, quoting, and emphasizing the words "insulate against the attack of subterranean termites." This is not a fair statement or deduction. The contract is that Beal "contracts to insulate the building * * * against the attack of subterranean termites, by applying Terminix in accordance with the requirements of the treating technique developed by E. L. Bruce Co." The word "insulate" therein is modified, restricted, and defined by the language of the contract. The words following insulate, "by applying Terminix in accordance with the requirements of the treatment technique developed by E. L. Bruce Co.", determine the meaning in which the word "insulate" is employed therein and establish the manner and extent of the insulation intended and expressed by the contract. The meaning of a word of a contract may not be decided by undue emphasis of it and the disregard of other qualifying and limiting terms of the contract. The obligation of Beal in this regard was to insulate against attack by subterranean termites upon the house by applying Terminix in accordance with the requirements of the treating technique developed by E. L. Bruce Co.

The trial court charged the jury that the word "insulate" means to make an island of, to isolate, to place in a detached situation or in a state of isolation and that it was for the jury to say whether or not a reasonably prudent person in the situation of appellees would take the word "insulate" as used in the contract to mean to place in such a state as to isolate subterranean termites from appellees' house and to prevent such termites from entering the house. The court also instructed the jury that if appellees had established by a preponderance of the evidence that Beal failed to insulate the house as that term was defined in the charge and that because thereof the house was damaged, the appellees were entitled to a verdict for the damages. The trial court entirely eliminated from the case the

words of the contract which modified, restricted, and defined the word "insulate" as used in the contract. This was error and it was prejudicial. The record establishes that Beal made inspections and all applications of Terminix to the house at the times and in the manner his contract required.

The parties to the contract were Beal and Erhorn. Erhorn assigned it to appellees. They acquired only the rights their assignor had. Appellees as assignees are in no better position in this litigation than Erhorn would have occupied if he had not assigned the contract and was a litigant in the case. Anything that was done, said, or concluded by appellees or Erhorn in their negotiations or transaction involving the contract is unimportant in this case. The mere assignment of a contract or a right resulting from it does not create a contractual obligation between the assignee and the other party to the contract. Such an assignment does not affect or change any of the provisions of the contract. If the assignor could not have maintained an action based on the contract, neither can the assignee. Babson v. Village of Ulysses, 155 Neb. 492, 52 N. W. 2d 320; Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757; United States Nat. Bank v. Alexander, 140 Neb. 784, 1 N. W. 2d 920; 4 Am. Jur., Assignments, § 95, p. 304; 6 C. J. S., Assignments, § 99, p. 1155.

It is immaterial in this litigation what the views of appellees were as to the meaning or effect of the contract. The controlling consideration is the contract Erhorn made with Beal. At the trial appellees were each permitted, over proper objections of appellant, to testify what the word "insulate" as it appeared in the contract meant to them when they bought the house May 28, 1947. The district court explained the ruling admitting the evidence by saying: "* * * I think * * * whatever his (plaintiff's) interpretation of the word 'insulate' might mean to him would be the interpretation that is intended by the one who drew the contract." This con-

clusion was incorrect and the admission of the testimony was prejudicially erroneous. Erhorn testified at the instance of appellees. He made no claim that the contract did not express the exact agreements he made with Beal. He made no appeal to the doctrine that when the terms of an agreement have been intended in a different sense by a party to it, that sense is to prevail against the other party in which he had reason to suppose the former understood it. § 25-1217, R. R. S. 1943. Erhorn said he made a contract to have the house treated for termites. Beal inspected it and treated it in accordance with the contract. They continued under the contract for 2 years. Erhorn said he was satisfied with what Beal had done. The record fully justifies the conclusion that the contract was intended by the parties to it to be exactly what the caption says it is—a service contract requiring Beal to apply Terminix to the house in the mode developed by appellant, to continue as specified in the contract to inspect the house, and when and where necessary to apply additional Terminix to it during the life of the contract. The motion of appellant for judgment notwithstanding the verdict should have been sustained.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Douglas County to sustain the motion of appellant for a judgment notwithstanding the verdict and to render a judgment of dismissal of the cause.

REVERSED AND REMANDED WITH DIRECTIONS.

TOWN OF EVERETT, BURT COUNTY, NEBRASKA, APPELLANT, V. PAUL TEIGELER, APPELLEE.

77 N. W. 2d 467

Filed June 8, 1956. No. 33934.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when

credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

2. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
3. **Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
4. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
5. **Waters: Injunctions.** For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.
6. **Waters.** Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercises ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.
7. ———. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a neighboring proprietor to his injury.
8. ———. Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage.
9. ———. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow.

10. ———. It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted.
11. ———. A lower proprietor has no lawful cause for complaint because the upper proprietor, in the exercise of good husbandry, by the use of ditches changes the course of drainage upon his own premises, but permits the water to flow without an appreciable increase in volume upon the servient estate in a natural drain, where it would have appeared if the ditches had not been constructed.
12. ———. Section 31-201, R. R. S. 1943, which authorizes a proprietor to drain his land by tile or open ditches so constructed as to discharge water into any depression or draw upon his own premises, does not authorize him to dam up and permanently obstruct a natural drain, so as to prevent assembled surface water from flowing therein in the natural course of drainage, and so as to injure the lands of neighboring proprietors.

APPEAL from the district court for Burt County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Richards, Yost & Schafersman, for appellant.

Spear & Lamme, for appellee.

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

CHAPPELL, J.

Plaintiff, Town of Everett, a township in Burt County, brought this action seeking by mandatory injunction to require defendant Paul Teigeler to remove a dike and restore his adjoining land to its condition just before the dike was constructed. After hearing on the issues made by plaintiff's petition, defendant's answer, and plaintiff's reply, the trial court inspected the premises and rendered a judgment which found and adjudged the issues generally in favor of defendant and against plaintiff, and dismissed the action at plaintiff's costs. Plaintiff's motion for new trial was overruled, and it

appealed, assigning that the judgment was contrary to the evidence and law. We sustain the assignment.

As held in Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite."

Also, as held in Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334: "The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings."

In the light of such rules and others hereinafter discussed, we have examined the evidence, which summarized fairly discloses the following: In 1943 plaintiff opened a 33-foot road in Burt County, running east and west between land in Section 11, Township 23, Range 8, owned by Alva Roscoe, whose land was adjacent to the road on the north, and land in Section 14, Township 23, Range 8, owned by defendant, whose land was adjacent to the road on the south. In a low spot in the road, about midway between such adjacent lands, plaintiff constructed a cement spillway for the passage of surface waters which naturally flowed south from Roscoe's land to a drainway on defendant's land, thence southward to a southern point on defendant's land where the water accumulated, and overflowed into Logan Creek, which drained it off in a south and southeast direction. Just south of the spillway, but on his own land, defendant constructed a dike running east and west, about 85 feet

long and 2½ to 3 feet high, which not only diverted the water from his land back up over plaintiff's road, but also diverted it westward for some distance, thence north, back across the road, where part of the water flowed back east in the north roadside ditch to the spillway, and part of it flowed northeast across Roscoe's land, thence back to the spillway and against defendant's dike. Thus, waters from defendant's diversion and from Roscoe's land dammed up over plaintiff's road for a distance of as much as 80 rods during heavy rains, making the road impassable and unable to be maintained. It is such dike that plaintiff sought to have removed by mandatory injunction, which relief we conclude the trial court should have granted.

Years ago both farms were owned by the same person, but operated separately. There was a private lane or road of a sort between them which was at times impassable at the low spot involved, and required detouring through adjoining fields. On both sides of such lane, there was hay land and pasture and a well-defined ditch with banks which continued from what is now the Roscoe land on into what is now defendant's land, thence on down toward the south into Logan Creek as a general drainage course. Whether the ditch was natural or man-made is not established with any certainty. In any event, for many years it carried water enough at times so that in early days men hunted along it and caught fish in it which had come back up out of Logan Creek. There is no dispute that waters falling on these lands had to drain through that territory toward the south and east, and that waters had always gone across the road in that direction where the spillway was later constructed.

Roscoe bought the north farm in 1920. At that time there was a small ditch on his land extending from northwest in a south or southeast direction into defendant's land at the location of the spillway. Roscoe farmed over that ditch but kept it cleaned out. In

1927 he broke up the hay meadow and pasture. A little later he tiled it, with the outlet running under the land now owned by defendant, into Logan Creek. Roscoe's land, from a point north of the road and west of the spillway, slopes downward to the east and northeast. Further north it slopes downward to the east and southeast to the spillway. From there it slopes upward to the east both north and south. East of the spillway defendant's land slopes upward to the east, and west of the spillway defendant's land slopes to the north and east. It was from that portion of defendant's land that the dike diverted water back over Roscoe's land into the roadside ditch and over the road.

It is clear that the water from Roscoe's land formerly reached the low spot where the spillway is, and then flowed south and a little east across defendant's land. Part of it in the south end thereof might be stored on defendant's land until it evaporated, but if there was any considerable volume of water it went on south into Logan Creek over defendant's land.

In about 1927 Roscoe constructed a ditch across the north part of his farm toward the east, from about where his buildings are located, to Logan Creek. Such ditch drained off nearly all the water on about the north half of Roscoe's farm, which water had formerly gone down toward the spillway and on over defendant's land. Later, in 1942, Roscoe put a dike on the south side of that ditch and since that time, except in case of unusual floods, he has kept all waters upon such north half from flowing south, which has relieved the Roscoe land and defendant's land of waters which they had formerly received.

There is also a roadside ditch running east and west just north of plaintiff's road and west of the spillway, which Roscoe admitted he had cleaned out to improve drainage. There is no dispute that when Roscoe cleaned out that ditch and the one heretofore mentioned running from northwest to southeast, it did not result in

any additional water being received by defendant, but it naturally made it reach the spillway faster.

Defendant bought the south farm in 1942. His land south of the spillway had been broken up in about 1928 or 1929. Contrary to a preponderance of credible evidence, he testified that there were no ditches on Roscoe's land that drained on to his land until about 1949, when Roscoe constructed them. He also testified that there was no drainway or watercourse 2 feet below the surrounding land on his land south of the spillway. He admitted that there was a swale on the south 80 rods of his land, which drained into Logan Creek. In 1952 he consulted conservation authorities and had a survey made. Later, with a Caterpillar tractor and scraper, defendant dug a ditch from a point 200 feet south of the spillway clear through, straight south to his south line. Connected therewith he also dug a ditch toward the east thereof, with a dike on its south side which carried waters from his land into Logan Creek. He also dug another ditch from near the north line of his land in a southeast direction and emptied it into Logan Creek. Water from heavy rains still flowed and accumulated on and over his land, so, without conservation advice, defendant built the dike here involved and extended his ditch up to it. Such dike admittedly holds back water coming down from the north toward the spillway and casts it back upon and over plaintiff's road. Defendant's contention that he was absolved from any liability because of the ditches claimed by him to have been constructed by Roscoe on his own land, together with Roscoe's manifest interest in this litigation, has no merit.

The soil conservation official who made the survey for defendant tesitfied that there was no defined watercourse 2 feet below the surrounding land leading south from the spillway over defendant's land, but that he did not advise defendant to build the dike. Defendant's tenant testified that there was an impression of a water-

way running south to defendant's south line from a point about 80 rods north thereof, and that the other 80 rods north of it up to the spillway was just naturally low where the water came down from the spillway and wound its way around through the lowest places until high enough to move on over into Logan Creek, but there was no watercourse 2 feet below the surrounding lands leading south from the spillway. During high water, he saw water flowing from Roscoe's land across into defendant's conservation ditch from each side of the dike, thence right on over across defendant's land to its south end. He admitted that water went west from defendant's dike, then crossed the road back north to Roscoe's land, thence south to the spillway; and that even without any ditches on Roscoe's land, the water would wind its way slowly across where the spillway was, where it had washed out an impression on defendant's land to the south.

One witness for defendant testified that in the 1920's, there was a ditch or drainway on the lands of both Roscoe and defendant in which water ran on down into Logan Creek, and that even without any ditches the water would go south and east where it always went. Another such witness testified that a ditch ran in a straight line from northwest to southeast on Roscoe's land, then turned straight south on and over defendant's land. He never saw a watercourse 2 feet below the surface of the surrounding land, but the water did go on across defendant's land, with the size of the stream dependent upon the amount of the rain. From about 1929 they just farmed right on across the ditch, but the water still went in the same course south and east as it always did.

Throughout this case defendant, relying upon section 31-202, R. R. S. 1943, has erroneously assumed, as the trial court must have done, that in order to be liable, the outlet from the spillway across south on defendant's land was required to be a depression or

draw at least "two feet below the surrounding lands and having a continuous outlet to a stream of water or river or brook." In doing so, defendant has doubtless overlooked the fact that sections 31-201 and 31-202, R. R. S. 1943, must be construed and applied together. See Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81, where we so construed and applied them. Such opinion is also authority for the rule that in cases such as that at bar, the flow of surface water in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land, cannot be arrested or interfered with to the injury of neighboring proprietors.

In McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912, this court held: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.

"Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.

"For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief." See, also, Mader v. Mettenbrink, *supra;* Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809.

As held in County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N. W. 2d 507: "Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own

land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.

"The right of the owner, without negligence, to protect his land against surface water is a continuing one and the right is commensurate with the necessity for protection.

"While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury."

Conversely, of course, the last rule aforesaid has application when a lower proprietor collects surface water in a large body and diverts it upon the land of an upper proprietor. For example, in Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600, involving comparable circumstances, this court said: "As to the dike which defendant constructed it was in the natural course of drainage for water coming down from plaintiff's land. It was constructed for no other purpose than to prevent the flow of this water over his land and on down over a natural course to ultimately empty into a creek some miles away. The dike diverted the water from its natural course and caused it to back up and inundate plaintiff's land.

"This under the principles announced he had no right to do. The plaintiff was entitled unqualifiedly to have the dike removed to the extent that it interferes with the free flow of water in the natural course of drainage and to an injunction restraining its maintenance or reconstruction."

Therein we also held: "Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage."

Likewise, in Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129, we held: "A proprietor may not collect surface waters on his estate into a ditch or drain and

discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow."

In Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617, we said: "The question raised, therefore, is whether the county could properly cover up the culvert and dam the natural drainage course where the surface waters were wont to flow in a state of nature. In so doing, the county carried the water in the north road ditch, doing damage to the plaintiff's driveway and to his meadow land on the east side of his quarter. We have held many times that water cannot be so diverted from its natural drainage course as it existed in a state of nature to the damage of another." See, also, Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

As early as Town v. Missouri P. Ry. Co., 50 Neb. 768, 70 N. W. 402, this court held: "Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a watercourse; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters."

In that connection, this court held in Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735: "The rule in Town v. Missouri P. R. Co., 50 Neb. 768, examined, approved, and followed, this case not coming under the exception to the general common-law rule as to surface waters suggested therein, and as announced in Flesner v. Steinbruck, 89 Neb. 129, and Aldritt v. Fleischauer, 74 Neb. 66."

In Flesner v. Steinbruck, 89 Neb. 129, 130 N. W. 1040, 34 L. R. A. N. S. 1055, this court held: "Every interference by one landowner with the natural drainage to

the injury of the land of another is unreasonable, if not made by the former in the reasonable use of his own property.

"It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted.

"A lower proprietor has no lawful cause for complaint because the upper proprietor, in the exercise of good husbandry, by the use of ditches changes the course of drainage upon his own premises, but permits the water to flow without an appreciable increase in volume upon the servient estate in a natural drain, where it would have appeared if the ditches had not been constructed.

"If an upper proprietor, in the interest of good husbandry, and without negligence, collects in a ditch surface water, which formerly spread over his premises, and accelerates its flow in the natural course of drainage through a natural drain onto the lands of his neighbor, he is not liable therefor."

Also, in Mapes v. Bolton, 89 Neb. 815, 132 N. W. 386, this court held: "A lower proprietor may not unnecessarily obstruct a natural drain upon his own premises without the upper proprietor's consent, so as to collect surface water and cast it back upon his neighbor's farm where it would not appear but for that obstruction, and to the injury of his neighbor's crops and land.

"Section 1, art. III, ch. 89, Comp. St. 1909, which authorizes a proprietor to drain his land by tile or open ditches so constructed as to discharge water into any depression or draw upon his own premises, does not authorize him to dam up and permanently obstruct a natural drain, so as to prevent assembled surface water from flowing therein in the natural course of drainage, and so as to injure his neighbor's crops and lands."

Section 1, article III, chapter 89, Comp. St. 1909, now appears as section 31-201, R. R. S. 1943.

In the light of such rules and the evidence aforesaid, we conclude that the judgment of the trial court should be and it is hereby reversed and the cause is remanded with directions to render judgment against defendant and in favor of plaintiff as prayed in plaintiff's petition. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

NEBRASKA SEEDSMEN ASSOCIATION, APPELLANT, V. DEPARTMENT OF AGRICULTURE AND INSPECTION OF THE STATE OF NEBRASKA ET AL., APPELLEES.
77 N. W. 2d 464

Filed June 8, 1956. No. 33975.

Judgments. The requisite precedent conditions of obtaining declaratory relief under the Uniform Declaratory Judgments Act, sections 25-21,149 to 25-21,164, R. R. S. 1943, are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination.

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

Van Pelt, Marti & O'Gara, Chauncey C. Sheldon, and *George E. Howell,* for appellant.

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

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

SIMMONS, C. J.

This is an action brought to secure a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act, sections 25-21,149 to 25-21,164, R. R. S. 1943. The Department of Agriculture and Inspection of the State of Nebraska and Ed Hoyt, its director, are defendants.

The plaintiff alleged that it is the duty of the defendant Hoyt, as such director, to execute, enforce, and administer "The Nebraska Seed Law," being sections 81-2,135.01 to 81-2,146.01, R. R. S. 1943. It is further alleged that a controversy has arisen between the parties regarding the interpretation of the act with particular reference to the use of nonwarranty and disclaimer or limitation of liability provisions in the labeling of seeds offered or exposed for sale for sowing purposes. Plaintiff further alleged that it contended that the law did not prohibit the labeling of seeds sold with statements which denied or limited the civil liability for damages of the seller. Plaintiff also alleged that defendants claimed the power to prohibit a seller of seeds from placing on the label or elsewhere on the containers any statements having the effect of limiting or denying the liability of the seller.

Defendants by answer asserted the right to prohibit statements by sellers of seeds on the labels on the containers, the effect of which is to limit or deny liability of such sellers for damages to purchasers of seeds resulting from or arising out of the falsity of statements put on the labels in accord with the provisions of the law. Defendants joined in a prayer for a declaratory judgment on the issues.

Trial was had resulting in a judgment sustaining defendants' interpretation of the law.

Plaintiff appeals and here requests a reversal and remand with directions to enter a judgment in accord with its interpretation of the act. For reasons hereinafter stated we reverse the judgment of the trial court and

remand the cause with directions to dismiss the action.

At the outset we are confronted with the question of the right of the plaintiff to maintain this action. We raise the question on our own motion deeming it important to the proper performance of the judicial function under the Uniform Declaratory Judgments Act.

The caption of the petition recites: "Nebraska Seedsmen Association, Plaintiff." The sole allegation as to the plaintiff, its capacity, and interest in the alleged controversy, is the following statement copied from the petition: "That the plaintiff is an unincorporated association organized for the purpose of carrying on the business of promoting and improving the growing and marketing of agricultural seeds, the dissemination of information of the seed trade and the receipt, holding and disbursement of fees, dues and contributions and other personal property."

Defendants by answer admit the allegation. No evidence was offered or received as to that allegation.

Section 25-21,150, R. R. S. 1943, provides: "Any person * * * whose rights, status or other legal relations are affected by a statute, * * * may have determined any question of construction * * * arising under the * * * statute * * * and obtain a declaration of rights, status or other legal relations thereunder." An unincorporated association is included within the statutory definition of "person." § 25-21,161, R. R. S. 1943.

We had this provision of the statute here in Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808. We there held: "The requisite precedent conditions of obtaining declaratory relief are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination."

We there reviewed the authorities generally and also analyzed our previous decisions. We do not deem it necessary to again state those conclusions. We do quote these two sentences: "It grants the moving party an opportunity to have his own rights determined but not some other person's rights when his own are not invaded or disturbed. * * * The questions are, does he have a private individual right involved in controversy, is there a justiciable issue involving the right presented to the court, and is or will that right be threatened or violated?"

Smithberger v. Banning, 130 Neb. 354, 265 N. W. 10, was a declaratory judgment action. There Nebraska Petroleum Marketers, Inc., filed a petition in intervention. There were allegations—not present here—of the interest of the association and its members in the subject matter of the litigation. As to that petition we held: "It does not allege in this pleading that as a corporate entity it is a dealer in gasoline, oils, etc., and thus subject to the terms of the statute, the validity of which it questions. Its complaint is wholly based on the fact that it is made up of constituent members who are, in their respective private capacities, dealers in gasoline, oils, etc., which the terms of the legislation in suit purport to tax. However, in addition to the fact of the identity of its membership, its representative capacity and its authority to appear for or in behalf of its membership in the present litigation is nowhere alleged, and cannot be presumed. In this class of cases corporate identity is wholly distinct from the persons who compose it. It is obvious that this corporation has no sufficient legal interest in the matters in controversy to invoke a judgment in its own behalf or in behalf of those it assumes to represent."

New Jersey Bankers Assn. v. Van Riper, 1 N. J. 193, 62 A. 2d 677, is a quite comparable case. There the association brought a declaratory judgment action to test the constitutionality of an act dealing with the escheat of unclaimed bank deposits. There the plaintiff was

an association whose membership consisted of almost all the banking institutions in the state. (Here there is no showing as to membership of plaintiff.) The association was a banking institution formed to advance the general welfare and interests of banks, but was not itself in the banking business. It sued in its own name with the asserted authority and on behalf of its member banks. (There is no such allegation here.) The defendants were in part the Attorney General and the State Treasurer. They moved to strike the complaint contending that the plaintiff had no standing to maintain the suit. The court held: "While the Declaratory Judgments Act in express terms empowers an unincorporated association to invoke its provisions, R. S. 2:26-66, 2:26-69, proceedings thereunder are necessarily restricted by the general rule of law requiring the prosecution of all actions to be in the name of the real party in interest—a person 'whose rights, status or other legal relations are affected' * * *."

The court then considered the New Jersey statute as to the power of unincorporated associations to sue and be sued and held that plaintiff was not legally competent to maintain the suit.

The court then reversed and remanded with directions to strike the bill of complaint.

For authorities generally dealing with this question see 1 C. J. S., Actions, § 18, p. 1047, where the rule is stated: "An action for a declaratory judgment may be brought only by a person whose rights are affected, or who has a real interest in the subject matter of the controversy; * * *." See Annotation, 174 A. L. R. 551, where the rules are stated: "The general rule that the party maintaining an action under a declaratory judgments act must have a substantial interest or legally protectible interest in the subject matter of the litigation is applicable to an action for a declaratory determination as to the validity of a statute or ordinance, and to establish such an interest the person maintaining the action must show that he will be directly affected by enforcement of

the statute in question. * * * The corollary to the general rule is that one to whom a statute is not applicable is not entitled to maintain an action for a declaratory judgment testing its validity."

We conclude that the plaintiff does not have that legally protectible interest or right in the controversy that is required to maintain the action.

The judgment of the trial court is reversed and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

UNITED COMMUNITY SERVICES, A CORPORATION, APPELLEE, V. THE OMAHA NATIONAL BANK, A CORPORATION, APPELLEE, IMPLEADED WITH OMAHA PUBLIC POWER DISTRICT, A CORPORATION, APPELLANT.
77 N. W 2d 576

Filed June 15, 1956. No. 33912.

1. **Charities.** Eleemosynary means relating or devoted to charity; given in charity; having the nature of alms.
2. ———. Charity is a gift for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion; by relieving their bodies from disease, suffering, or constraint; by assisting them to establish themselves for life; or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.
3. **Corporations: Charities.** Generally a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders and is ultra vires however worthy of encouragement or aid the object of the gift may be.
4. **Constitutional Law: Corporations.** A public corporation, authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the Legislature and therefore a governmental subdivision of the state within the terms of Article VIII, section 2, of the Constitution of Nebraska, as amended in 1920.
5. **Electricity: Corporations.** Public corporations chartered for

the purpose of supplying the public with electricity have such lawful rights and powers as are clearly and expressly granted, together with such implied powers as are reasonably necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld.

6. **Corporations.** The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.
7. **Constitutional Law.** The state Constitution is not a grant but a restriction of legislative power, consequently courts can enforce only those limitations which the Constitution imposes.
8. **Constitutional Law: Statutes.** Every legislative act comes before this court surrounded with the presumption of constitutionality and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution.
9. ———: ———. The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions.
10. ———: ———. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
11. **Constitutional Law: Corporations.** The rights and franchises of a public corporation never become vested rights as against the state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated.
12. **Constitutional Law.** Article XIII, section 3, of the Constitution of Nebraska is intended to prevent the state from extending its credit to private enterprises.
13. **Statutes.** It is the province of the Legislature to determine matters of policy. In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the Legislature.
14. ———. The vital point, in all such appropriations, is whether the purpose is public. If it is, it does not matter whether the agency through which it is dispensed is public or not since the appropriation is not made for the agency but for the object which it serves. The test is in the result, not in the means.
15. **Constitutional Law: Statutes.** The Legislature may make a

reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.

16. ———: ———. The Legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each.

17. **Constitutional Law.** An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Morsman, Maxwell, Fike & Sawtell, for appellee United Community Services.

Wells, Martin, Lane, Baird & Pedersen, for appellee The Omaha National Bank.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer,* and *Kennedy, Holland, DeLacy & Svoboda,* amici curiae.

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

WENKE, J.

The United Community Services, a corporation, brought this action in the district court for Douglas County against the Omaha Public Power District and The Omaha National Bank. The purpose of the action is to determine whether or not the Omaha Public Power District, which we shall hereinafter refer to as the district, had legal authority to make the pledges that it did to the plaintiff, which we shall hereinafter refer to as

appellee. The trial court found that the pledges made were in the nature of business expenditures which the district had the right to make under its general powers. It entered a decree accordingly. Its motion for a new trial having been overruled, the district took this appeal therefrom.

When this court heard the case being orally argued the first time, it became apparent that all parties involved were interested solely in having the trial court's decree sustained. Such fact is evidenced by the briefs. It appeared to us then as it still does, that the matter involved is of substantial public concern and should be fully presented by both sides in order to give this court a better opportunity of being informed as to the questions involved. For that purpose we continued the oral hearing thereof on February 8, 1956, and directed the Attorney General to appear and file a brief for that purpose. This he did on March 16, 1956. Appellee, in its reply to the brief so filed, is quite critical of the position taken therein by the Attorney General. In presenting a case to this, or any other court, counsel should confine their remarks to the facts thereof and the law applicable thereto. Language critical of one's adversary, or of a court, has no place in such procedure.

The nature of the case is one seeking a declaratory judgment to determine the right of a public power district to make contributions to a community chest operating within the boundaries of the territory served by such district; first, under its general statutory powers, and second, under a statute passed by the 1951 Legislature giving such district the specific power to do so under the conditions therein set forth. (Now §§ 14-1106 and 14-1107, R. R. S. 1943.)

Appellee, United Community Services, a Nebraska corporation with its principal place of business in Omaha, is a nonprofit charitable organization without capital stock. It is successor to the Omaha Welfare Federation and Community Chest, a Nebraska corpora-

tion, and is commonly referred to as "Community Chest." It annually conducts a campaign in the city of Omaha to collect funds in support of numerous properly accredited and affiliated agencies engaged in charitable and eleemosynary purposes, which funds are used by these agencies to carry on their work exclusively within the limits of the city, a city of the metropolitan class, for the welfare of the people therein. As an example, in 1954 it collected $1,234,869 for this purpose.

Appellant is a public power district organized under Chapter 70 of the Nebraska statutes and has the usual powers of a public corporation. It is primarily engaged in the operation of an electrical utility, being the sole distributor of electrical energy, which it produces, to the residents of the district it serves, which includes the city of Omaha. It does not have power to tax, so none of its revenues are derived from that source.

For each of the years 1950 and 1951 the district, by separate resolutions of its board of directors, contributed and paid to appellee the sums of $28,000 and $32,000 respectively. However, before doing so, an indemnifying agreement was entered into by the parties with The Omaha National Bank, hereinafter referred to as the bank, whereby appellee deposited with the bank $75,000 in principal of United States securities to guarantee that a refund of these contributions would be made to the district if it should be judicially determined that the contributions were made without legal authority.

In each of the years 1952, 1953, and 1954 the district, by separate resolutions of its board of directors which contain findings and impose requirements to meet all the provisions of the law relating thereto as passed by the 1951 Legislature, authorized contributions to be made to appellee in the respective amounts of $36,800, $39,000, and $39,000. The evidence shows these amounts were not in excess of that authorized by the statute. However, these amounts were never paid to appellee.

It is to enforce these pledges, and to relieve itself from

the continuance of its obligation to keep the securities on deposit with the bank under the indemnifying agreement hereinbefore referred to, that appellee brought this action. It thereby seeks to have determined whether or not the district was legally authorized to make the foregoing contributions.

Eleemosynary means relating or devoted to charity; given in charity; having the nature of alms. See Webster's New International Dictionary (2d ed.), p. 829.

In 10 Am. Jur., Charities, § 3, p. 585, the legal meaning of charity is stated as: "* * * a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." See, also, 142 A. L. R. 1076; 14 C. J. S., Charities, § 1(a), p. 410; 17 McQuillin, Municipal Corporations (3d ed.), § 47.01, p. 1.

"It is the general rule that a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders and is ultra vires, however worthy of encouragement or aid the object of the gift may be." 6A Fletcher, Cyclopedia Corporations (Perm. ed.), § 2939, p. 667.

And, as stated in 10 McQuillin, Municipal Corporations (3d ed.), § 28.43, p. 106: "* * * a municipality cannot give away its property or expend money for purposes other than corporate ones, and it follows that a municipality has no power in any manner to dispose of property of the corporation without consideration, where not for a corporate purpose."

But the district contends it has the lawful right to make these contributions under its general powers, since what was done results in benefits to the district, that is, that they are ordinary expenses and not a gift. To

support this theory appellee offered evidence to the effect that the district's 980 active and 83 retired employees, and their families, take advantage of some of the facilities which these agencies supply; that it helps the morale of these employees because the district supports the community chest and therefore they are more loyal and efficient employees; that it helps protect the district's property by reason of the fact that the programs of these agencies curb juvenile delinquency; that by doing so the district discharges a duty to the public of the community which it serves and thus creates good public relations; that a good community welfare program helps draw new business to Omaha which the district will have the opportunity of serving; and that all this will result in increased revenue and lower rates. It is also the thought of the district officers that as one of the leading businesses in Omaha it is important for it to accept civic responsibility in the community which it serves and properly discharge its duties to the public thereof.

A summary of the foregoing is contained in each of the resolutions adopted by the board of directors, the last one being as follows: "That it is hereby found and determined that to make a contribution to the 1953 (1954) campaign of United Community Services will protect and increase the safety of its property and promote and aid the health and welfare of its employees and of The City of Omaha; that it will enable the employees to render more efficient service to Omaha Public Power District and will enable the District to better discharge its duties to the public, and the Board of Directors does further find that such a contribution will be for the best interests of the District in its proprietary capacity and its relations with the public generally."

Section 70-602, R. R. S. 1943, provides in part that: "A district may be created as hereinafter provided, and when so created, shall be a public corporation and politi-

cal subdivision of this state, and may sue or be sued in its corporate name."

In regard thereto we have said that: "* * * a public corporation, authorized by the legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the legislature and therefore a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920." Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412. See, also, Regents v. McConnell, 5 Neb. 423.

The Legislature gave to public power districts all the usual powers of a corporation organized for public purposes. § 70-625, R. R. S. 1943. These are more fully set forth in section 70-626, R. R. S. 1943, and section 70-655, R. R. S. 1943. They are intended to permit the business of the district to be operated in a successful and profitable manner.

We have said that the following applies to a municipal corporation in exercising the power it possesses when functioning in a proprietary capacity: "* * * a municipal corporation 'possesses, and can exercise, the following powers, and no others; First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.' Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. 364." Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558. See, also, Slepicka v. City of Wilber, 150 Neb. 376, 34 N. W. 2d 646. The same is true of public corporations engaged in proprietary functions. As held in State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480, by quoting from 29

C. J. S., Electricity, § 15, p. 521: "Companies chartered for the purpose of supplying the public with electricity * * * have such lawful rights and powers as are clearly and expressly granted, together with such implied * * * powers as are reasonably * * * necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld."

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra,* in dealing with this subject, we said: "The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances." See, also, Greenwood v. City of Lincoln, 156 Neb. 142, 55 N. W. 2d 343, 34 A. L. R. 2d 1203; State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672. We think the same would be true of all public corporations authorized to engage in proprietary functions.

Since we have held that a district, in the operation of its business, should be treated in the same manner as a private corporation, appellant cites cases as controlling which hold that private corporations may expend funds for purposes, as was here done, on the basis that they are proper operating expenses. It is true there are some courts, both state and federal, that have come to such a conclusion independent of statutory authority, however, generally the authority to do so exists by statute or provisions of the Internal Revenue Code and Treasury Department directives issued pursuant thereto. The same is true in this state since the 1953 Legislature passed what is now section 21-1,165, R. R. S. 1943, authorizing private corporations to contribute to charitable undertakings or enterprises.

In this jurisdiction, under the general powers granted public corporations, the revenues derived are required to be devoted to the purposes for which the corporation

is being operated, that is, the payment of operating expenses, indebtedness, and repairs, extensions, and improvements of the facilities. The diversion of the revenues to purposes other than these cannot be approved as incident thereto. While we are not unmindful of the fact there is some reasonable basis for the argument made, particularly in view of the evidence adduced to the effect that these contributions bring some benefits to the district and therefore should be considered as operating expenses, nevertheless, we think the matter of subjecting all such public corporations to solicitations by all classes of nonprofit agencies serving a public purpose is a matter of such grave public concern that it should be left with the Legislature which has plenary power over them. There the pros and cons of the matter can be fully presented and that body determine the public policy in regard thereto. We think the purposes served by these agencies are very worthy of everyone's charity but whether or not the revenue of public corporations should be permitted to be contributed for those purposes through these agencies, and to what extent, is, we think, a matter for the Legislature and not the courts. In the absence of express statutory authorization we find the district was without authority to make these contributions.

In this respect we have not overlooked the principle applicable as to when courts will interfere with the actions of corporate authorities in handling the ordinary business affairs entrusted to them. See Slepicka v. City of Wilber, *supra*. But these principles have no application if such corporate authorities act, as here, without authority.

The 1951 Legislature dealt with the subject by passing L. B. 447, which is now sections 14-1106 and 14-1107, R. R. S. 1943. They provide as follows:

"For the purpose of promoting and aiding in the health and welfare of any city of the metropolitan class in which it may be operating, any public corporation or

political subdivision in the State of Nebraska, which is engaged in a business in a proprietary capacity in a city of the metropolitan class, such as the production or furnishing of light, power, gas, water, or any other utility to the public, and which proprietary activities of such public corporation or political subdivision are not supported directly by taxation, may use its funds for charitable or eleemosynary purposes." § 14-1106, R. R. S. 1943.

"Any such public corporation or political subdivision in the State of Nebraska which is engaged in a business in a proprietary capacity in a city of the metropolitan class may contribute from its funds derived or to be derived from its proprietary activities to any association or corporation in a city of the metropolitan class which is organized or existing without profit to its officers, directors, or members and which operates exclusively for charitable or eleemosynary purposes for the welfare of the public; Provided, the governing body of such public corporation or political subdivision shall before making such contribution find and determine by the vote of two-thirds of all its members that to make such contribution will protect and increase the safety of its property and promote the health and welfare of its employees and enable them to render more efficient service to such public corporation or political subdivision and enable it to better discharge its duties to the public; and provided further, that the association or corporation to which such contributions are made shall so operate that the funds contributed shall be used within the limits of the city of the metropolitan class for the purposes set forth in this act. Such contributions shall not in any one year be in excess of one half of one per cent of the annual gross receipts of such public corporation or political subdivision in that year, which shall be computed on the basis of the receipts derived within the corporate limits of such metropolitan city." §14-1107, R. R. S. 1943.

Are the functions being served by these agencies for

a public purpose? What is a public purpose is primarily for the Legislature to determine. However, in Platte Valley Public Power & Irr. Dist. v. County of Lincoln, *supra,* we said that: "A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants."

While the revenues received by the district in the operations of its business are not public funds in the same sense as those derived from taxation, however, they are public funds collected by the district for certain purposes and the Legislature may, under its control of the district, authorize their expenditure for a public purpose beneficial to such district and those immediately interested therein but under the restrictions and limitations imposed on the Legislature by the Constitution.

The state Constitution is not a grant but a restriction of legislative power, consequently courts can enforce only those limitations which the Constitution imposes. Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772.

Administrative construction only becomes important in case provisions of a statute are of doubtful meaning. Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F. 2d 130. Likewise legislative construction is entitled to consideration when deliberately given, especially when adhered to consistently for a considerable period of time. Elmen v. State Board of Equalization & Assessment, *supra.* But in either event such would not be controlling if the act contravenes some provision of the Constitution.

The language employed in the statute here involved is plain and we must construe it accordingly. No rules of construction are necessary for that purpose.

The resolution passed by the district's board of directors met the requirements thereof. That leaves the only question remaining, did the Legislature act within its authority in dealing with the matters involved?

In this respect the following has application: "Every legislative act comes before this court surrounded with the presumption of constitutionality and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution." Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W. 2d 636, 150 A. L. R. 129. See, also, Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502.

Further, it should be understood that: "The constitutional validity of an act of the legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions." City of Beatrice v. Wright, 72 Neb. 689, 101 N. W. 1039.

Also, the Legislature cannot do indirectly what the Constitution prohibits it from doing directly. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85.

Bearing in mind the foregoing principles we turn next to the question of the constitutionality of sections 14-1106 and 14-1107, R. R. S. 1943.

We do not think the factual situation here presented involves a subscription to stock, or becoming the owner of any capital stock of a railroad, private corporation, or association by a city, county, town, precinct, municipality, or other subdivision of the state as prohibited by Article XI, section 1, of the Constitution of Nebraska.

We do not think the factual situation here presented can in any way be said to relate to Article XIII, section 2, of the Constitution of Nebraska, which, as far as here material, provides: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad, or other works of internal improvement, * * *."

Article I, section 10, of the Constitution of the United States provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts, * * *."

Article I, section 16, of the Constitution of Nebraska likewise provides: "No * * * law impairing the obligation of contracts, * * * shall be passed."

As between the district and the state we have, as early as Regents v. McConnell, *supra*, said: "Hence it is very clear that the rights and franchises of such public corporations never become vested rights as against the state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated."

All the outstanding obligations of the district, which are revenue bonds, were issued pursuant to and under the authority of Resolution No. 19 passed by the board of directors. It provides that operating expenses are to be paid only after all debt requirements have been met. The plan provided for securing the payment of these revenue bonds is as follows: All money received by the district is put in a "Revenue Fund"; from this fund sufficient is then deposited in the "Debt Service Fund" for payment of its indebtedness requirements in an amount adequate to cover the specific items therein set forth; and it is only after the foregoing provisions have been met that the funds remaining in the "Revenue Fund" may be withdrawn therefrom and used for general purposes, including operating expenses. It is thus clearly evident that the authorization made in sections 14-1106 and 14-1107, R. R. S. 1943, could in no possible way impair the outstanding obligations of the district.

Article XIII, section 3, of the Constitution of Nebraska, provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation."

In State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. N. S. 607, Ann. Cas. 1912C 542, we said of this section: "Section 3, art. XII (now XIII) of the constitution, was intended to prevent the state from extending its credit to private enterprises."

Also in Oxnard Beet Sugar Co. v. State, on rehearing,

73 Neb. 66, 105 N. W. 716, we said: "The legislature cannot appropriate the public moneys of the state to encourage private enterprises."

But, as stated in City of Glendale v. White, 67 Ariz. 231, 194 P. 2d 435: "No hard and fast rule can be laid down, for in determining whether a proposed expenditure of public funds is valid as devoted to a 'public use or purpose' each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. Opinion of the Justices, 320 Mass. 773, 67 N. E. 2d 588, 165 A. L. R. 807."

As stated in Oxnard Beet Sugar Co. v. State, *supra*: "It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature; * * *." See, also, Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805; State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N. W. 59, 68 Am. S. R. 629, 39 L. R. A. 513; State ex rel. Custer County Agricultural Society & Live Stock Exchange v. Robinson, 35 Neb. 401, 53 N. W. 213, 17 L. R. A. 383.

The nature of appellee and the purposes it serves has already been set forth herein. That these are for the welfare of the public and that they serve a public purpose there can be no doubt. See, Hager v. Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 67 L. R. A. 815; Myer v. Children's Aid Assn., 73 Ind. App. 489, 127 N. E. 835; Furlong v. South Park Com'rs., 340 Ill. 363, 172 N. E. 757; Power Oil Co. v. Cochran, *supra*.

In exercising the authority we think the following has application: " 'These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is

public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.' (Hager v. Home Society, 119 Ky. 235, 83 S. W. 605, 67 L. R. A. 815.)" Myer v. Children's Aid Assn., *supra*. See, also, Furlong v. South Park Com'rs., *supra*; Bullock v. Billheimer, 175 Ind. 428, 94 N. E. 763; Sambor v. Hadley, 291 Pa. 395, 140 A. 347; Long v. Mayo, 271 Ky. 192, 111 S. W. 2d 633.

We think the Legislature was not, by this section, prohibited from authorizing the use of the district's funds for a public purpose beneficial to it but in delegating such authority, which is to authorize the "use of its funds for charitable or eleemosynary purposes," it must set up reasonable standards to guide the agency which is to administer it. Schutte v. Schmitt, *ante* p. 162, 75 N. W. 2d 656. This we think it did by the following requirements therein set forth: "* * * the governing body of such public corporation or political subdivision shall before making such contribution find and determine by the vote of two-thirds of all its members that to make such contribution will protect and increase the safety of its property and promote the health and welfare of its employees and enable them to render more efficient service to such public corporation or political subdivision and enable it to better discharge its duties to the public; and provided further, that the association or corporation to which such contributions are made shall so operate that the funds contributed shall be used within the limits of the city of the metropolitan class for the purposes set forth in this act. Such contributions shall not in any one year be in excess of one half of one per cent of the annual gross receipts of such public corporation or political subdivision in that year, which shall be computed on the basis of the receipts derived within the corporate limits of such metropolitan city." § 14-1107, R. R. S. 1943.

Article III, section 18, of the Constitution of Nebraska, provides: "The Legislature shall not pass local or special laws in any of the following cases, that is to say:

* * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

"The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the constitution prohibiting local and special legislation." Allan v. Kennard, 81 Neb. 289, 116 N. W. 63. See, also, State ex rel. Cone v. Bauman, 120 Neb. 77, 231 N. W. 693.

"The rule established by the authorities is that while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. See Cooley, Constitutional Limitations (5th ed.), 481." State ex rel. Dawson County v. Farmers & Merchants Irr. Co., 59 Neb. 1, 80 N. W. 52.

As recently as Blauvelt v. Beck, *ante* p. 576, 76 N. W. 2d 738, we restated the principle as follows: "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment." See, also, Galloway v. Wolfe, 117 Neb. 824, 223 N. W. 1, 62 A. L. R. 637; State ex rel. Cone v. Bauman, *supra*; State ex rel. County of Dawson v. Dawson County Irr. Co., 125 Neb. 836, 252 N. W. 320; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773.

We, also, said in State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, that: " 'The legislature may legislate in regard to a class of persons, but they cannot take

what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fraction of the original unit as two classes, and enact different rules for the government of each.' State v. Julow, supra (129 Mo. 163, 31 S. W. 781, 50 Am. S. R. 443, 29 L. R. A. 257)."

It will be noted that section 14-1106, R. R. S. 1943, limits the public corporations or political subdivisions in the state that may use their funds for charitable or eleemosynary purposes to those engaged in a business in a proprietary capacity in a city of the metropolitan class and are not supported directly by taxation, and then section 14-1107, R. R. S. 1943, provides such public corporation or political subdivision so engaged may contribute from funds derived from its proprietary activities to any association or corporation, such as appellee, operating therein provided the governing body of such public corporation or political subdivision shall find certain things to exist. Among these are that it will protect and increase the safety of its property; that it will promote the health and welfare of its employees; that it will help its employees and enable them to render more efficient service; and that it will enable the district to better discharge its duties to the public.

We can see no real difference in the circumstances surrounding the employees of such public corporations whether in a metropolitan city or outside thereof, nor can we see any real difference in the health and welfare benefits that will be received from such donations by the public in a city of the metropolitan class and those that would be received by the public who live in the smaller communities and cities of the state which may be included in the area served. The latter would be true not only generally over the state but even within the very district herein involved. We think the Legislature had authority to deal with the subject but having entered the field could not arbitrarily classify the districts, or within a district, by limiting the right of such

public corporation to use its revenues for such purposes only in Omaha, a city of the metropolitan class, or the district serving it. The public good which the Legislature intended, and which it thought the money so authorized to be expended would serve, is applicable to the employees of all public power districts so operating. We think if such contributions are to be authorized no reasonable basis exists for the classification here made, which is, "For the purpose of promoting and aiding in the health and welfare of any city of the metropolitan class in which it may be operating, * * *." § 14-1106, R. R. S. 1943.

Two other sections of the state Constitution are called to our attention. They are Article I, section 4, which provides that: "No person shall be compelled to * * * support any place of worship against his consent, * * *" and Article VII, section 11, which provides: "Neither the state Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof."

In this respect the following principle should be borne in mind: "Neither may the legislature circumvent an express provision of the Constitution by doing indirectly what it may not do directly." Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317.

There are as evidenced here, agencies which, as part of their work, engage in both religious and charitable activities. Y.M.C.A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123; Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549; Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93, 81 A. L. R. 1166. If by giving to agencies of this character, even though the money given is designated to be used for

activities non-sectarian in character, it makes available to such agency for religious or educational purposes money it has on hand to an extent not otherwise possible, thus indirectly doing what the Constitution prohibits, we think it would be bad. Any legislation passed dealing with this subject and delegating such authority to some agency must properly restrict that agency to the same extent as the Legislature itself is restricted in order to prevent such agency from doing what the Legislature itself could not do. As we have already stated in Steinacher v. Swanson, *supra*: "* * * it is not what has been done but what can be done under a statute that determines its constitutionality."

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

The brief of amici curiae, filed in behalf of the Omaha Industrial Foundation, does not present an identical situation with that involved herein. Consequently we do not find it either necessary or desirable to determine the question as to whether or not the contributions made to it were within the general powers of the public corporation making them.

Having come to the conclusion that without express statutory authority authorizing it to do so that the district was without legal authority to make the contributions it did to appellee in 1950 and 1951 and further, because we find the act passed by the 1951 Legislature relating to the 1952, 1953, and 1954 pledges to be unconstitutional, we reverse the decision of the trial court and remand the action to it with the following directions: First, that the bank be directed to refund to the district the amount of the 1950 and 1951 contributions as is provided for in the indemnifying agreement which it entered into with appellee and the district; and second,

that the appellee be denied a recovery on the district's 1952, 1953, and 1954 pledges. Costs are taxed to the appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

NORMAN HOFFMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
77 N. W. 2d 592

Filed June 15, 1956. No. 33969.

1. **Automobiles: Criminal Law.** An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question.
2. **Homicide: Automobiles.** In criminal cases prosecuted under the motor vehicle homicide act the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.
3. **Homicide: Intoxicating Liquors.** Within the meaning of the motor vehicle homicide act the following is a proper description of a person under the influence of intoxicating liquor: A person is under the influence of intoxicating liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently.
4. **Witnesses.** Hypothetical questions to experts must be framed so as to fairly reflect facts either admitted or proved by other witnesses and must not assume as proved that which has not been, nor should they be based upon conclusions of fact which can only be found by a jury.
5. ———. It is error to permit an expert to answer a question based upon a hypothesis which hypothesis assumes facts not proved by other witnesses.
6. **Witnesses: Appeal and Error.** If however the deficiency is ad-

mitted or proved by the opposing party the error becomes harmless and in consequence may not be regarded as ground for reversal.

7. **Homicide: Automobiles.** In the prosecution of a charge of motor vehicle homicide proof of gross negligence is not essential to sustain a conviction.
8. **Criminal Law: Evidence.** The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
9. ———: ———. After a jury has considered the evidence in the light of this rule and returned a verdict of guilty the verdict on review may not, as a matter of law for insufficiency of evidence, be set aside if the evidence sustains some rational theory of guilt.

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

Dryden & Jensen, for plaintiff in error.

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

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

YEAGER, J.

This is the second appearance of this case in this court. It was previously reported as Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314. The case is an error proceeding from the district court for Buffalo County, Nebraska, in a criminal action wherein Norman Hoffman was tried and convicted on a charge of causing death while engaged in the unlawful operation of an automobile. Following conviction he was sentenced to serve a term of not less than 1 year nor more than 3 years in the State Reformatory.

By this proceeding Hoffman, the plaintiff in error, who will hereinafter for convenience be referred to as defendant, seeks a reversal of the conviction and sentence.

His brief contains five assignments of error as grounds for reversal: (1) The court erred in giving instruction No. 7 of its own motion; (2) the court erred in giving instruction No. 11 of its own motion; (3) the court erred in giving instruction No. 15 of its own motion; (4) the court erred in receiving evidence of expert witness, Dr. R. D. Johnson, as to intoxication; and (5) the evidence is not sufficient to sustain a conviction.

A determination upon these assignments of error requires a brief review of the essential phases of the crime charged against the defendant and the evidence in support of it.

The essentials of the charge are that on May 16, 1954, the defendant was engaged in the operation of an automobile and while so engaged he unlawfully so operated it that he caused it to collide with another motor vehicle, which other motor vehicle was being lawfully driven on a highway, in such manner as to cause the death of one Billy Carlson. The sufficiency of the charge is not brought into question.

In brief detail the record of the evidence in support of the charge discloses that on the afternoon of May 15, 1954, the defendant with the deceased, Billy Carlson, came to Grand Island, Nebraska, in an automobile belonging to the defendant and that after arrival at Grand Island the two partook of numerous drinks of alcoholic liquor after which at about 3 a. m. on May 16, 1954, they left Grand Island and started westward toward Kearney, Nebraska. The evidence of consumption of liquor came from the defendant on the trial of the case.

At or near the east edge of Kearney, Nebraska, the automobile in which defendant and Carlson were riding collided with the rear end of a truck going in the same direction. The truck was caused to leave the highway to the right. Defendant's automobile left the highway to the south or left and came to rest an undetermined but quite considerable distance to the west. The truck

was badly damaged and defendant's automobile was practically demolished. The defendant was seriously injured and Carlson was killed. Defendant's automobile had two doors with two separated front seats and a rear seat. After the automobile came to rest Carlson was in the right front seat and was hanging partly outside the car on that side. The defendant was in the left front or driver's seat but was somewhat to the right of what may be regarded as the driver's proper position.

After the automobile came to rest the defendant was taken to the hospital where according to a State's witness he said that he was the driver of the automobile. The State adduced no direct evidence, as distinguished from circumstantial evidence, that the defendant was driving the automobile. The defendant testified that Carlson was the driver and that he was asleep in the back seat of the car and had no knowledge of what occurred after leaving Grand Island until about 6 hours after the collision. A witness also testified that at the hospital the defendant consented that a sample of his blood could be taken. A sample of the blood was taken and testimony discloses that it contained .24 percent of alcohol by weight. A witness called as an expert testified effectually that in his opinion alcohol in the blood in excess of .15 percent was sufficient to lower the mental and physical abilities of the person.

The State adduced direct evidence that the truck which was struck by defendant's automobile was moving westward in its proper lane of travel when struck and that, shortly before, it was examined and that its lights were in proper condition and lighted. There is no evidence to the contrary and none from which a contrary inference could reasonably be drawn.

The defendant denied that he knowingly either stated that he was driving the automobile or that he consented to the taking of the sample of blood.

It was on this evidence that the jury found the de-

fendant guilty of causing the death of Carlson while he was unlawfully operating an automobile.

As is apparent from what has been said the information is sufficient to embrace any unlawful operation of an automobile causing death. The court however in the instructions defining the issues submitted only unlawful operation by reason of gross and excessive negligence. The State presented its case in part on the theory that there was involved operation under the influence of intoxicating liquor but that theory was not submitted in the instruction defining the issues. It was referred to later but only in definition of statutory duties. Of this however no complaint is made.

As pointed out by the first assignment of error the defendant asserts that the court erred in giving instruction No. 7 of its own motion. The second is that the court erred in giving instruction No. 11. As we interpret, these two are presented together. Under these the legal principle as follows is presented: "An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question." Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. See, also, Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

There has been a failure to discover in the presentation of the first assignment any real suggestion of error in instruction No. 7. Instruction No. 11 contains a definition of statutory duties. Apparently the basis of the objection to instruction No. 11 is not that the duties of the defendant were not properly defined, but that there was a failure to define the duties and obligations of the operator of the truck upon the highway.

There is no evidence to indicate that the driver of the truck operated it in any wise contrary to any provisions of statute.

Instructions as to the manner of the operation of the truck would have been proper only if there was evidence tending to show that the operation was an independent intervening cause.

A prosecution under the act under which this case is prosecuted is in its nature a prosecution for manslaughter. In a prosecution under this act this court said: "In manslaughter cases, this court has generally held that the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain the conclusion beyond a reasonable doubt that defendant's negligence or unlawful acts were also a proximate cause of the death of another." Birdsley v. State, 161 Neb. 581, 74 N. W. 2d 377. See, also, Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. N. S. 403, Ann. Cas. 1912C 495; Benton v. State, 124 Neb. 485, 247 N. W. 21; Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873.

There is no evidence in this case justifying a reasonable inference that the operation of the truck was an intervening proximate cause of the collision.

Under this conception it must be said the first and second assignments of error are without merit.

By the third assignment of error the defendant contends that the instruction defining the term, "under the influence of intoxicating liquor," is improper. The only claimed error is that the terminology departs from the terminology employed by this court in Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56. It is not pointed out where in substance there is any real distinction between the definition in that case and the instruction in this case. The same conclusion with inevitability and without peradventure flows from the two definitions. The definition contained in the instruction, as follows, given in this case is approved: "You are instructed that the term 'under the influence of intoxicating liquor,' means that a person is under the influence of alsoholic

(alcoholic) liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently."

The fourth assignment of error is an assertion in effect that it was error to receive the opinion of the witness, Dr. R. D. Johnson, as to whether or not the alcoholic content of the blood of the defendant was sufficient upon which to say that he was under the influence of intoxicating liquor. The error is predicated upon the proposition that the opinion was based on a hypothetical question containing a statement or statements of fact not in evidence.

The only factual element included in the question of which there was no evidence which we have been able to discover is the matter of the age of the defendant. In the hypothetical question the answer was required to respond to an assumption as to a man from 25 to 30 years of age. This had application to the defendant. In truth there was no evidence in the record at that time as to the defendant's age.

This was of course error. It is erroneous to include in a hypothetical question statements of fact in the absence of evidence thereof. The rule as stated in Ballard v. State, 19 Neb. 609, 28 N. W. 271, is the following: "Hypothetical questions to experts must be framed so as to fairly reflect facts either admitted or proved by other witnesses and must not assume as proven that which has not been, nor should they be based upon conclusions of fact which can only be found by a jury." See, also, Morrill v. Tegarden, 19 Neb. 534, 26 N. W. 202; Landis & Schick v. Watts, 84 Neb. 671, 121 N. W. 980; Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338.

It may not well be said however on the review by this court that the error was prejudicial. It became

harmless by evidence voluntarily given by the defendant himself. He testified that he was 28 years of age. This was within the age range specified in the hypothetical question to which the answer responded. This court said in Gorman v. Bratka, 139 Neb. 84, 296 N. W. 456: "Harmless error in the admission of evidence is not sufficient ground for the reversal of a judgment."

The fifth and last assignment of error is that the evidence is insufficient to sustain a conviction. As a background for consideration of this assignment it is pointed out that proof was required that the defendant was driving the automobile; that while so doing he operated it into the rear end of the truck; that in consequence of this Carlson was killed; and that the operation of the automobile was in an unlawful manner.

As pointed out, the court in instruction No. 7 limited illegality of operation within the charge to gross and excessive negligence. By instruction No. 11 the jury was told, as a matter of statute, that: (1) " 'The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distqnce (distance) and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle,' " (2) " 'No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding fifty miles per hour between the hours of sunset and sunrise,' " and (3) " 'It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquir (liquor).' "

Further by this instruction and instruction No. 7 the jury was told substantially but quite clearly that before it could find the defendant guilty it must find beyond a reasonable doubt that he operated his automobile in

violation of one or more of these statutory provisions, and in addition thereto that the operation was grossly negligent.

While of course the requirement of the instructions that there was a burden on the State to show gross negligence can have no determining significance in this case, since the verdict was one of guilty, it appears that attention should be called to the fact that this phase of the instructions was erroneous and should not have been submitted. The law exacts no such requirement of proof in cases such as this.

The evidence of the State in proof of the charge in most phases was circumstantial. The jury was instructed as to the basis for consideration of such evidence. There is no contention that the instruction in this respect was improper. The proper rule is as stated in Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611, as follows: "To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence."

The record of the evidence discloses without question that Carlson was killed as the result of a collision of defendant's automobile with the rear end of the truck. A reasonable inference, if not an inescapable one, flows from the evidence that the collision took place in the right or westbound lane of traffic. In this light it is reasonably inferable, if not inescapably so, that the driver violated the statute requiring him to pass to the left at a safe distance.

In the light of the consequences of the collision as shown by the evidence, it is reasonably inferable that the driver was driving at a rate of speed that was greater than was reasonable and proper in violation of statute.

From the condition and position of the automobile, the surrounding conditions as disclosed, and the position of the defendant and of Carlson in the automobile it is reasonably inferable that the defendant was the driver. There was evidence sufficient to justify a reasonable inference that at the time the defendant was under the influence of intoxicating liquor and that because of this, in violation of statute, the collision and death came about.

Thus there was competent evidence of probative value in support of the issues and each element thereof for consideration by the jury. The applicable rule to apply under these circumstances is stated in Morgan v. State, 51 Neb. 672, 71 N. W. 788, as follows: "It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed." This quotation is repeated in the opinion in Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158.

Under this rule, in the first instance, it is a function of the jury to weigh the circumstantial evidence and to test it by the following rule found in Morgan v. State, *supra,* and repeated in Kitts v. State, *supra:* "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt."

If the jury does so find, that finding may not, as a matter of law, be disturbed on review by this court if the evidence supporting the finding sustains some rational theory of guilt.

In this case there was competent circumstantial evidence of probative value from which a jury could rea-

sonably infer that the defendant was the driver of the automobile, that he operated it in violation of law in one or all of the phases presented, and that the violation or violations were the proximate cause of the collision and the death of Carlson.

It must be said therefore that the fifth assignment of error is without substantial merit.

Other questions have been argued in the brief which have not been presented by assignments of error. They will not be considered herein, first, for the reason that there is an absence of assignment, and second, for the reason that nothing of merit has been presented in support of them.

The judgment of the district court is affirmed.

AFFIRMED.

NEIGHBORS & DANIESLON, A CO-PARTNERSHIP, APPELLEE, V. WEST NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLANT.

77 N. W. 2d 667

Filed June 22, 1956. No. 33880.

1. **Attorney and Client.** Ordinarily the value of an attorney's services is a question for a jury.
2. ———. The object of special or charging liens is to protect the claim of the attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor.
3. ———. Unless the proceeds have come into the attorney's hands, he must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it.
4. ———. 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.
5. ———. When a charging lien is created by agreement an action to establish and enforce it is within the equity jurisdiction of the court.

6. **Appeal and Error.** In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and that the only issue remaining for this court is the sufficiency of the pleadings to support the judgment.

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

Mothersead, Wright & Simmons and *Robert M. Harris,* for appellant.

Stubbs & Metz, for appellee.

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

WENKE, J.

Neighbors & Danielson, a copartnership consisting of Thomas F. Neighbors and Lester A. Danielson, was organized and exists for the purpose of practicing law in Scottsbluff, Nebraska. The partners are Thomas F. Neighbors and Lester A. Danielson, each of whom is licensed to practice law in Nebraska. The copartnership brought this action in the district court for Scotts Bluff County against the West Nebraska Methodist Hospital, a corporation. The purpose of the action is to have determined the amount of attorney's fees owing it by defendant and to enforce the payment thereof out of funds, which, by agreement, had been deposited for that purpose in the Scottsbluff National Bank. The basis for the suit arises out of the copartnership representing the defendant in connection with the estate of Marguerite M. Finch, deceased, a resident of Kimball County, Nebraska, whose last will and testament was probated in the county court thereof and later, in an ancillary probate proceeding, in Park County, Wyoming. The hospital was named as a legatee in her will. This representation covered a period of about 3 years. The trial court found generally for the plaintiff and that it was entitled to recover, for services rendered and expenses incurred,

the sum of $8,375.52 and to have enforced its lien for that amount out of funds deposited in the Scottsbluff National Bank under and pursuant to the terms of the parties' agreement hereinbefore referred to. It entered judgment accordingly. Its motion for new trial having been overruled, defendant perfected this appeal.

Appellee's amended petition, upon which the cause was tried, referred to and made a part thereof a "Contract and Stipulation" entered into by the parties on June 4, 1954. Under this agreement $8,375.52 of a $14,212.29 check was deposited in the Scottsbluff National Bank in a special account out of which any judgment entered by a court of competent jurisdiction in favor of appellee was to be paid. A condition of this agreement was that appellee release its lien filed with the district court of Park County, Wyoming, and also with the administrator of the Marguerite M. Finch estate. Doing so released to the hospital $5,836.77 which was the balance of the $14,212.29 check that had been issued by the Wyoming administrator to the hospital but was being held by appellee under and by authority of its lien above referred to. The agreement preserved appellee's lien on the $8,375.52.

Appellant complains of the fact that it was denied a trial by jury, having made a motion for that purpose. The case was tried by the court. Ordinarily the value of an attorney's services is a question for a jury. Prince v. Pathfinder Life Ins. Co., 133 Neb. 705, 276 N. W. 661; § 25-1104, R. R. S. 1943; Art. I, § 6, Constitution of Nebraska.

However, when a cause of action for equitable relief is pleaded a jury cannot be demanded as a matter of right for the trial of any issue in the case. This is true even though the defendant sets up a legal defense, for when a court of equity acquires jurisdiction over a cause for any purpose it may retain the cause for all purposes and proceed to a final determination of all matters put at issue in the case. Sharmer v. McIntosh, 43 Neb. 509,

61 N. W. 727; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383; Daniels v. Mutual Benefit Life Ins. Co., 73 Neb. 257, 102 N. W. 458.

In Jones v. Duff Grain Co., 69 Neb. 91, 95 N. W. 1, we said: "The object of special or charging liens is to protect the claim of the attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor." We then went on to say: "* * * unless the proceeds have come into the attorney's hands, he must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it." See, also, 5 Am. Jur., Attorneys at Law, § 242, p. 407.

While section 7-108, R. R. S. 1943, provides for attorney's liens, they can, however, be created by agreement. Tuttle v. Wyman, 149 Neb. 769, 32 N. W. 2d 742. And this is true of a charging lien for, as stated in Tuttle v. Wyman, *supra:* " '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."

We think that is the nature of the lien here created by the agreement of the parties and is enforceable by an independent action in equity.

"Ordinarily, the charging lien is confined to the fees and costs due for services rendered in the particular suit in which the judgment was recovered." Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128.

It is enforceable by intervention in the original action. Tuttle v. Wyman, *supra.* However, as here, when a charging lien is created by agreement, an action to establish and enforce it is within the equity jurisdiction of the court. As stated in 5 Am. Jur., Attorneys at Law, § 244, p. 408: "In the absence of statutes giving juris-

diction to courts of law, the proper method—or, at least, one method—for enforcing an attorney's charging lien is by a resort to equity; such a lien is equitable in its nature." Then it goes on to state: "In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment for the proper order is sufficient."

A purported bill of exceptions filed herein was quashed. Consequently, the only issue that will be considered on this appeal is the sufficiency of the pleadings to support the judgment rendered. As stated in Zenker v. Zenker, 161 Neb. 200, 72 N. W. 2d 809: "In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and that the only issue remaining for this court is the sufficiency of the pleadings to support the judgment." See, also, Doon v. Adcock, 127 Neb. 335, 255 N. W. 548.

Let us assume, solely for the purpose of discussion, that the trial court was in error in denying the appellant a jury trial. We still do not think a reversal would be proper for all errors are not necessarily prejudicial. See, Ring v. Duey, *ante* p. 423, 76 N. W. 2d 433. As stated in Hoerler v. Prey, 125 Neb. 822, 252 N. W. 327, where no conflict appeared in the evidence adduced: "A verdict would have had to be directed for the appellee. Hence, there was no prejudicial error in denying a jury trial." In the case at bar, in order for appellant to demonstrate that such ruling was prejudicial, it would be necessary for it to show that the evidence adduced presented a jury question in fact. If not, the erroneous ruling would not be prejudicial. Without the bill of exceptions this court is not in a position to affirmatively say the error was prejudicial.

In view of what we have said we find nothing to require a reversal of the trial court's decree and therefore order that it be affirmed.

AFFIRMED.

CUSTER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.

77 N. W. 2d 590

Filed June 22, 1956. No. 33920.

SUPPLEMENTAL OPINION

Dismissal and Nonsuit: Judgments. A dismissal of a suit which is not upon or does not involve the merits is not a bar to another action on the same cause.

APPEAL from the district court for Platte County: H. EMERSON KOKJER, JUDGE. *Motion for rehearing denied.*

George Healey and *Richard D. Wilson,* for appellant.

Evans & Evans, Kenneth M. Olds, and *Hugh W. Eisenhart,* for appellees Custer Public Power District et al.

Walter, Albert & Leininger, Crosby, Crosby & Nielsen, and *Crosby, Pansing & Guenzel,* for appellees Loup River Public Power District et al.

Beatty, Clarke, Murphy & Morgan and *Charles W. Baskins,* for appellee City of North Platte.

John Riddell, for appellee York County Rural Public Power District.

Christian A. Sorensen, for appellees Southern Nebraska Rural Public Power District et al.

Elbert H. Smith, for appellee Dawson County Public Power District.

R. O. Canaday, for appellee Central Nebraska Public Power & Irrigation District.

Ward W. Minor, amicus curiae.

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

SIMMONS, C. J.

Our earlier opinion in this case is found *ante* p. 300, 75 N. W. 2d 619.

Platte and Loup have filed a motion for rehearing advancing some 21 alleged errors of fact and law which it is claimed were made in the opinion. The moving parties are supported by briefs of Central and some of the rurals.

In the opinion we set out parts of the 1946 contract between Loup, Platte, Central, and Consumers. We determined that the contract of Consumers made in 1946 to buy all or substantially all of its electric power from the hydros was and is contrary to public policy, and hence illegal and void.

We adhere to the rules of law stated in that opinion.

In the opinion we stated: "We come then to the question of whether or not the contract provision in the 1946 agreement of Consumers to buy all of its power from N.P.P.S. is void as against public policy. We are not here dealing with the narrow question of the power of a corporation to contract to buy all of a named commodity from one source of supply. Rather we are here dealing with the power of Consumers, a public corporation, to contract not to exercise for a period of 26 years its charter powers of constructing generating plants, generating electricity, and selling electricity at wholesale or retail."

This language is not to be lifted out of its context. It must be read in the light of the contract provisions, the issues and contentions of the parties, and the holding of the opinion.

The moving parties here contend that we have held that a contract for 26 years for the purchase of substantially all of the energy requirements of a customer

is void. We did not so hold. Obviously the length of the period covered by such a contract is an element to be considered in weighing the problem here presented. It is not the sole element nor necessarily a controlling element.

The duration of this contract was an element considered by us. That it created a monopoly in the hydros for the generation of substantially all power required by Consumers until 1972 is abundantly clear. It was not held that the contract was against public policy for that reason alone. In addition to the contract provision for the purchase by Consumers of its power requirements from the hydros, the contract provided that the hydros would build additional generating plants to meet the prospective increased needs of Consumers. It provided that if the hydros failed to do so, that then Consumers could construct generating capacity to meet its prospective needs, but that if Consumers did so, it would then lease the new generating capacity, as it had its existing plants, to the hydros on terms that would assure proper operation and maintenance and amortization of costs. It provided that Consumers would buy additional power so generated from the hydros. Finally it provided that when Consumers was fully paid its construction costs it would convey the leased plants to the hydros. It, in effect, guaranteed the hydros against loss at the expense of Consumers' customers. These contract provisions are interrelated and interdependent.

These and other provisions in the contract effectively made Consumers the subservient captive corporation of the hydros. The contract provision here involved was a substantial link in the chain of captivity.

That the provision here involved impaired the obligation of Consumers to discharge its public duties and impaired Consumers' ability to furnish electrical energy to the ultimate consumer at the lowest cost consistent with sound business management is also abundantly clear.

We adhere to our conclusions stated in the opinion that the contract is illegal and void.

Platte and Loup in their cross-petition requested declaratory judgments on their second and third causes of action. The trial court considered the evidence and denied the declaratory judgments.

On appeal here we determined the issues on a nonmerit ground and denied the declaratory judgments. In doing so we held that the trial court did not err in declining to render declaratory judgments on the questions presented by the cross-petition.

Loup and Platte now rightly state that it was not our intention to determine those issues on their merits. Nevertheless, they fear that our opinion may be construed as res judicata in any future litigation involving those issues. The opinion is not to be so construed.

It has long been the rule that: "A dismissal of a suit which is not upon, or does not involve, the merits, is not a bar to another action on the same cause * * *." Bank of Maywood v. Estate of McAllister, 56 Neb. 188, 76 N. W. 552. See, also, 50 C. J. S., Judgments, § 685, p. 139.

Our decision in affirming the trial court was an affirmation of the result of the trial court's judgment. It was not an affirmance of the reasons of the trial court for the dismissal. It was intended to be a dismissal without prejudice. It will not support a plea of res judicata on the merits of the issues presented.

We have considered the other grounds assigned in the motion. They do not require discussion. Other than as supplemented by this opinion, the motion for rehearing is denied.

MOTION FOR REHEARING DENIED.

IN RE ESTATE OF LENORE S. BENSON, DECEASED.
DORIS P. CLUTTER, APPELLANT, V. GRACE G. MERRICK ET AL., APPELLEES.

77 N. W. 2d 572

Filed June 22, 1956. No. 33953.

1. **Wills.** The probate jurisdiction of the county court is original and exclusive in all matters concerning the probate of the will of a deceased person.
2. **Wills: Appeal and Error.** A final order of the county court in a proceeding for probate of the will of a deceased person may be the subject of an appeal to the district court by any person against whom it is made or who may be affected thereby.
3. ———: ———. A proceeding for the probate of the will of a deceased person is in rem and all persons interested therein are parties thereto. A person affected thereby may appeal from a final order of the county court concerning the will to the district court without regard to whether or not he appeared and contested the probate of the will in the county court and he is entitled to be heard in the district court without diminution of rights as a party to the cause.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded with directions.*

Melvin Moss, for appellant.

Denney & Denney, for appellees.

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

BOSLAUGH, J.

Lenore S. Benson, a resident of Jefferson County, died May 24, 1955. An instrument purporting to be the will of the deceased and a petition seeking its probate were filed in the county court of that county. An order for hearing was entered, notice was given as required by law, the matter was heard by the county court at the time designated in the order, and the instrument purporting to be the will was admitted to probate as the will of the deceased. Doris P. Clutter, a niece and heir at

law of the deceased, within the time and manner allowed by law, prosecuted an appeal to the district court from an order of the county court probating the instrument. Grace G. Merrick, a beneficiary named therein, and Irl Else, nominated therein as executor, timely filed in the district court a petition for probate of the instrument as the will of the deceased and for the appointment of Irl Else as executor of the will and estate of the deceased. Doris P. Clutter filed an answer to the petition setting forth objections to and legal reasons why the instrument should not be probated as the will of the deceased. Doris P. Clutter had not appeared in the county court by pleading, evidence, or otherwise in an effort to contest and defeat the probate of the instrument as the will of the deceased. Grace G. Merrick by motion asked the district court to strike six of the seven numbered paragraphs of the answer of appellant to the petition of appellees because they each contained matter that was not pleaded in the county court in opposition to the probate of the instrument involved, were not a part of the issues tried in that court, constituted a departure, and were irrelevant and surplusage. The motion was sustained and Grace G. Merrick then requested that the appeal be dismissed "because the record discloses that no issue was raised in the County Court." This was granted and a judgment of dismissal of the appeal was rendered. This appeal is from that judgment.

Appellant claims that she was a party to this proceeding in the county court; that she, as heir of the deceased, was a person against whom an order and decree was made by the county court when it admitted the instrument involved in this matter to probate as the will of the deceased; that she was affected thereby; and that by virtue thereof she was legally qualified to appeal from the order and decree of the county court to the district court. The appellees assert that appellant was not competent to appeal from the order and decree of probate of the instrument rendered by the county court

because she made no actual appearance in the cause or objections to the probate of the instrument as the will of the deceased in the county court.

The relevant provisions of section 30-217, R. R. S. 1943, are: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, together with a petition for its probate, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, and no will shall be proved until notice shall be given as herein provided * * *." The only pleading specified by statute concerning the procedure for the probate of a will in a county court is "a petition for its probate" mentioned in the above quotation. Prior to the amendment of 1921 the statute did not contain the words now therein "together with a petition for its probate" and there was no requirement for any pleading in the procedure for the probate of a will in the county court. Laws 1921, c. 151, § 1, p. 632; § 1303, R. S. 1913.

In re Estate of Sweeney, 94 Neb. 834, 144 N. W. 902, concerned the probate of the will of Bridget Sweeney which was proposed by petition of the person named therein as executor. The State of Nebraska objected to its probate because the deceased, as it alleged, died without heirs; and that at the time the will was executed the testator was not of sound mind and was incapable of making any testamentary disposition of property. There was no other objector in the county court. The instrument offered as the will of the deceased was denied probate. The proponent prosecuted an appeal to the district court. Two heirs of the deceased who had not made an appearance in the proceedings in the county court by objection to the probate of the instrument or otherwise filed a petition of intervention in the district

court. They pleaded lack of testamentary capacity and unsoundness of mind of the deceased when the instrument was made; and that it was the product of undue influence and improper acts of the chief beneficiary therein and her family. There were two proponents in the district court. They moved to dismiss the petition of intervention because the interveners were not qualified to intervene; that it was filed too late; that the proceedings were begun and tried in the county court and were pending on appeal; and that the petition changed the issues presented to and tried by the county court. The motion was denied and the intervention was permitted. The State of Nebraska made no appearance in the district court. Probate was disallowed in that court and the proponents prosecuted an appeal to this court. They contended that the intervention was too late; that the interveners could have appeared and objected in the county court before the trial was had there but that thereafter they were precluded from appearing and contesting in any other court to which the case was taken; and that they could not in any event appear in the district court and interject into the record a new or additional objection to the probate of the will that had not been made in the county court. This court in disposing of the case said: "Where the court is called upon to determine the probate of a will, it is acting upon the *res* of the estate, and when an appeal is taken from the county court by the executors to the district court it removes the whole case to the district court, and all parties interested in the distribution are necessarily parties in the district court and are entitled to be heard there." The opinion contains the following: "The appellants contend, first, that the Burchills should not have been permitted to intervene after the case had been appealed to the district court. This question seems to have been considered in In re Estate of Creighton, 91 Neb. 654. In that case it is said in the second paragraph of the syllabus: 'An order of the county court

in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem,* all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court.' * * * 'The proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem.* Every one interested is a party in the probate court, *whether he is named or not* * * *. Everybody interested in that distribution is a party to the proceeding, whether he has appeared in the probate court in the proceeding or not, and so, if the state, in behalf of this charity, was interested in the distribution of the assets in the probate court, it was necessarily a party before that court, *whether it appeared there or not.* The court was acting upon the *res* of the estate, and not upon the persons interested in it. Therefore, it seems to follow that, when an appeal was taken by the executors to the district court, it removed the whole case to the district court, and all parties interested in the distribution were necessarily parties there and entitled to be heard.' It would seem that the position of this court in that case is amply sustained by the authorities and by reason of the rule."

In In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675, the propriety of a creditor of the estate filing a pleading in the district court in a proceeding pending therein on appeal from a decision of the county court in a matter which was a part of the administration of the estate was contested. A motion to strike the pleading was denied. This court discussed the matter in this manner: "The county court has original and exclusive jurisdiction in the settlement of estates by which distribution is made of the assets, and its final orders are binding upon all persons. The proceeding is *in rem.* All persons interested in the assets are considered parties

in the county court, whether named or not, and they may appear for the purpose of protecting their interests in the county court or on appeal to the district court. Appeal to the district court removes the whole case to the district court, and all persons interested in the distribution are necessary parties in the district court and entitled to be heard there. (Numerous cases are cited.) These cases also dispose of the appellant's contention that the creditor, not having filed any pleadings in the county court, should not have been permitted to file an answer in the district court or appear as a party therein." See, also, In re Estate of Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D 128; In re Estate of Bayer, 116 Neb. 670, 218 N. W. 746; In re Estate of Sautter, 142 Neb. 42, 5 N. W. 2d 263; Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366; O'Connor v. Stanley, 54 F. 2d 20.

The appellant, as heir of the deceased, was interested in her estate and appellant was of necessity a party to the proceedings in the county court for the probate of the instrument claimed to be the will of the deceased whether or not she was named or actually appeared therein and offered contest to the probate of the instrument as the will of the deceased. A proceeding in a county court to probate a will is in rem and every person interested is a party thereto and may appear and participate therein in the proceeding in that court or on appeal to the district court. In re Estate of Sweeney, *supra;* In re Estate of Creighton, *supra;* In re Estate of Nilson, *supra;* In re Estate of Sautter, *supra;* Johnson v. Marsh, *supra;* Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711.

The order and decree of the county court admitting the instrument involved to probate as the will of the deceased was a final order within the meaning of the statute authorizing appeals in probate matters. Appellant, a party to the proceeding, was a person against whom the order and decree was made and she was

affected thereby. § 30-1601, R. R. S. 1943. Doris P. Clutter precisely qualified as an appellant from the order and decree of probate made by the county court in this matter. She was forever bound by the order and decree of probate made by the county court if she permitted the time for appeal to elapse without complying with the requirements for an appeal to the district court. The county court is vested by the Constitution and statutes of the state with exclusive, original jurisdiction in all matters concerning the probate of wills and the settlement of estates of deceased persons. The adjudication by the court of a matter within its authority is, unless appealed from, final and not subject to collateral attack. In re Estate of Creighton, *supra;* Rohn v. Kelley, *supra.*

Appellant was qualified to prosecute an appeal from an adjudication of the county court that the instrument proposed for probate was the will of the deceased. She timely and duly exercised that right. She was entitled to appear by pleading and otherwise and contest the validity of that instrument as the will of the deceased in the district court.

The judgment should be and it is reversed and the cause is remanded with directions to the district court of Jefferson County to overrule the motion of appellees to strike the answer of appellant and for further proceedings in accordance with law.

REVERSED AND REMANDED WITH DIRECTIONS.

CLAIR J. HOKE ET AL., APPELLEES, V. DAVID A. WELSH ET AL., APPELLANTS.
77 N. W. 2d 659

Filed June 22, 1956. No. 33956.

1. **Deeds: Boundaries.** Where a plat of the lands conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection

therewith; and the courses, distances, or other particulars which appear on such plat are, as a general rule, to be considered as the true description of the land conveyed.

2. **Deeds.** Knowledge or notice of an encumbrance, a paramount title, or a defective title, does not impair the right of recovery upon covenants of warranty.
3. **Municipal Corporations: Boundaries.** A conveyance of a tract of land by a description shown on a plat which has been vacated includes the title to one-half of adjacent streets and alleys which have been vacated, in the absence of express intention to the contrary shown in the conveyance.
4. **Boundaries.** Fixed monuments control over field notes, a description of a survey by words, or a picturization of a survey by a plat.
5. ———. A monument is a permanent landmark established for the purpose of indicating boundaries. For a monument to control over field notes, a description of a survey by words, or a picturization of a survey by a plat, the survey should show the relation of the lines and corners contained within it to the lines and corners of some original survey marked out on the ground or other artificial or natural monument.
6. **Deeds: Vendor and Purchaser.** The remedy for a deficiency in quantity in the real estate conveyed by deed ordinarily is to grant the purchaser an abatement of the purchase price in the same proportion the deficiency bears to the tract conveyed.
7. ———: ———. When the sale is in gross there is no remedy afforded the grantor or grantee for an excess or a deficiency unless such excess or deficiency is so great as to raise a presumption of fraud.
8. **Trial: Judgments.** In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact and, second, that he is entitled to a judgment as a matter of law.

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

McGinley, Lane, Powers & McGinley, for appellants.

Firmin Q. Feltz, for appellees.

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

CARTER, J.

This is an appeal from a summary judgment awarding

damages to the plaintiffs in the amount of $1,015.07, with interest at 6 percent from November 2, 1954, for breach of covenants of warranty and seizin. It is the contention of the defendants that the trial court erred in sustaining plaintiffs' motion for a summary judgment and in failing to sustain defendants' motion for a summary judgment.

The record shows that on August 20, 1954, the defendants conveyed the real estate involved in this action to the plaintiffs in joint tenancy, the land being described as follows: "A parcel of land designated as South One Half (S½) of Block Thirty-five (35) Original Town of Ogallala, Nebr., and as All of Lots Five (5), Six (6), Seven (7), and Eight (8), Block Thirty-five (35), Original town of Ogallala, now vacated." The record shows that the south half of Block 35 was originally platted into four lots, each 66 feet wide and 125 feet long. Streets running north and south on the east and west sides of Block 35 were 66 feet in width. The record shows that the street to the west was a paved street which had been used by the public as a street for more than 10 years. The fact that Lots 5, 6, 7, and 8, in the south half of Block 35 extend only to the north line of the Union Pacific Railroad right-of-way, a distance of 91 feet, or, if one-half of the vacated alley be added, a distance of 98 feet, gives rise to the present litigation. The plaintiffs assert that the plat of the Original Town of Ogallala shows that Lots 5, 6, 7, and 8, in Block 35, were 125 feet in length, with a street along the south line which was 166 feet wide. Defendants contend that such plat shows a street 66 feet wide, but assert that no street ever existed since the plat was mistakenly prepared with an overlap of 34 feet upon the property of the Union Pacific Railroad Company. We are in accord with the position taken by the plaintiffs that there was a street shown on the original plat along the south of Block 35, one-half of which would revert to the owner of the south half of Block 35 when the plat

was vacated. We find, however, that such street was 66 feet wide for reasons hereinafter discussed. The question therefore is whether or not the tract of land sold by defendants to the plaintiffs was short 67 feet on the north and south line by 330 feet east and west, the latter distance being the width of the four lots and one-half of the vacated streets on the east and west sides of the tract.

In deeding the property in question, defendants used the description from a plat which was vacated in 1901. The deed specifically followed the lot and block description with the words "now vacated." This carries with it the legal inference that streets and alleys have reverted to the owners of the adjacent real estate, one-half on each side thereof. § 17-558, R. R. S. 1943. See, also, Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002; Hart v. Village of Ainsworth, 89 Neb. 418, 131 N. W. 816.

The general rule has been stated as follows: "Where a map, plat, plan, or survey of the premises conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection therewith; and the courses, distances, or other particulars which appear on such map, plat, plan, or survey, are, as a general rule, to be considered as the true, or part of the true, description of the land conveyed." 26 C. J. S., Deeds, § 101, p. 373. See, also, Barri v. Schwarz Bros. Co., 93 Conn. 501, 107 A. 3; Kahn v. Delaware Securities Corp., 114 Fla. 32, 153 So. 308.

Applying the foregoing rule, it is clear that the purport of the deed was to convey the title to the lots and one-half of the vacated streets and alleys to the purchaser as they are shown on the plat of the Original Town of Ogallala. In Ingraham v. Hunt, 159 Neb. 725, 68 N. W. 2d 344, we stated the rule as follows: "However, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the

parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties." The use of the words "now vacated" brings into play the legal effects that attach to the description used by virtue of the vacation of the plat. The fact that the street on the west side of Block 35 may have been acquired subsequently by the city for a street by prescription is not a material factor in the case.

Defendants contend that plaintiffs had knowledge that the defendants had no title to a portion of the real estate involved. The general rule is that the fact that the grantee knew at the time of the conveyance that grantor's title was defective or that the grantor had no title in a part or in the whole of the land does not affect the right of recovery for a breach of convenant. See 21 C. J. S., Covenants, § 38, p. 908. In Berry v. Crisp (Ky.), 247 S. W. 2d 384, it is stated: "The rule is that, even though the grantee knew at the time of the conveyance that the grantor did not have title to the minerals, he may recover for the breach of warranty." In Texas Company v. Snow, 172 Ark. 1128, 291 S. W. 826, it is said: "Knowledge or notice, however full, of an incumbrance, or of a paramount title does not impair the right of recovery upon covenants of warranty, as they are taken for protection and indemnity against known and unknown incumbrances or defects of title." See, also, Smiley v. Thomas, 220 Ark. 116, 246 S. W. 2d 419.

It appears from the record, therefore, that the description of the real estate conveyed by the deed was a parcel of land 330 feet wide, such distance consisting of 4 lots 66 feet wide and one-half of two vacated streets each 66 feet wide; and 165 feet in length, such distance

consisting of the following measurements: the length of the lot on the ground, 91 feet; one-half of the alley, 7 feet; the shortage of the lot, 34 feet; and one-half of the vacated street bordering the south of the lots, 33 feet.

It is the contention of the defendants that the course and distance description shown by the plat must give way to a description referring to a known monument. It is asserted that the railroad right-of-way is set out in the surveyor's certificate to the original plat of the Original Town of Ogallala as such a monument which controls the picturization of courses and distances contained in the original plat. The basis of defendants' contention that the railroad right-of-way is a monument is derived from the following language of the surveyor's certificate attached to the original plat: "* * * and that the streets alleys, lanes, avenues, squares, commons and such pieces or lots as are set apart for public village, Town, city County or railroad use or dedicated to charitable religious or Educational purposes are even and accurately staked off and marked."

We are in accord with the view that fixed monuments and surveys staked out on the ground control over field notes, showing the courses, distances, and quantities; or a description of a survey in words, or a picturization of a survey in a plat. The general rule is: "Since plats are merely a picturization of courses and distances, the statements as to conflicts between monuments and plats apply also to conflicts between the monuments marking a surveyed line and the description thereof in a course and distance description; the monuments prevail over calls for courses and distances. Of course, this is only true as to a survey marked on the ground at or before the time of the conveyance, and shown by statements in the conveyance to have been made for or adopted by the grantor." Patton on Titles, § 98, p. 328. See, also, Oregon Home Builders v. Eisman, 88 Ore. 611, 172 P. 114; Hunt v. Keye, 150 Minn. 142, 184 N. W. 840.

The above-cited cases, relied upon by the defendants,

are clearly distinguishable from the case at bar. In those cases the railroad right-of-way was referred to in the suveyor's certificate as a part of the description of the land conveyed. The boundary of the railroad right-of-way was made to coincide with the boundary of the tract conveyed. The right-of-way was used as a monument by the owner of the tract when the land was platted. But in the case here presented, the north boundary of the railroad right-of-way was not made a boundary of Block 35, nor was the south boundary of Block 35 made to coincide with the north boundary of the right-of-way. We find nothing in the surveyor's certificate that makes the north boundary of the railroad right-of-way a fixed boundary of Block 35. The words "railroad use" in the surveyor's certificate do not make the railroad right-of-way a monument. The surveyor's certificate evidences no intent that the railroad right-of-way was a fixed monument controlling the words of the grant contained in the deed. Nor is there any evidence of a survey marked out on the ground which would control over the words of the surveyor's certificate or the courses and distances shown by the plat.

The defendants, upon discovery of the shortage in the land conveyed, sought to rescind and tendered back the purchase price. The remedy ordinarily is to grant the purchaser an abatement of the purchase price in case of a deficiency in quantity. Newberg v. Chicago, B. & Q. R. R. Co., 120 Neb. 171, 231 N. W. 766. This court has held that on a sale of land by its legal description, or other specific description by which its boundaries are made certain, for a sum in gross, the boundaries will control in case of a discrepancy as to quantity; and such a sale in gross affords no remedy to the grantor or the grantee for an excess or a deficiency unless such excess or deficiency is so great as to raise a presumption of fraud. In re Estate of Robinson, 105 Neb. 1, 178 N. W. 840; O'Shea v. Hampton, 127 Neb. 60, 254 N. W. 670. But in the instant case the shortage of land is approxi-

mately 50 percent of that conveyed by the deed. Whether or not the sale was in gross is therefore immaterial. It is sufficient to raise the presumption of fraud under the foregoing rule even if it be treated as a sale in gross. The trial court was correct in abating the purchase price on a proportionate basis between the land conveyed and the shortage.

It is clear from the record, including the request for admissions contained therein, that there was no genuine issue as to any material fact in the case and that plaintiffs are entitled to a judgment as a matter of law. Under such circumstances, a motion for a summary judgment affords a proper remedy. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543; Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344.

The plaintiffs by cross-appeal assert that the trial court erred in holding that the street south of Block 35, as shown by the plat and surveyor's certificate, was not 166 feet in width. The surveyor's certificate states specifically that "all streets are 66 feet wide." This overcomes any inference to be drawn from the ambiguous language of the surveyor's certificate which states that: "The street on south side of R R track is 110 feet wide on the north side is 166 from center of track." The trial court correctly determined the street south of Block 35 as originally platted to be 66 feet wide. There is no merit to the cross-appeal.

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

AFFIRMED.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, V. OLIVE K. GSANTNER, DOING BUSINESS AS THE BAYBROOK KENNELS, APPELLEE.
77 N. W. 2d 663

Filed June 22, 1956. No. 33964.

Municipal Corporations. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, and *Irving B. Epstein,* for appellant.

Henry C. Winters, for appellee.

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

SIMMONS, C. J.

As presented here, plaintiff sought an injunction prohibiting defendant from operating a dog kennel on described property. Defendant by answer admitted the operation of the dog kennel and contended that it was a nonconforming and permitted use within the meaning of section 14-406, R. R. S. 1943. Trial was had. The trial court rendered judgment dismissing plaintiff's petition with prejudice. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause with directions to render judgment for plaintiff as prayed.

The property involved is located on Pacific Street and was zoned 2nd Suburban by Zone Ordinance No. 15239 effective March 1, 1945.

Prior to 1946 the property was a part of a 62-acre farm. A house, barn, corncrib, and a chicken coop were

buildings on the property. During that period of time the occupants raised cattle, hogs, mules, and chickens on the premises here involved. Some of these animals were customarily sold for profit.

Defendant purchased about 15 acres of this property, including the building site, by contract in April 1946, and entered into possession. She raised some pigs for the first 3 years.

Immediately after going into possession, defendant began to use the corncrib as a dog kennel, and built outside pens. She then and since has there conducted the business of raising and selling dogs, and boarding dogs for hire. It is this operation which the plaintiff seeks to enjoin.

The property of defendant, here involved, is within one-half mile of a designated residential district.

Section 14-406, R. R. S. 1943, provides in part: "The lawful use of land existing on April 1, 1925, although such use does not conform to the provisions hereof, may be continued, but if such nonconforming use is abandoned, any future use of said premises shall be in conformity with the provisions of sections 14-401 to 14-418. The lawful use of a building existing on April 1, 1925, may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building, provided no structural alterations, except those required by law or ordinance are made therein. If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of the same or a higher classification."

Defendant contends that she has changed the use of the premises from one nonconforming use to another nonconforming use of the same classification.

This argument is based on the premise that under the zoning ordinance a building on the premises in a 2nd Suburban District may be used for: "Agricultural and horticultural uses, including the usual farm structures,

dairy farms, commercial poultry farms and commercial live stock farms, but such dairy farms, commercial poultry farms, or commercial live stock farms shall not be established within one-half mile of a designated residential district." Zone Ordinance No. 15239, §§ XII and XIII, pp. 22, 24.

From the above provision it is argued that a commercial livestock farm cannot be established within one-half mile of a designated residential district, but that it can be so operated in a 2nd Commercial District.

The ordinance by definition provides: "Dog Kennel: A lot, building, structure, enclosure, or premises whereon or wherein three (3) or more dogs over three months of age are kept or maintained for any purpose whatsoever.

"Dog Kennel, Non-Conforming: A dog kennel which is located in an area other than one classified as 2nd Commercial District, or Industrial District, and which was located in said area before the same was zoned or rezoned to 2nd Commercial District or Industrial Districts." Zone Ordinance No. 15239, § I, p. 5.

Defendant then argues that a dog kennel operated outside of a 2nd Commercial District is a nonconforming use. Hence she concludes that both a commercial livestock farm and a dog kennel are of the same classification.

The trial court accepted the defendant's contentions in its decree.

The position is not tenable.

We have held: "Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning." Henke v. Zimmer, 158 Neb. 697, 64 N. W. 2d 458.

What then is the generally accepted meaning of the words used in the ordinance provisions above quoted?

The framers of the ordinance have defined dog ken-

nels, which definition, of course, is to be accepted.

Under the above ordinance "Agricultural and horticultural uses, including the usual farm structures, dairy farms, commercial poultry farms and commercial live stock farms" are conforming uses, except that "dairy farms, commercial poultry farms, or commercial live stock farms shall not be established within one-half mile of a designated residential district."

The exception goes not to agricultural uses but to the specific included uses. It is a ban on the establishment, prospectively, of the uses as set out within one-half mile of a designated residential district.

Defendant does not contend that her dog kennel business is within the agricultural use classification, and hence a conforming use.

For defendant to come within the permitted nonconforming use provisions of the statute, it is necessary that three things be established: (1) That the use made of the premises prior to the adoption of the ordinance was a commercial livestock farm operation; (2) that the use for which the premises are now used is a commercial livestock farm operation; and (3) that the two uses are of the same classification or that the dog kennel use is of a higher classification.

Other nonconforming uses are not involved.

In Jones v. Johnson, 80 Ga. App. 340, 55 S. E. 2d 904, the court held: "The distinction between agricultural uses on the one hand, and business, manufacturing or commercial uses on the other is fundamental, * * *."

Chudnov v. Board of Appeals of Town of Bloomfield, 113 Conn. 49, 154 A. 161, was a zoning case. It involved an attempt to establish the raising of poultry as a business within a residence zone in connection with other farming activities on the ground that it was a "farming" operation. The court denied the claim. It was held: "It is generally recognized, however, that stock-raising, dairying, and kindred activities are legitimately to be considered as a part of and included within

farming when carried on in connection with and incidental and subordinate to tillage of the soil. * * * It is apparent that, as a general rule, the limitation of such activities as the raising or keeping of livestock or poultry to subservience to and an incident of the main characteristic of the occupation of farming—the cultivation and production of crops—will obviate, in large measure, or reasonably ameliorate the results, detrimental to the paramount interests and uses of a community or neighborhood of a residential character, which are to be anticipated from such activities when independently conducted."

Obviously the drafters of the ordinance here involved made a distinction between agricultural uses generally and "dairy farms, commercial poultry farms, or commercial live stock farms." In the Chudnov case the permitted use was "Farming, truck gardening, nurseries or greenhouses." Applicable thereto the court held: "That it is deemed necessary to specify these enterprises as permitted negatives an intent that others less obviously related to 'farming' are to be allowed not only in connection with and incidental to recognized farming operations but also as a distinct and independent business and use."

In Town of Lincoln v. Murphy, 314 Mass. 16, 49 N. E. 2d 453, 146 A. L. R. 1196, an attempt was made to establish a piggery in a residential zone where the permitted uses were "farms, greenhouses, nurseries, and truck gardens; and the sale of produce raised in the town or on land of the owner." The court held: "One of the chief characteristics of a farm ordinarily is the use of the land for the production of crops by the cultivation of the soil, but farming activities are not confined to the tilling of the land and the harvesting of crops. Land may be utilized for grazing by livestock, or in raising hay for cows for the production of milk and other dairy products. A part of the land may be profitably employed in the raising of poultry and the sale

of chickens and eggs. There may be an orchard upon the premises which would yield enough fruit to warrant the expenditure of labor in caring for the trees and collecting and marketing the fruit." The court held that the maintenance of a piggery was not permitted under the ordinance as a farming operation. In that case there had been no hog raising carried on on the premises prior thereto. Here there had been no dog kennel operations carried on on these premises prior to defendant's activities in that respect.

We conclude that the raising and selling of livestock conducted on this land prior to the enactment of the ordinance were in the classification of agricultural uses generally, and were not in the classification of a commercial livestock farm operation. The ordinance prohibits the establishment of a commercial livestock farm on the premises involved. Defendant seeks to change a conforming use to a nonconforming use. The ordinance prohibits it.

We do not hold, however, that the operation of a dog kennel is a commercial livestock farm operation. See, Howard & Herrin v. Nashville, C. & St. L. Ry. Co., 153 Tenn. 649, 284 S. W. 894, 46 A. L. R. 1530; Henderson v. Lancaster & Wallace, 2 La. App. 680; Granier v. Chagnon, 122 Mont. 327, 203 P. 2d 982; Dunkly v. Erich, 158 F. 2d 1; 54 C. J. S. 635; § 54-1101, R. R. S. 1943.

It follows that plaintiff is entitled to the injunction sought.

The judgment of the trial court is reversed and the cause remanded with directions to render a decree for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM MARA, APPELLEE, V. ORA NORMAN, TREASURER OF PERKINS COUNTY, NEBRASKA, APPELLEE, IMPLEADED WITH GEORGE VOLBERDING ET AL., APPELLANTS.
77 N. W. 2d 569

Filed June 22, 1956. No. 34003.

Constitutional Law. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed.

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

George B. Hastings and *John E. Dougherty*, for appellants.

Bruce K. Lyon, for appellee.

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

WENKE, J.

This litigation results from two of our opinions holding unconstitutional certain statutes dealing with school lands. See, State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508.

William Mara was in possession of Section 36, Township 11 North, Range 41 West of the 6th P. M., in Perkins County, Nebraska, during 1951 and prior years under a 25-year lease. As a result of our decision in State ex rel. Ebke v. Board of Educational Lands & Funds, *supra*, the Board of Educational Lands and Funds, hereinafter referred to as the board, did, on April 16, 1952, at Grant, Nebraska, offer for sale at public auction a 12-year lease on these premises, the term thereof to commence January 1, 1952. George Volberding made the highest and best bid for the lease; however, by oral agreement, he transferred his right to a lease on the north half of the section to Everett Walrod. Leases dated April 28, 1952,

were executed and subsequently delivered by the board to the lessees therein named. A lease on the south half of the section was made to George and Alice Volberding and one on the north half of the section to Everett and Elaine Walrod. We shall hereinafter refer to them as the lessees.

During the tenure of his lease William Mara made improvements on the north half of Section 36 and, in 1952, had a growing crop of wheat on the land. On June 3, 1952, the board, by letter of that date, requested the county commissioners of Perkins County, under the provisions of section 72-240.06, R. R. S. 1943, to appraise the wheat growing on the south half of Section 36. This the county commissioners did on June 10, 1952, appraising the wheat growing thereon at $500. This report they filed with the county treasurer on June 30, 1952.

Later, on June 18, 1952, the board made a similar request of the county commissioners in relation to the improvements and crops on the north half of Section 36. The commissioners did so on June 30, 1952, appraising the improvements at $8,000 and the wheat growing thereon at $6,200. They also filed this report with the county treasurer on June 30, 1952.

Apparently, according to the stipulation of the parties, George Volberding and Everett Walrod made similar requests of the county commissioners. When such requests were made is not shown.

On July 11, 1952, the board, in answer to his letter of July 2, 1952, notified George Volberding that as soon as he deposited with the county treasurer the amount of these appraisals he would be entitled to his lease and possession of the land. These payments were made to the county treasurer on or before July 29, 1952. George Volberding took possession of the south half of the section in June 1952 and used one small granary located on the section. Everett Walrod took possession of the north half of the section on November 1, 1952, and used

one small granary located thereon. None of the other buildings have been used. All the improvements are located on the north half of the section.

Although he knew the money had been deposited with the county treasurer William Mara made no demand therefor until the day he commenced this action, which was April 6, 1955. In fact he harvested and kept the wheat grown on this land in 1952 which had been appraised at $6,700. Immediately following the release of our opinion in Watkins v. Dodson, *supra*, on February 11, 1955, holding section 72-240.06, R. R. S. 1943, unconstitutional, the lessees asked Ora Norman, county treasurer of Perkins County, to return these funds to them. This demand she refused to comply with, the same as she later refused to pay the $8,000 to William Mara when he demanded it immediately before bringing this action.

This suit was brought by William Mara to obtain the $8,000 deposited with the county treasurer as the appraised value of the improvements he had put on the north half of Section 36 while he occupied it under a 25-year lease.

The defendant county treasurer, who made no claim to the funds, was permitted to deposit them with the clerk of the district court. Since plaintiff had harvested and kept the wheat crop for 1952, it was agreed by the parties, and authorized by the court, to have the clerk of the court return the $6,700, the appraised value of the wheat growing on the premises at the time of the appraisal, to George Volberding and Everett Walrod. This he did. However, the court found plaintiff was entitled to the $8,000 and directed the clerk of the court to pay it to him. Their motion for new trial having been overruled, the defendant lessees have appealed therefrom.

We held in Watkins v. Dodson, *supra*, that: "Section 72-240.06, R. R. S. 1943, fails to provide for notice to be given the owner of improvements so that he may ap-

pear before the appraisers and protect his rights and, for failure to so provide, is unconstitutional and void."

And in Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105, we held that: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed." See, also, Watkins v. Dodson, *supra;* Swanson v. Dolezal, 114 Neb. 540, 208 N. W. 639.

As stated in 16 C. J. S., Constitutional Law, § 101, p. 289: "An unconstitutional legislative enactment legally binds no one, and need not be complied with. No rights are conferred, no protection is afforded, and no duties can be imposed, by such a statute."

The effect of our holding in Watkins v. Dodson, *supra,* is stated in Jessen v. Blackard, 160 Neb. 557, 71 N. W. 2d 100, as follows: "Effects of this are that there was no statutory definition of improvements on school lands; that there was no provision for appraisement of improvements on school lands; that there was no requirement that a new lessee on school lands should take or pay for improvements of a former lessee on school lands; and that there was no requirement that the old lessee of school lands should deliver to a new lessee his improvements on school lands."

While the trial court based its holding on estoppel and appellee urges quasi estoppel is here controlling, it should be remembered that while estoppel may be urged for the protection of a right, it can never create a right. Here the act has already been declared unconstitutional. This action is not for that purpose.

Appellee contends this is a common-law action against an agent, the county treasurer, for money had and received by her for him. But under the statute the county treasurer was not an agent of the appellee but a public officer given certain duties to perform in connection with her office, that is, to pay to the state the amount

due it, if any, from the former lessee and to hold the balance of such funds, if any, for the use of such former lessee. With the act being declared unconstitutional that duty actually never existed and certainly is nothing upon which appellee can predicate any rights.

We have dealt with an almost identical situation in Jessen v. Blackard, *supra*. Therein the factual situation was as follows: "On August 4, 1952, plaintiffs paid to the county treasurer for the benefit of defendant $1,526, that being the appraised value of all improvements except the wheat. There is no information as to whether or not the defendant accepted this $1,526." We then said: "Under these authorities it is clear that the court has a duty of its own to perform. It may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by this court whether the question has been raised by the parties or not. In the instance of previous declaration of unconstitutionality this court will take notice of its own judgment and opinion." We think that is the situation here. As further stated in Jessen v. Blackard, *supra*: "If the tendered payment for improvements other than wheat has been accepted by the defendant then that portion of the cross-petition shall also be dismissed, but if it has not, then there shall be a new trial to determine whether or not there was such property taken and if so the value thereof." The latter has application here.

We therefore reverse the judgment of the trial court and remand the cause with directions that the $8,000 now being held by the clerk of the court be paid to George Volberding and Everett Walrod and that appellee be given permission to amend his pleadings, if he so desires, to have determined whether or not his improvements have been taken by the lessees and converted to their use and, if so, the value thereof. All cost are taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

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13. Rule stated as to manner of consideration by Supreme Court in an action at law where a jury has been waived. *Wallace v. Insurance Co. of North America* 172
14. Supreme Court upon examination of record should determine whether or not the evidence adduced responds to the issues made by the pleadings. *Wallace v. Insurance Co. of North America* 172
15. The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence. It is error to submit to the jury an issue not pleaded in the case. *Barney v. Adcock* 179
16. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. *Barney v. Adcock* 179
17. It is prejudicial error for the district court to include in its instructions to the jury allegations of fact made in a pleading in the cause which are without evidence tending to establish them. *Bramhall v. Adcock* 198
18. It is error to charge the jury that allegations of negligence made in a pleading may be considered by it in arriving at a verdict in the cause and also to instruct the jury in effect that such allegations should be disregarded by it. *Bramhall v. Adcock* 198
19. Where conflicting instructions are given, it is prejudicial error unless it is apparent from the record that the jury was not misled by the charge. *Bramhall v. Adcock* 198

20. An appeal to the Supreme Court in a workmen's compensation case is considered de novo upon the record. *Fidelity & Casualty Co. v. Kennard* 220
21. Under statute and Revised Rules of the Supreme Court, consideration of the cause on appeal is limited to errors assigned and discussed, except that the Supreme Court may, at its option, note a plain error not assigned. *Trute v. Skeede* 266
22. After appeal and remand a party may not add or substitute a defense substantially different from that relied on at the original trial. *O'Neil v. Union Nat. Life Ins. Co.* 284
23. On remand, as to matters not inconsistent or in conflict with a position taken at the former trial, the district court is clothed with a discretion to allow amendments in the further disposition of the case. *O'Neil v. Union Nat. Life Ins. Co.* 284
24. Where a case has been remanded with general directions to proceed in accordance with an opinion which disposes of all issues to be considered on a new trial, a judgment should be entered in favor of the party in whose favor the issues were decided. *O'Neil v. Union Nat. Life Ins. Co.* 284
25. Upon reversal and remand where all issues are not decided by the Supreme Court, it is the duty of the district court to try the case and make an adjudication upon the remaining issues. *O'Neil v. Union Nat. Life Ins. Co.* 284
26. Rule for trial of equity case de novo stated. *Heppe v. State* 403
Sechser v. Sechser 486
Hipsley v. Hipsley 518
Town of Everett v. Teigeler 769
27. When a trial has been had in district court on the theory presented by the pleadings, it will be treated in Supreme Court on the same basis. *Ring v. Duey* 423
28. Affidavits filed with the clerk of the district court not preserved by the bill of exceptions will not be considered by the Supreme Court. *Harder v. Harder* 433
29. Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. *Scottsbluff Nat. Bank v. First State Bank* 475
30. By statute, either party may appeal from the judgment of the county court in the same manner

as provided by law in cases tried and determined by justices of the peace. *Rice v. McGrath* 511

31. By statute, in all cases of appeal from the county court, the plaintiff shall, within 50 days from and after the rendition of the judgment in the said court, file his petition as required in civil cases in the district court. *Rice v. McGrath* 511

32. By statute the plaintiff in the county court on appeal to the district court shall be the plaintiff therein and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court. *Rice v. McGrath* 511

33. A judgment will not be reversed for errors against a party not entitled to succeed in any event. *Eilts v. Bendt* 538

34. A transcript of the proceedings at the trial to constitute a bill of exceptions must be settled as provided by statute and filed with the papers in the case in the office of the clerk of the district court where the case was brought and prosecuted. *Burke Lumber & Coal Co. v. Anderson* 551

35. It is the duty of the clerk to settle the bill of exceptions in the case of the death of the judge before whom the cause was tried. *Burke Lumber & Coal Co. v. Anderson* 551

36. Steps for settlement of bill of exceptions outlined. *Burke Lumber & Coal Co. v. Anderson* 551

37. The Supreme Court takes judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal. *Burke Lumber & Coal Co. v. Anderson* 551

38. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined. If the pleadings are sufficient to support the judgment of the district court, the judgment will be affirmed. *Burke Lumber & Coal Co. v. Anderson* 551

39. Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record the judgment will be upheld. *Burke Lumber & Coal Co. v. Anderson* 551

40. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant. *Burke Lumber & Coal Co. v. Anderson* 551
41. On an appeal to review the ruling of the district court on a motion for new trial, the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto. *Corbitt v. Omaha Transit Co.* 598
42. Review by petition in error is confined to convictions of felonies and misdemeanors under the criminal code. *State v. Warren* 623
43. A prosecution for violation of a city ordinance, which does not include an offense made criminal by statute, is a civil proceeding to recover a penalty. A judgment and sentence therein may be reviewed in the Supreme Court only by appeal. *State v. Warren* 623
44. In a prosecution for violation of a city ordinance, the credibility of witnesses and the weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *State v. Warren* 623
45. In an appeal from an order granting a new trial where the trial court has not given any reason therefor, it is ordinarily necessary to examine the entire record to ascertain whether or not the action of the court in granting the new trial finds justification. *Ireland v. Stalbaum* 630
46. Where the evidence discloses that the trial court unduly restricted the oral argument of defendant's counsel in submitting its case to the jury, it constitutes reversible error unless it is shown not to have prejudiced the defendant's case. *Riley v. National Auto Ins. Co.* 658
47. Scope of review stated where a criminal case is presented in Supreme Court upon a transcript without a bill of exceptions. *Shanahan v. State* 676
48. Where there is no bill of exceptions, instructions proper under any evidence that might have been proper will not be deemed erroneous. *Shanahan v. State* 676
49. Instructions are to be considered together to the end that they may be properly understood, and, when

so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Shanahan v. State* 676

50. Supreme Court is authorized by statute to reduce a sentence when in its opinion the sentence is excessive, and to render such sentence as may be warranted by the evidence. *Guedea v. State* 680

51. It is the duty of the Supreme Court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant. *Guedea v. State* 680

52. A substantial reason for the reduction of a sentence must be warranted by the evidence. *Guedea v. State* 680

53. On an appeal from an order of the State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *Houk v. Peake* 717

54. Where instructions considered as a whole state the law fully and correctly, error will not be predicated therein merely because a separate instruction considered by itself might be subject to criticism. *Uldrich v. State* 746

55. The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case. A duty is imposed on the Supreme Court on appeal to give consideration to the fact that the trial court did view the premises. *Town of Everett v. Teigeler*.... 769

56. If a fact constituting a deficiency in a hypothetical question is admitted or proved by the opposing party the error becomes harmless and in consequence may not be regarded as ground for reversal. *Hoffman v. State* 806

57. In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence and were correctly decided, and that the only issue remaining for the Supreme Court is the sufficiency of the pleadings to support the judgment. *Neighbors & Danielson v. West Nebraska Methodist Hospital*.... 816

58. A final order of the county court in a proceeding for probate of a will may be the subject of an

appeal to the district court by any person against whom it is made or who may be affected thereby. *Clutter v. Merrick* 825

59. A proceeding for the probate of a will is in rem and all persons interested therein are parties thereto. A person affected thereby may appeal from a final order of the county court to the district court without regard to whether or not he appeared and contested the probate of the will in the county court. *Clutter v. Merrick* 825

Appearances.

1. A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing. *Burke Lumber & Coal Co. v. Anderson* 551
2. Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record the judgment will be upheld. *Burke Lumber & Coal Co. v. Anderson* 551

Assignments.

1. Under the common law an assignee of a part of a demand cannot enforce an assignment in an action at law unless there has been an acceptance on the part of the debtor. *First Nat. Bank of Wayne v. Gross Real Estate Co.* 343
2. An order drawn upon a particular fund creates an equitable assignment thereof, although not accepted by the drawee. *First Nat. Bank of Wayne v. Gross Real Estate Co.* 343
3. As a general rule where there is an assignment of a fractional part of an entire right the assignee must resort to equity to enforce that right and in doing so bring before the court all parties in interest. *First Nat. Bank of Wayne v. Gross Real Estate Co.* 343
4. An assignment of a contract does not create a contractual obligation between the assignee and the other party to the contract. *Hansen v. E. L. Bruce Co.* 759
5. An assignee of a contract generally acquires no greater right than that possessed by the assignor. The assignee stands in the place of the assignor

and he cannot sue if the assignor could not have maintained an action. *Hansen v. E. L. Bruce Co.* 759

Attorney and Client.

1. By statute, an attorney is entitled during the pendency of an action or proceeding to receive money claimed by his client unless he has been previously discharged. The same rule is applicable to a county attorney representing the county in litigation wherein the state and the county are parties. *State ex rel. Heintze v. County of Adams* 127
2. The right to tax attorney's fees in workmen's compensation cases is purely statutory. *Fidelity & Casualty Co. v. Kennard* 220
3. By statute the right to attorney's fees in a workmen's compensation case relates to a specific situation. An employee failing to come within the statute is not entitled to attorney's fees to be allowed and taxed as costs. *Fidelity & Casualty Co. v. Kennard* 220
4. It is the practice to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Trute v. Skeede* 266
5. The county court and the district court on appeal have authority in a proper case to order payment of costs and attorney's fees for services rendered to a good faith trustee. *Scully v. Scully* 368
6. Elements stated upon which the determination of a reasonable attorney's fee is to be made. *Scully v. Scully* 368
7. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association. *State ex rel. Nebraska State Bar Assn. v. Bates* 652
8. Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Bates* 652
9. The district court has no authority to award an attorney's fee in favor of the plaintiff upon rendition of judgment in its favor in an action for damages resulting from a collision under an automobile insurance policy. *Riley v. National Auto Ins. Co.* 658
10. Ordinarily the value of an attorney's services is

a question for a jury. *Neighbors & Danielson v. West Nebraska Methodist Hospital* 816

11. The object of a charging lien is to protect the claim of the attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor. *Neighbors & Danielson v. West Nebraska Methodist Hospital* 816
12. Unless the proceeds have come into the attorney's hands, he must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it. *Neighbors & Danielson v. West Nebraska Methodist Hospital* 816
13. 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, if it appears to have been the intention of the parties that such judgment or proceeds is to be looked to for security. *Neighbors & Danielson v. West Nebraska Methodist Hospital* 816
14. When a charging lien is created by agreement, an action to establish and enforce it is within the equity jurisdiction of the court. *Neighbors & Danielson v. West Nebraska Methodist Hospital* 816

Auctions and Auctioneers.

1. The business of auctioneering and the sale of merchandise at auction are legitimate, lawful, and useful activities. *Blauvelt v. Beck* 576
2. The business of conducting public auction sales of merchandise is lawful and useful but it is affected with a public interest and is subject to reasonable legislative restrictions. *Blauvelt v. Beck* 576
3. The source of the authority to regulate auctions is the police power. A regulatory statute enacted by virtue thereof must have relation to the public health, safety, and welfare. *Blauvelt v. Beck* 576
4. If the regulations imposed by a statute enacted under the police power do not have relation to the public health, safety, or welfare they are invalid as an invasion of property rights of persons affected. *Blauvelt v. Beck* 576
5. The Nebraska Public Auction Law is unconstitutional because it is based upon an arbitrary and unreasonable classification. *Blauvelt v. Beck* 576

Automobiles.

1. A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such marks is solely the province of the jury. *Davis v. Dennert* 65
2. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Davis v. Dennert* 65
3. The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, but is only evidence of negligence. *Davis v. Dennert* 65
4. Where one is suddenly confronted with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. *Davis v. Dennert* 65
5. In a negligence case, the emergency rule cannot be successfully invoked by either party unless the evidence supports a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself or who has not used due care to avoid it. *Davis v. Dennert* 65
6. Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. *Dietze v. State* 80
7. Foundation may be laid for the admission of evidence of the readings of radar equipment by evidence of experience of persons in the handling of such equipment from which it is made to appear that the equipment correctly indicates the speed of moving vehicles. *Dietze v. State* 80
8. An automobile is not an inherently dangerous instrumentality. The owner is not generally liable for its negligent use by another to whom its control and operation is entrusted. *Deck v. Sherlock*.... 86
9. Liability on the part of the owner of an automobile may arise where he entrusts the control and operation thereof to a person so lacking in competency and skill as to convert the vehicle into a dangerous instrumentality. *Deck v. Sherlock* 86

10. The liability on the part of an owner of an automobile for its negligent operation by another to whom its control and operation is entrusted does not arise out of the relationship of the parties but out of the act of entrustment to one whose incompetency is known or should have been known by the owner. *Deck v. Sherlock* 86

11. In order to charge the owner of an automobile with liability for negligence in entrusting the vehicle to an incompetent driver, it must be shown that the owner had knowledge of the driver's incompetence or that in the exercise of ordinary care he should have known thereof from the facts and circumstances known to him. *Deck v. Sherlock* 86

12. Where the owner of an automobile engages with another in the drinking of alcoholic beverages and during the course of which he entrusts the control and operation of his automobile to such other person, it is ordinarily for the jury to determine whether or not the owner exercised due care in so doing. *Deck v. Sherlock* 86

13. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision. *Barney v. Adcock* 179
Bramhall v. Adcock 198

14. The presence of smoke, snow, fog, mist, blinding headlights, or similar elements is not generally recognized as an intervening cause but as a condition which imposes upon the operators of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with surrounding circumstances. *Barney v. Adcock* 179
Bramhall v. Adcock 198

15. The presence of ice upon a highway is not generally an independent, intervening causal factor that relieves an automobile operator from responsibility for the result of his negligence. *Barney v. Adcock* 179
Bramhall v. Adcock 198

16. In order for an accident to be solely attributable to an icy condition of the highway, it must be made evident that the accident would in some manner have occurred because of the ice, even if the motorist

had not been negligent. *Barney v. Adcock* 179
Bramhall v. Adcock 198

17. The driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him. *Bramhall v. Adcock* 198

18. If reasonable minds may disagree on the issue of the exercise of the reasonable care required of an operator of an automobile under the circumstances of the situation in question, the issue of his negligence is one of fact to be decided by the jury. *Spracklin v. Omaha Transit Co.* 351

19. When one looks and does not see what is in plain sight he is in the same situation as one who does not look. *Ring v. Duey* 423

20. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Ring v. Duey* 423
Benedict v. Andersen 735

21. A guest by statutory definition is a person who accepts a ride in a motor vehicle without giving compensation therefor. *Eilts v. Bendt* 538

22. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. *Eilts v. Bendt* 538

23. The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Eilts v. Bendt* 538

24. To recover damages for injuries received while riding in a motor vehicle against the owner or operator of such vehicle, a guest must prove by the greater weight of the evidence the gross negligence of the host or operator of the vehicle and that it was the

proximate cause of the accident and injuries. *Eilts v. Bendt* 538

25. Damages to an automobile resulting from a collision, where plaintiff's husband was operating it with plaintiff's permission while in an intoxicated condition, was an "accidental loss" within an automobile policy providing collision coverage. *Riley v. National Auto Ins. Co.* 658

26. An accident within the meaning of an automobile insurance policy indemnifying against loss by collision or upset includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. *Riley v. National Auto Ins. Co.* 658

27. The insured named in a loss-payable clause of an automobile insurance policy is a proper but not an indispensable party. *Riley v. National Auto Ins. Co.* 658

28. Where a provision of an automobile insurance policy purports to limit the liability to a used-car price fixed in a current publication, and such current publication does not establish such price, such provision is ineffective as a limitation upon the liability of the insurer. *Riley v. National Auto Ins. Co.* 658

29. A clause in an insurance policy providing for a deduction of $100 for each collision or upset contemplates one deduction for each accident giving rise to a cause of action. *Riley v. National Auto Ins. Co.* 658

30. An automobile insurance policy is a contract and its plain provisions will be enforced in the absence of statutory regulation or illegality. *Riley v. National Auto Ins. Co.* 658

31. An unambiguous provision fixing the limit of the insurance company's liability for damage to an automobile is binding upon the parties and the instructions of the court dealing with the assessment of damages should be in conformity therewith. *Riley v. National Auto Ins. Co.* 658

32. Where the contract of insurance provides that the insurer may repair the insured vehicle, it is error for the trial court not to instruct on the measure of damages with reference to repairs where there is evidence that it can be repaired and placed in substantially as good condition as before the accident. *Riley v. National Auto Ins. Co.* 658

33. The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the moment of an accident, and thus contributed to cause the accident. *Benedict v. Andersen* 735
34. A motorist entering an intersection of two streets or highways is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. *Wendel v. Carlson* 742
35. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored automobile to exercise ordinary care to avoid an accident. *Wendel v. Carlson* 742
36. The failure of a motorist upon approaching an intersection to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery. *Wendel v. Carlson* 742
37. One crime only is defined by statute prohibiting any person from operating or being in actual physical control of automobile while under the influence of intoxicating liquor. *Uldrich v. State* 746
38. The phrase "under the influence of alcoholic liquor" is substantially synonymous with "intoxicated," "intoxication," or "drunkenness," and with "in an intoxicated condition" and "in a drunken or partly drunken condition." *Uldrich v. State* 746
39. An instruction was not erroneous that defined the meaning of the term under the influence of alcoholic liquor. *Uldrich v. State* 746
40. Duty of driver of an automobile approaching a railroad crossing stated. *Neusbaum v. Chicago & N. W. Ry. Co.* 754
41. If the driver of an automobile is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted. *Neusbaum v. Chicago & N. W. Ry. Co.* 754
42. Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will de-

feat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given. *Neusbaum v. Chicago & N. W. Ry. Co.* 754

43. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications. *Hoffman v. State* 806

44. In prosecutions under the motor vehicle homicide act, the negligence of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence was also a proximate cause of the death of another. *Hoffman v. State* 806

45. In the prosecution of a charge of motor vehicle homicide, proof of gross negligence is not essential to sustain a conviction. *Hoffman v. State* 806

Bailments.

A special contract of bailment prevails in determining the liabilities of the parties as against general principles of law applicable in the absence of express agreement. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.* 47

Banks and Banking.

1. Statute on joint bank deposits fixes the property rights of the persons named in the deposit where compliance with the statute has been had. *DeForge v. Patrick* 568

2. Upon the death of one payee named in joint bank deposit, the survivor or survivors named therein take the whole legal title thereto free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit. *DeForge v. Patrick* 568

Bills and Notes.

1. Evidence of a parol agreement entered into by the makers and the payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its terms, is in-

competent as tending to vary or contradict the terms of a written instrument by parol. *Bowen v. Farrens* 493

2. An oral agreement, made after a promisory note was executed, to extend the maturity date thereof, is not enforcible where there is no consideration for such agreement. *Bowen v. Farrens* 493

Boundaries.

1. Where a plat of the lands conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection therewith. The courses, distances, or other particulars which appear on such plat are, as a general rule, to be considered as the true description of the land conveyed. *Hoke v. Welsh* 831
2. In the absence of an express intention to the contrary, a conveyance of a tract of land by a description shown on a plat which has been vacated includes the title to one-half of adjacent streets and alleys which have been vacated. *Hoke v. Welsh*.... 831
3. Fixed monuments control over field notes, a description of a survey by words, or a picturization of a survey by a plat. *Hoke v. Welsh* 831
4. A monument is a permanent landmark established for the purpose of indicating boundaries. For a monument to control, a survey should show the relation of the lines and corners contained within it to the lines and corners of some original survey marked out on the ground or other artificial or natural monument. *Hoke v. Welsh* 831

Charities.

1. Eleemosynary means relating or devoted to charity; given in charity; having the nature of alms. *United Community Services v. The Omaha Nat. Bank* 786
2. Charity is defined. *United Community Services v. The Omaha Nat. Bank* 786
3. Generally a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders. *United Community Services v. The Omaha Nat. Bank* 786

Children Born Out of Wedlock.

1. Statements or declarations of complainant in a filiation proceeding made out of court are incompetent and inadmissible as corroboration in her behalf. *Lockman v. Fulton* 439

2. The uncorroborated testimony of the mother of a child born out of wedlock is not sufficient to support a verdict or finding that the alleged father is the actual father. *Lockman v. Fulton* 439
3. In filiation proceedings, the testimony of complaining witness must be corroborated. *Lockman v. Fulton* 439
4. In an action to establish the paternity of a child born out of wedlock, only a preponderance of evidence is necessary to sustain a conviction. *Lockman v. Fulton* 439
5. The character and quality of proof of corroboration is the same in filiation proceedings as in criminal cases wherein corroboration of the testimony of the prosecutrix is required. *Lockman v. Fulton* 439
6. Circumstances, if material and competent, may corroborate complainant's testimony, but mere opportunity alone is insufficient corroboration to support a judgment that defendant is actually the father of complainant's child. *Lockman v. Fulton* 439
7. In a filiation proceeding, if the testimony of complainant with regard to the principal fact is so inconsistent, contradictory, improbable, or incredible as to be self-destructive, or if the corroborative evidence is of a like doubtful character or wholly lacking in probative force or value, a finding or verdict and judgment of guilty will be respectively set aside and reversed. *Lockman v. Fulton* 439

Constitutional Law.

1. Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute. *Schutte v. Schmitt* 162
2. The word "revenue" as used in Article V, section 2, of the Constitution is broad and general. It includes all public money which the state collects or receives from whatever source and in whatever manner. *Wilson v. Marsh* 237
3. Any arbitrary act of the state by which any part of the salary of a district judge is withheld from him diminishes his salary during his term of office by the amount thereof retained by the state and is a violation of Article III, section 19, of the Constitution. *Wilson v. Marsh* 237
4. The primary purpose of the constitutional prohibi-

tion against diminution of the salary of a public officer during his term of office is not to benefit the official but the public. It may not be construed as a private grant. It is a limitation imposed in the public interest. *Wilson v. Marsh* 237

5. If the Judges Retirement Act of Nebraska is operative during the present term of the district judges it increases their compensation during their term of office in violation of the Constitution. *Wilson v. Marsh* 237

6. If a part of an act is unconstitutional and the remainder is so interrelated with the invalid part that it cannot be sustained without doing violence to the legislative intention as a whole, the entire act is invalid. *Wilson v. Marsh* 237

7. It is not the province of the Supreme Court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains. *Wilson v. Marsh* 237

8. If an act of the Legislature is capable of more than one interpretation, one of which sustains it as valid and another renders it in conflict with the Constitution, the Supreme Court must adopt the former. *Wilson v. Marsh* 237

9. The Legislature when it passes an act is presumed to know the provisions and limitations of the Constitution of the state, the interpretation that the Supreme Court has given them, and the construction the Supreme Court has given similar legislation previously enacted. *Wilson v. Marsh* 237

10. The presumption is that the Legislature in passing an act intended it to be a valid enactment rather than one in conflict with the Constitution of the state. *Wilson v. Marsh* 237

11. The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental subdivisions when and as conferred by the state by its Constitution or legislation. *Peterson v. Vasak* 498

12. If an act as originally passed was unconstitutional because it contained matter different from that expressed in the title, or referred to more than one subject matter, it becomes valid law, if otherwise constitutional, on adoption by the Legislature and incorporation of it into a general revision without reference to the title as originally enacted. *Peterson v. Vasak* 498

13. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality. *Peterson v. Vasak* 498
14. Liberty in the constitutional meaning includes absence of arbitrary and unreasonable restraint upon an individual in the conduct of his business and the use and enjoyment of property. *Blauvelt v. Beck* 576
15. A statute must be sustained if a condition of affairs exists concerning which the Legislature, exercising its conceded right to enact laws for protection of health, safety, and welfare of the people, might pass the law in question. *Blauvelt v. Beck* 576
16. If legislative action is arbitrary and an unreasonable interference with the right to engage in and carry on business and has no relation to the protection of the public within the legislative power, the act must fail. *Blauvelt v. Beck* 576
17. The reasonableness of restrictions imposed by the Legislature by the exercise of the police power is a judicial matter. *Blauvelt v. Beck* 576
18. A regulatory provision of a statute having some relation to public health, safety, or welfare but which arbitrarily and unreasonably interferes with private business and imposes unreasonable and unnecessary restrictions may not be upheld. *Blauvelt v. Beck* 576
19. The question of whether legislation is in the public interest is ordinarily one for legislative determination, but the Legislature may not, under the guise of regulation in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory. *Blauvelt v. Beck* 576
20. The validity of a law is tested by what may be done under its authority. *Blauvelt v. Beck* 576
21. The fundamental requisite of due process of law is opportunity to be heard. This right has small reality or value unless one is informed that the matter is pending and he can choose for himself what action he will take in reference to it. *Blauvelt v. Beck* 576
22. To constitute due process, the method of transmitting notice to a person of a pending matter must be one that is reasonably calculated to give him notice thereof and an opportunity to be heard. *Blauvelt v. Beck* 576

23. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment. *Blauvelt v. Beck* 576
24. The Nebraska Public Auction Law is unconstitutional because it is based upon an arbitrary and unreasonable classification. *Blauvelt v. Beck* 576
25. The Installment Loan Act is not a local or special law regulating interest on money in violation of the Constitution. *State ex rel. Beck v. Associates Discount Corp.* 683
26. The Installment Loan Act does not violate the constitutional provision with reference to the enactment of legislative bills. *State ex rel. Beck v. Associates Discount Corp.* 683
27. A public corporation is an arm or branch of the government and under the plenary control of the Legislature. *United Community Services v. The Omaha Nat. Bank* 786
28. The state Constitution is not a grant but a restriction on legislative power. Courts can enforce only those limitations which the Constitution imposes. *United Community Services v. The Omaha Nat. Bank* 786
29. Every legislative act comes before the Supreme Court surrounded with the presumption of constitutionality. This presumption continues until the act under review clearly appears to contravene some provision of the Constitution. *United Community Services v. The Omaha Nat. Bank* 786
30. The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions. *United Community Services v. The Omaha Nat. Bank* 786
31. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. *United Community Services v. The Omaha Nat. Bank* 786
32. The rights and franchises of a public corporation never become vested rights as against the state. Its charter does not constitute a contract in the sense

of the constitutional provision which prohibits the obligation of contracts being violated. *United Community Services v. The Omaha Nat. Bank* 786

33. Constitutional provision prohibiting giving or loaning of credit of state was intended to prevent the state from extending its credit to private enterprises. *United Community Services v. The Omaha Nat. Bank* 786

34. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. *United Community Services v. The Omaha Nat. Bank* 786

35. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each. *United Community Services v. The Omaha Nat. Bank* 786

36. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed. *United Community Services v. The Omaha Nat. Bank* 786

Mara v. Norman 845

Contracts.

1. If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

2. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

3. Contracts contrary to public policy, that is those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

4. A corporation cannot disable itself by contract from

performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

5. One who undertakes for a consideration to do work requiring special skill impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require. If he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put. *Numon v. Stevens* 339
6. The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. *Numon v. Stevens* 339
7. Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally. *Greer v. Chelewski* 450
8. A contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable. *Greer v. Chelewski* 450
9. In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties. *Hansen v. E. L. Bruce Co.* 759
10. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. *Hansen v. E. L. Bruce Co.* 759
11. The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents. *Hansen v. E. L. Bruce Co.* 759
12. The entire contract must be regarded with a conscious effort to give effect to every part of it without disproportionate emphasis upon one to the neglect of other provisions. *Hansen v. E. L. Bruce Co.* 759
13. An assignment of a contract does not create a contractual obligation between the assignee and the other party to the contract. *Hansen v. E. L. Bruce Co.* 759
14. An assignee of a contract generally acquires no greater right than that possessed by the assignor.

The assignee stands in the place of the assignor and he cannot sue if the assignor could not have maintained an action. *Hansen v. E. L. Bruce Co.* 759

Corporations.

1. A corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
2. Generally a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders. *United Community Services v. The Omaha Nat. Bank* 786
3. A public corporation is an arm or branch of the government and under the plenary control of the Legislature. *United Community Services v. The Omaha Nat. Bank* 786
4. Public corporations chartered for the purpose of supplying the public with electricity have such lawful rights and powers as are clearly and expressly granted, together with such implied powers as are reasonably necessary to enable them to exercise those expressly conferred. *United Community Services v. The Omaha Nat. Bank* 786
5. The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances. *United Community Services v. The Omaha Nat. Bank* 786
6. The rights and franchises of a public corporation never become vested rights as against the state. Its charter does not constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. *United Community Services v. The Omaha Nat. Bank* 786

Costs.

1. It is the practice to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Trute v. Skeede* 266
2. The county court and the district court on appeal have authority in a proper case to order payment of

costs and attorney's fees for services rendered to a good faith trustee. *Scully v. Scully* 368

Courts.

1. The Supreme Court of Nebraska has original jurisdiction of an action relating to the revenue of the state. *Wilson v. Marsh* 237
2. The county court has original and exclusive jurisdiction in probate matters, which is conferred upon the district court in those matters appealed to it. *Scully v. Scully* 368
3. By statute, either party may appeal from the judgment of the county court in the same manner as provided by law in cases tried and determined by justices of the peace. *Rice v. McGrath* 511
4. By statute, in all cases of appeal from the county court, the plaintiff shall, within 50 days from and after the rendition of the judgment in the said court, file his petition as required in civil cases in the district court. *Rice v. McGrath* 511
5. By statute the plaintiff in the county court on appeal to the district court shall be the plaintiff therein and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court. *Rice v. McGrath* 511
6. The term "discretion" denotes the absence of a hard and fast rule. *Rice v. McGrath* 511
7. When the term "discretion" is invoked as a guide to judicial action it means a sound discretion, not exercised arbitrarily or willfully, but with regard to what is right and equitable under the circumstances. *Rice v. McGrath* 511

Criminal Law.

1. Where competent evidence is adduced to support every element of the offense charged it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Salerno v. State* 99
2. Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. *Salerno v. State* 99
3. Where the accused is identified as having been at or near the scene of a crime about the time of its

commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider. *Lipscomb v. State* 417

4. A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses. *Lipscomb v. State* 417
5. Rule stated relating to method of interrogation of defendant as to previous conviction of a felony. *Lipscomb v. State* 417
6. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Lipscomb v. State* 417
7. Statute authorizing interrogation of defendant as to previous conviction of a felony does not permit exploration of the charge or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed. *Lipscomb v. State* 417
8. Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction. *Lipscomb v. State* 417
9. Review by petition in error is confined to convictions of felonies and misdemeanors under the criminal code. *State v. Warren* 623
10. Warrant for arrest of a probationer for violation of parole may be had either upon affidavit or verified information. *Phoenix v. State* 669
11. While procedure to vacate a parole has been simplified by amendment of statute, proceeding can still be instituted by a verified information. *Phoenix v. State* 669
12. In proceedings to vacate a parole granted by the district court, whether by motion or information, the defendant is entitled to notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial. *Phoenix v. State* 669
13. In proceedings to revoke a parole, it is sufficient that the violation of the conditions is established by clear and satisfactory evidence, and proof be-

yond a reasonable doubt is not required. *Phoenix v. State* 669

14. Technical formality and preciseness of charge are not a prerequisite to judicial investigation of whether or not defendant has observed the conditions of his probation. A statement of the facts showing the claimed violation of his parole, notice to the defendant of a hearing, and a lawful hearing on the charge, are sufficient. *Phoenix v. State* 669
15. Supreme Court is authorized by statute to reduce a sentence when in its opinion the sentence is excessive, and to render such sentence as may be warranted by the evidence. *Guedea v. State* 680
16. It is the duty of the Supreme Court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant. *Guedea v. State* 680
17. A substantial reason for the reduction of a sentence must be warranted by the evidence. *Guedea v. State* 680
18. Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence within such limits will not be disturbed unless there appears to be an abuse of such discretion. *Guedea v. State* 680
19. The word "or," when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative. *Uldrich v. State* 746
20. One crime only is defined by statute prohibiting any person from operating or being in actual physical control of automobile while under the influence of intoxicating liquor. *Uldrich v. State* 746
21. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications. *Hoffman v. State* 806
22. The test by which a jury should determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. *Hoffman v. State* 806
23. After a jury has considered the evidence in the light of the circumstantial evidence rule and re-

turned a verdict of guilty, on review the verdict may not, as a matter of law for insufficiency of evidence, be set aside if the evidence sustains some rational theory of guilt. *Hoffman v. State* 806

Damages.

1. If a litigant seeks to recover damages for the unlawful detention of property he must establish his right to the possession thereof during the period for which he seeks to recover and that the party against whom he seeks relief unlawfully withheld possession thereof. *Johnson v. Ruhl* 330
2. The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. *Numon v. Stevens* 339

Declaratory Judgments.

1. One of the purposes of the Uniform Declaratory Judgments Act is to terminate the controversy that gives rise to the proceedings. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
2. Proceedings under the Uniform Declaratory Judgments Act are governed by applicable established rules of pleading. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
3. Under the Uniform Declaratory Judgments Act courts have a reasonable discretion in determining the controversies to which it applies. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

Deeds.

1. Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Hipsley v. Hipsley* 518
2. 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. *Hipsley v. Hipsley* 518
3. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption. *Hipsley v. Hipsley* 518

4. 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. *Hipsley v. Hipsley* 518
5. In a suit to set aside deed to defendant for want of delivery, plaintiff has the burden of proving non-delivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed. *Hipsley v. Hipsley* 518
6. The presumption of delivery of a deed is not conclusive, but raises a strong implication, which can only be overcome by clear and satisfactory proof. *Hipsley v. Hipsley* 518
7. Where a plat of the lands conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection therewith. The courses, distances, or other particulars which appear on such plat are, as a general rule, to be considered as the true description of the land conveyed. *Hoke v. Welsh* 831
8. Knowledge or notice of an encumbrance, a paramount title, or a defective title, does not impair the right of recovery upon covenants of warranty. *Hoke v. Welsh* 831
9. The remedy for a deficiency in quantity in real estate conveyed by deed ordinarily is to grant the purchaser an abatement of the purchase price in the same proportion the deficiency bears to the tract conveyed. *Hoke v. Welsh* 831
10. When the sale is in gross there is no remedy afforded the grantor or grantee for an excess or a deficiency unless such excess or deficiency is so great as to raise a presumption of fraud. *Hoke v. Welsh* 831

Dismissal and Nonsuit.

A dismissal of a suit which is not upon or does not involve the merits is not a bar to another action on the same cause. *Custer Public Power Dist. v. Loup River Public Power Dist.* 821

Divorce.

1. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Koerwitz v. Koerwitz* 411

2. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. *Koerwitz v. Koerwitz* 411
3. Rule for determination of alimony and division of property in divorce case stated. *Koerwitz v. Koerwitz* 411
4. By statute, it is provided that in cases of divorce or annulment of marriage the decree may be revised as to care, custody, and maintenance of children if the circumstances of the parties shall change, or if it shall be to the best interests of the children. *Harder v. Harder* 433
5. An application for a change with respect to care, custody, and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of decree. *Harder v. Harder* 433
6. Ordinarily in divorce actions attorney's fees and costs are granted to the wife. *Sechser v. Sechser* 486
7. Remarriage is a change of circumstance that may be considered by the court along with other changes of circumstances in passing upon an application to reduce child support payments fixed in a previous order or decree. *Phillips v. Phillips* 649
8. Remarriage, standing alone, does not afford a valid basis for reducing payments for child support. It does not bear directly upon the legal duty of a father to contribute to the support of his minor children by a former marriage. *Phillips v. Phillips* 649
9. In determining the provision to be made for the support of minor children in a divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in accordance with the best judgment and sound discretion of the court. *Phillips v. Phillips* 649
10. Where there has been a change of circumstances, the rule applicable to original determination of child support payments applies in determining whether such payments should be increased or reduced. *Phillips v. Phillips* 649

Drains.

1. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which

may be reasonably anticipated to drain there. *Cover v. Platte Valley Public Power & Irr. Dist.* 146

2. After an easement to drain across the lands of another has been legally acquired, it is limited both as to extent and nature to the terms of the original grant. *Cover v. Platte Valley Public Power & Irr. Dist.* 146

Easements.

1. After an easement to drain across the lands of another has been legally acquired, it is limited both as to extent and nature to the terms of the original grant. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
2. If the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement. *Cover v. Platte Valley Public Power & Irr. Dist.* 146

Electricity.

1. Statutory prohibition upon establishment of an electric light and power district that conflicted with another district related to the organization of the district. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
2. Conflict of interest provision relates to a fact condition that may be held to prevent the organization of the district, and not to a fact condition subsequently arising so as to restrict operation of organized district under its charter powers. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
3. Under power district statute, the powers of the Department of Roads and Irrigation are to approve or disapprove a petition for the organization of a district. The department can exercise only those powers conferred by express enactment or by necessary implication. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
4. Under power district statute, the Department of Roads and Irrigation is without power to approve a petition for the organization of a district subject to conditions and limitations not expressed in the petition. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
5. The public policy of this state as to public power districts is the concept of electrical energy being

furnished to the ultimate consumer at the lowest cost consistent with sound business management. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

6. Public corporations chartered for the purpose of supplying the public with electricity have such lawful rights and powers as are clearly and expressly granted, together with such implied powers as are reasonably necessary to enable them to exercise those expressly conferred. *United Community Services v. The Omaha Nat. Bank* 786

Eminent Domain.

1. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. *Heppe v. State* 403
2. The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Since the power is in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner. *Heppe v. State* 403
3. The power of eminent domain is an inherent attribute of sovereignty and exists independently of constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power. *Heppe v. State* 403
4. The power of eminent domain is exercisable through the Legislature or through some department or agency by authority of the Legislature. *Heppe v. State* 403

Equity.

1. Laches is an equitable doctrine and it does not result from the mere passage of time. *State ex rel. Nebraska State Bar Assn. v. Bates* 652
2. Laches will not defeat a cause if there has been no material change in the position of the objector. *State ex rel. Nebraska State Bar Assn. v. Bates* 652
3. In a disciplinary proceeding against an attorney, lapse of time since the acts were committed is generally not available as a defense. *State ex rel. Nebraska State Bar Assn. v. Bates* 652
4. The rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for re-

covery upon a single primary right. *State ex rel. Beck v. Associates Discount Corp.* 683

Estoppel.

1. The doctrine of estoppel may be applied in a controversy where the state, county, or city, or any other government agency is involved. *State ex rel. Heintze v. County of Adams* 127
2. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. *O'Neil v. Union Nat. Life Ins. Co.* 284

Evidence.

1. Rule stated as to distinction between contradiction and impeachment of a witness. *Davis v. Dennert* 65
2. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Davis v. Dennert* 65
3. A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such marks is solely the province of the jury. *Davis v. Dennert* 65
4. Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. *Dietze v. State* 80
5. Foundation may be laid for the admission of evidence of the readings of radar equipment by evidence of experience of persons in the handling of such equipment from which it is made to appear that the equipment correctly indicates the speed of moving vehicles. *Dietze v. State* 80
6. Where evidence is admitted as an admission against interest against one defendant, it is ordinarily not admissible against his codefendant. In such a case it is not error for the court to limit the purpose of its admission and to refuse its consideration by the jury on an issue as to which it is immaterial or incompetent. *Deck v. Sherlock* 86

7. A death certificate from the War Department is not admissible in evidence in and of itself as proof of cause of death. *O'Neil v. Union Nat. Life Ins. Co.* 284
8. Where there is uncontradicted and conclusive evidence of the cause of death other than a certificate from the War Department the admission of the certificate in evidence is error without prejudice. *O'Neil v. Union Nat. Life Ins. Co.* 284
9. Where evidence is offered by deposition and it appears that the form of questions is technically objectionable, but the court on inspection can see that the answers furnish proper evidence, exceptions to the questions will be overruled and the testimony admitted. *O'Neil v. Union Nat. Life Ins. Co.* 284
10. The diagram of a location made, identified, and described by a witness to illustrate testimony given by the witness is admissible in evidence. *O'Neil v. Union Nat. Life Ins. Co.* 284
11. Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider. *Lipscomb v. State* 417
12. Rule stated relating to method of interrogation of defendant as to previous conviction of a felony. *Lipscomb v. State* 417
13. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Lipscomb v. State* 417
14. Evidence of a parol agreement entered into by the makers and the payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its terms, is incompetent as tending to vary or contradict the terms of a written instrument by parol. *Bowen v. Farrens* 493
15. The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all. *Bowen v. Farrens* 493
16. On appeal of a conviction of a violation of an ordi-

nance, the district court will take notice of the facts the municipal court could have noticed judicially before the removal of the case to the district court. *State v. Warren* 623

17. Where the parties to an action have stipulated to the existence of a fact or the truth of testimony, the stipulation to the extent it has been made is binding upon the parties, the jury, and the court. *Ireland v. Stalbaum* 630

18. Where a stipulation has been entered into that a witness or witnesses if called would give testimony of a particular kind or character or in a particular manner, such evidence is not necessarily binding upon the triers of the facts. *Ireland v. Stalbaum* 630

19. In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what is the contract of the parties. *Hansen v. E. L. Bruce Co.* 759

20. The test by which a jury should determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. *Hoffman v. State* 806

21. After a jury has considered the evidence in the light of the circumstantial evidence rule and returned a verdict of guilty, on review the verdict may not, as a matter of law for insufficiency of evidence, be set aside if the evidence sustains some rational theory of guilt. *Hoffman v. State* 806

Executors and Administrators.

1. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Wyrick v. Wyrick* 105

2. The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. *Supp v. Allard* 563

Fraud.

1. Fraud is never presumed, but must be clearly

proved in order to entitle a party to relief on the ground that it has been practiced on him. *Bowen v. Farrens* 493

2. It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. *Bowen v. Farrens* 493

Frauds, Statute of.

When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Wyrick v. Wyrick* 105

Fraudulent Conveyances.

To set aside a conveyance of real estate on the ground that it is fraudulent as to subsequent creditors, such creditors must allege and prove that such conveyance was made with intent to defraud subsequent creditors and in contemplation of such future indebtedness. *DeForge v. Patrick* 568

Highways.

1. The violation of a statute intended to assure the safety of travelers on the public highways is not negligence as a matter of law but may be considered with other evidence in deciding an issue of negligence. *Barney v. Adcock* 179

2. A traveler on a highway is required to exercise reasonable care for the safety of others thereon. *Barney v. Adcock* 179

Homicide.

1. In prosecutions under the motor vehicle homicide act, the negligence of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence was also a proximate cause of the death of another. *Hoffman v. State* 806

2. Under the motor vehicle homicide act, a person is under the influence of intoxicating liquor if such person has lost to an appreciable degree the normal control of his body or mental facilities, and to that extent there is an impairment of the capacity to

think and act correctly and efficiently. *Hoffman v. State* 806
3. In the prosecution of a charge of motor vehicle homicide, proof of gross negligence is not essential to sustain a conviction. *Hoffman v. State* 806

Injunctions.
1. As a general rule, an injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete. *Schutte v. Schmitt* 162
2. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. *Heppe v. State* 403
3. Under Installment Loan Act, Attorney General is authorized to bring action to enjoin violation and to obtain appointment of receiver. *State ex rel. Beck v. Associates Discount Corp.* 683
4. Where acts sought to be enjoined are threatened or being performed by more than one, all may be joined as defendants. *State ex rel. Beck v. Associates Discount Corp.* 683
5. Injunction is the proper remedy to prevent obstruction of flow of surface water in a well-defined course. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Town of Everett v. Teigeler* 769

Insurance.
1. Loan by an insurer to an insured, to be paid only if insured made a recovery from a third person, did not make the insurer the real party in interest. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.* 47
2. Where insurer has advanced to insured the amount of the insurance under an agreement that the amount was received as a loan to be repaid only from such recovery as might be had from any other party, insured is the real party in interest. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.* 47
3. The statutes of this state authorize the inclusion in insurance policies of provisions for contestability on the ground that death came about during military service. *O'Neil v. Union Nat. Life Ins. Co.* 284
4. An insurance policy which is susceptible of more

than one interpretation will be given the one most favorable to the insured. *O'Neil v. Union Nat. Life Ins. Co.* 284

5. Where there is no ambiguity in an insurance policy, the courts will indulge no forced construction against the insured and the policy will be interpreted according to the intention of the parties as expressed in the instrument. *O'Neil v. Union Nat. Life Ins. Co.* 284

6. Where a policy of life insurance insures a person against death except in military or naval service in time of war, the exception applies only if death is occasioned by actual service or is an incident thereof. *O'Neil v. Union Nat. Life Ins. Co.* 284

7. Damages to an automobile resulting from a collision, where plaintiff's husband was operating it with plaintiff's permission while in an intoxicated condition, was an "accidental loss" within an automobile policy providing collision coverage. *Riley v. National Auto Ins. Co.* 658

8. An accident within the meaning of an automobile insurance policy indemnifying against loss by collision or upset includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. *Riley v. National Auto Ins. Co.* 658

9. The insured named in a loss-payable clause of an automobile insurance policy is a proper but not an indispensable party. *Riley v. National Auto Ins. Co.* 658

10. Where a provision of an automobile insurance policy purports to limit the liability to a used-car price fixed in a current publication, and such current publication does not establish such price, such provision is ineffective as a limitation upon the liability of the insurer. *Riley v. National Auto Ins. Co.* 658

11. A clause in an insurance policy providing for a deduction of $100 for each collision or upset contemplates one deduction for each accident giving rise to a cause of action. *Riley v. National Auto Ins. Co.* 658

12. An automobile insurance policy is a contract and its plain provisions will be enforced in the absence of statutory regulation or illegality. *Riley v. National Auto Ins. Co.* 658

13. An unambiguous provision fixing the limit of the insurance company's liability for damage to an automobile is binding upon the parties and the instructions of the court dealing with the assessment of

damages should be in conformity therewith. *Riley v. National Auto Ins. Co.* 658

14. Where the contract of insurance provides that the insurer may repair the insured vehicle, it is error for the trial court not to instruct on the measure of damages with reference to repairs where there is evidence that it can be repaired and placed in substantially as good condition as before the accident. *Riley v. National Auto Ins. Co.* 658

15. The district court has no authority to award an attorney's fee in favor of the plaintiff upon rendition of judgment in its favor in an action for damages resulting from a collision under an automobile insurance policy. *Riley v. National Auto Ins. Co.* 658

Interest.

1. The recovery of interest on an unliquidated claim, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount. *Riley v. National Auto Ins. Co.* 658

2. The Installment Loan Act is not a local or special law regulating interest on money in violation of the Constitution. *State ex rel. Beck v. Associates Discount Corp.* 683

3. The Installment Loan Act does not violate the constitutional provision with reference to the enactment of legislative bills. *State ex rel. Beck v. Associates Discount Corp.* 683

Interpleaders.

1. A bill of interpleader is an equitable remedy whereby a disinterested stakeholder in possession of a fund or other property claimed by each of rival defendants may require them to litigate among themselves the issue of ownership without embroiling him. *Burke Lumber & Coal Co. v. Anderson* 551

2. When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it. All persons claiming the fund are necessary and proper parties to the action. *Burke Lumber & Coal Co. v. Anderson* 551

3. Upon interpleader by a stakeholder, the stakeholder should pay the money held by him into court or aver a willingness to pay it into court so that the court

has control of the fund and its order as to the disposition may be made effective. *Burke Lumber & Coal Co. v. Anderson* 551
4. The court has the right to require the deposit of the fund involved as a condition precedent to a determination of the issue as to whom it shall be paid. *Burke Lumber & Coal Co. v. Anderson* 551
5. On an interpleader the stakeholder may deposit the fund or property into court, and ordinarily he is required to make, or to offer to make, such a deposit. *Burke Lumber & Coal Co. v. Anderson* 551

Intoxicating Liquors.
1. Where the owner of an automobile engages with another in the drinking of alcoholic beverages and during the course of which he entrusts the control and operation of his automobile to such other person, it is ordinarily for the jury to determine whether or not the owner exercised due care in so doing. *Deck v. Sherlock* 86
2. The phrase "under the influence of alcoholic liquor" is substantially synonymous with "intoxicated," "intoxication," or "drunkeness," and with "in an intoxicated condition" and "in a drunken or partly drunken condition." *Uldrich v. State* 746
3. An instruction was not erroneous that defined the meaning of the term under the influence of alcoholic liquor. *Uldrich v. State* 746
4. Under the motor vehicle homicide act, a person is under the influence of intoxicating liquor if such person has lost to an appreciable degree the normal control of his body or mental facilities, and to that extent there is an impairment of the capacity to think and act correctly and efficiently. *Hoffman v. State* 806

Joint Tenancy.
1. Nebraska recognizes common law joint tenancy with right of survivorship. *DeForge v. Patrick* 568
2. Joint tenancies are created by contract. *DeForge v. Patrick* 568
3. Joint tenancies are not favored and, if not expressly created by contract, the law presumes the tenancy is in common. *DeForge v. Patrick* 568
4. If the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to

control and a joint tenancy with right of survivorship will be created. *DeForge v. Patrick* 568

5. A joint tenancy with right of survivorship vests the whole title in the survivor free from the debts of the deceased joint tenant. *DeForge v. Patrick* 568
6. An estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy. Such act has the effect of destroying the right of survivorship incidental to it. *DeForge v. Patrick* 568
7. Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. *DeForge v. Patrick* 568
8. After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains. *DeForge v. Patrick* 568
9. Statute on joint bank deposits fixes the property rights of the persons named in the deposit where compliance with the statute has been had. *DeForge v. Patrick* 568
10. Upon the death of one payee named in joint bank deposit, the survivor or survivors named therein take the whole legal title thereto free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit. *DeForge v. Patrick* 568

Judges.

1. The compensation of a district judge is fixed by statute. It is defined as an annual salary and it is required to be paid to him in equal monthly installments during the year in which his service is rendered. *Wilson v. Marsh* 237
2. Any arbitrary act of the state by which any part of the salary of a district judge is withheld from him diminishes his salary during his term of office by the amount thereof retained by the state and is a violation of Article III, section 19, of the Constitution. *Wilson v. Marsh* 237
3. A county judge is prohibited by the Constitution from practicing law in any matter arising in or growing out of any proceeding in his court. *State ex rel. Nebraska State Bar Assn. v. Bates* 652

Judgments.

1. A judgment debtor or debtor under a decree in

equity may satisfy the obligations of such judgment or decree by performance of an agreement to satisfy in some manner other than that provided for by the judgment or decree. *Powell v. Van Donselaar* 96

2. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings, the court has the right and should examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
3. A void judgment is in reality no judgment. It is a mere nullity. It is supported by no presumption, and may be impeached in any action, direct or collateral. *Schutte v. Schmitt* 162
4. The summary judgment act authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where the truth is clear, and where no genuine issue remains for trial. *First Nat. Bank of Wayne v. Gross Real Estate Co.* 343
5. Conditions precedent for obtaining relief under the Uniform Declaratory Judgments Act stated. *Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection* 781
6. A dismissal of a suit which is not upon or does not involve the merits is not a bar to another action on the same cause. *Custer Public Power Dist. v. Loup River Public Power Dist.* 821
7. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact and, second, that he is entitled to a judgment as a matter of law. *Hoke v. Welsh* 831

Juries.

One of the purposes of the voir dire examination is to disclose whether or not a prospective juror knows one or more of the parties, or knows something about the case. *Lipscomb v. State* 417

Life Estates.

1. The relation of a life tenant to his remaindermen is that of a quasi trustee. The relation is the same if a power of disposal is annexed to the life estate. *Trute v. Skeede* 266
2. Where life tenants under a will accept a convey-

ance of real estate in lieu of a mortgage, such acceptance does not have the effect to enlarge or change the nature of the original bequest and devise given in the will. *Trute v. Skeede* 266

3. A change in the form of the estate under the power expressly given in the will does not have the effect to enlarge or change the nature of the original title thereto. *Trute v. Skeede* 266

4. When a life estate is expressly created by a will and unlimited power of disposition is given thereunder to the life tenants with the remainder over in whatever part remains undisposed of at the death of the life tenants, the part of the property undisposed of passes to the remaindermen unless otherwise provided. *Trute v. Skeede* 266

5. Where the evidence discloses that life tenants have been reimbursed for advancements made by them to pay debts of the estate, they are not entitled to a lien on the proceeds of a sale of land belonging to the remaindermen. *Trute v. Skeede* 266

6. It is the general rule that an increase in the value of real estate in an estate belongs to the remaindermen or corpus rather than to the life tenant or equitable life beneficiary. *Trute v. Skeede* 266

Livery Stable Keepers.

1. A livery-stable keeper who lets a horse for hire impliedly promises or warrants that the horse is suitable for the purpose for which it is let. He is liable for injuries resulting from the viciousness or dangerous propensities of the horse if he had knowledge, or, in the exercise of reasonable care, should have had knowledge, of such viciousness or propensities. *Baty v. Wolff* 1

2. Where a riding horse bailed for hire has shown unmanageable characteristics, the bailee is required to dismount if a person in the exercise of ordinary care would do so under the circumstances. *Baty v. Wolff* 1

Lotteries.

The payment of anything directly to a promotor by those who hold chances to draw prizes is not required to constitute a lottery, but any consideration even of a slight degree is sufficient. *State ex rel. Line v. Grant* 210

Mandamus.

1. In order to justify the issuance of a peremptory writ of mandamus against public officers it must appear that the duty is imposed by law, that the duty exists at the time the writ is applied for, and that the duty to act is clear. *Kurth v. City of Lincoln* 643
2. The discretionary powers of public officers cannot be controlled by mandamus. *Kurth v. City of Lincoln* 643
3. The acts of public officers which are to be performed in a ministerial as distinguished from a governmental or discretionary capacity may be controlled by mandamus. *Kurth v. City of Lincoln* 643
4. Where public officers are required to examine facts and law in order to make a determination, mandamus will not lie to control the action. *Kurth v. City of Lincoln* 643

Motor Carriers.

1. The State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity. Such proceedings are administrative and legislative in character. *Houk v. Peake* 717
2. The burden is on an applicant for a certificate of convenience and necessity to show that operation under the certificate is and will be required by the present or future public convenience and necessity. *Houk v. Peake* 717
3. Controlling questions on issuance of certificate of public convenience and necessity to a motor carrier stated. *Houk v. Peake* 717
4. The term "willful failure," as used in the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure of which complaint is made. *Houk v. Peake* 717
5. Where there is competent evidence to sustain the finding of the State Railway Commission that there was not a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it, an order

based on such finding is not unreasonable or arbitrary. *Houk v. Peake* 717

Municipal Corporations.

1. The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations, are legislative functions. *Schutte v. Schmitt* 162
2. The referendum provisions of our statutes as they relate to municipal corporations apply to legislative acts, but not to administrative or executive matters. *Kelley v. John* 319
3. If an ordinance of a city serves merely to put into execution a previously enacted law, it is clearly executive or administrative in character. *Kelley v. John* 319
4. The test for determining that which is legislative from that which is administrative or executive is whether the ordinance is one making a law, or administering or executing a law already in existence. *Kelley v. John* 319
5. An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities. *Kelley v. John* 319
6. A city is a political subdivision of the state that is created as a convenient agency for the exercise of the governmental powers of the state that are entrusted to it by constitutional provision or legislative enactment. *Peterson v. Vasak* 498
7. A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization. *Peterson v. Vasak* 498
8. The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental subdivisions when and as conferred by the state by its Constitution or legislation. *Peterson v. Vasak* 498
9. The words of a municipal zoning ordinance are interpreted according to their natural import in common and accepted usage. *Peterson v. Vasak* 498
10. If the operation and effect of a zoning ordinance deprive the owner of the value and use of real

estate, it creates a specific instance of unnecessary hardship making an exception to zoning requirements. *Peterson v. Vasak* 498

11. A board of appeals authorized by zoning act is vested with discretion in the determination of matters within its province to decide. Its acts are judicial in their nature and are subject to review and reversal if they constitute an abuse of discretion and are arbitrary. *Peterson v. Vasak* 498

12. When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid while under the other its validity may be doubtful, that construction which makes sure of its validity will ordinarily be given. *Starman v. Shirley* 613

13. In construing a statute or ordinance the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. *Starman v. Shirley* 613

14. The maxim, expressio unius est exclusio alterius, means that where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention. *Starman v. Shirley* 613

15. A prosecution for violation of a city ordinance, which does not include an offense made criminal by statute, is a civil proceeding to recover a penalty. A judgment and sentence therein may be reviewed in the Supreme Court only by appeal. *State v. Warren* 623

16. On appeal of a conviction of a violation of an ordinance, the district court will take notice of the facts the municipal court could have noticed judicially before the removal of the case to the district court. *State v. Warren* 623

17. A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal except in case of a complete failure to state an offense. *State v. Warren* 623

18. On appeal to the Supreme Court in a prosecution for a violation of a city ordinance, it will be presumed, nothing appearing to the contrary, that the

facts before the district court were sufficient to sustain a finding of a violation of the ordinance. *State v. Warren* 623

19. The word "manure" has no technical meaning and has not acquired a commercial one different from its ordinary use. Manure is a common product universally known and hence an ambiguity or indefiniteness cannot arise from the use of the term. *State v. Warren* 623

20. An offense charged in a prosecution for a violation of a city ordinance is required to be proven by a preponderance of the evidence only to justify a conviction. *State v. Warren* 623

21. In a prosecution for violation of a city ordinance, the credibility of witnesses and the weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *State v. Warren* 623

22. In the absence of an express intention to the contrary, a conveyance of a tract of land by a description shown on a plat which has been vacated includes the title to one-half of adjacent streets and alleys which have been vacated. *Hoke v. Welsh* 831

23. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. *City of Omaha v. Gsantner* 839

Negligence.

1. The burden of proving negligence is on the party alleging it. *Wolcott v. Drake* 56

2. If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof. *Wolcott v. Drake* 56

3. Negligence on the part of defendant cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care attends a person charged with negligence as well as the person killed. *Wolcott v. Drake* 56

4. Negligence is not presumed. The mere happening

of an accident does not prove negligence. *Wolcott v. Drake* 56

5. The burden of proving a cause of action is not sustained by evidence from which negligence can only be established by surmise or conjecture. *Wolcott v. Drake* 56

6. It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable. *Wolcott v. Drake* 56

7. Negligence is the doing of something which an ordinarily prudent person would not have done, or the failure to do something which an ordinarily prudent person would have done, under the same or similar circumstances. *Wolcott v. Drake* 56

8. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Davis v. Dennert* 65

9. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Davis v. Dennert* 65

10. The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, but is only evidence of negligence. *Davis v. Dennert* 65

11. Where one is suddenly confronted with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. *Davis v. Dennert* 65

12. In a negligence case, the emergency rule cannot be successfully invoked by either party unless the evidence supports a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself or who has not used due care to avoid it. *Davis v. Dennert* 65

13. An automobile is not an inherently dangerous instrumentality. The owner is not generally liable for its negligent use by another to whom its control and operation is entrusted. *Deck v. Sherlock* 86

14. Liability on the part of the owner of an automobile may arise where he entrusts the control and operation of his automobile to a person so lacking in competency and skill as to convert the vehicle into a dangerous instrumentality. *Deck v. Sherlock* 86
15. The liability on the part of an owner of an automobile for its negligent operation by another to whom its control and operation is entrusted does not arise out of the relationship of the parties but out of the act of entrustment to one whose incompetency is known or should have been known by the owner. *Deck v. Sherlock* 86
16. In order to charge the owner of an automobile with liability for negligence in entrusting the vehicle to an incompetent driver, it must be shown that the owner had knowledge of the driver's incompetence or that in the exercise of ordinary care he should have known thereof from the facts and circumstances known to him. *Deck v. Sherlock* 86
17. Where there is no competent evidence to support the pleaded defense of contributory negligence, it is prejudicial error to submit that issue to the jury. *Anderson v. Nielsen* 110
18. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Anderson v. Nielsen* 110
19. A party engaged in public work, the construction of which involves change of the flow of waters in a natural drainway, is negligent if such party fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
20. It is sufficient to constitute an act of God that the operation of natural forces should be such as human foresight could not reasonably be expected to anticipate. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
21. To be a defense an act of God must be the sole proximate cause of damages without negligent participation of defendant. The burden of proving such defense by a preponderance of the evidence rests

upon defendant. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
22. Where an act of God and the negligence of defendant concur in proximately causing damages, the defendant is liable as though the damages had been caused by his negligence alone. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
23. The violation of a statute intended to assure the safety of travelers on the public highways is not negligence as a matter of law but may be considered with other evidence in deciding an issue of negligence. *Barney v. Adcock* 179
24. A traveler on a highway is required to exercise reasonable care for the safety of others thereon. *Barney v. Adcock* 179
25. What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case. *Barney v. Adcock* 179
26. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision. *Barney v. Adcock* 179
Bramhall v. Adcock 198
27. Negligence, to justify the recovery of damages, must have proximately caused or contributed to the injury for which compensation is sought. *Barney v. Adcock* 179
28. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. *Barney v. Adcock* 179
Bramhall v. Adcock 198
29. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Barney v. Adcock* 179
Bramhall v. Adcock 198
30. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The presence or activity of inanimate things is usually a mere condition and not the cause. *Barney v. Adcock* 179

31. The presence of smoke, snow, fog, mist, blinding headlights, or similar elements is not generally recognized as an intervening cause but as a condition which imposes upon the operators of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with surrounding circumstances. *Barney v. Adcock* 179
Bramhall v. Adcock 198
32. The presence of ice upon a highway is not generally an independent, intervening causal factor that relieves an automobile operator from responsibility for the result of his negligence. *Barney v. Adcock* 179
Bramhall v. Adcock 198
33. In order for an accident to be solely attributable to an icy condition of the highway, it must be made evident that the accident would in some manner have occurred because of the ice, even if the motorist had not been negligent. *Barney v. Adcock* 179
Bramhall v. Adcock 198
34. If the separate, independent acts of negligence of two or more persons combine to produce a single injury, each of them is liable for resulting damages, though one of them alone might not have caused the injury. *Barney v. Adcock* 179
35. The driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him. *Bramhall v. Adcock* 198
36. If the evidence establishes that the negligence of plaintiff is more than slight as compared with the negligence of defendant, the trial court may decide the case as a matter of law and instruct a verdict for the defendant or dismiss the action. *Spracklin v. Omaha Transit Co.* 351
Hickman v. Parks Construction Co. 461
37. The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him. *Spracklin v. Omaha Transit Co.* 351
38. When one looks and does not see what is in plain sight he is in the same situation as one who does not look. *Ring v. Duey* 423
39. When one, being in a place of safety, sees or could

have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Ring v. Duey* 423

40. In an action involving the comparative negligence rule wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed or a verdict directed. *Hickman v. Parks Construction Co.* 461

41. The general rule with respect to responsibility for a dangerous place or operation is that a party charged with the duty of taking suitable precautions to avoid injury or damage to persons or property, and his failure to take such precautions is negligence. *Hickman v. Parks Construction Co.* 461

42. A contractor making an excavation on property of another is under a duty to provide such protection as would guard persons rightfully on the property against any contingency reasonably to be anticipated. *Hickman v. Parks Construction Co.* 461

43. A contractor making an excavation on property of another is not relieved of his duty to provide such protection as would guard persons rightfully on the property against contingencies reasonably to be anticipated by reliance upon others to take the necessary precautions. *Hickman v. Parks Construction Co.* 461

44. Elements of application of the comparative negligence statute stated. *Hickman v. Parks Construction Co.* 461

45. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence thereof. *Hickman v. Parks Construction Co.* 461

46. Ordinarily the comparison of negligence under the comparative negligence statute is for the jury. *Hickman v. Parks Construction Co.* 461

47. Where the master and servant relation does not exist, one who voluntarily assumes the risk of injury from a known danger is barred from a recovery in a negligence case. The rule has no application in the case of exposure to unknown and hidden danger. *Hickman v. Parks Construction Co.* 461

48. In order to constitute actionable negligence, there must exist three essential elements: A duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery. *Scottsbluff Nat. Bank v. First State Bank* 475

49. When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination. *Scottsbluff Nat. Bank v. First State Bank* 475

50. Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Eilts v. Bendt* 538

51. The existence of gross negligence must be determined from the facts and circumstances in each case. *Eilts v. Bendt* 538

52. The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Eilts v. Bendt* 538

53. To recover damages for injuries received while riding in a motor vehicle against the owner or operator of such vehicle, a guest must prove by the greater weight of the evidence the gross negligence of the host or operator of the vehicle and that it was the proximate cause of the accident and injuries. *Eilts v. Bendt* 538

54. A finding of gross negligence on the part of the driver of the defendant's car was not warranted by record. *Eilts v. Bendt* 538

55. Contributory negligence is defined. *Corbitt v. Omaha Transit Co.* 598

56. Statute giving a pedestrian the right-of-way in crossing a street does not relieve the pedestrian of responsibility for the results of his own contributory negligence. *Corbitt v. Omaha Transit Co.* 598

57. When a pedestrian suddenly moves from a place of safety into the path of a moving vehicle and is struck, his own conduct constitutes contributory

negligence more than slight in degree as a matter of law and precludes recovery. *Corbitt v. Omaha Transit Co.* 598

58. Plaintiff may not recover where the evidence shows as a matter of law that the plaintiff was guilty of negligence which was slight and that of the defendant was less than gross, or more than slight by comparison with that of the defendant which was gross. *Ireland v. Stalbaum* 630

59. When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Benedict v. Andersen* 735

60. The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the moment of an accident, and thus contributed to cause the accident. *Benedict v. Andersen* 735

61. Burden of proof on question of contributory negligence stated. *Wendel v. Carlson* 742

62. A motorist entering an intersection of two streets or highways is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. *Wendel v. Carlson* 742

63. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the motorist to exercise ordinary care to avoid an accident. *Wendel v. Carlson* 742

64. The failure of a motorist upon approaching an intersection to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery. *Wendel v. Carlson* 742

New Trial.

1. Whether the decision was to grant a new trial or deny one, the questions in the Supreme Court are, do the alleged error or errors appear in the record, were they called to the attention of the trial court

by the motion, and do they constitute prejudicial error to the party complaining. *Anderson v. Nielsen* 110

2. In consideration of motions for a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to a correct determination of the question or questions presented. *Anderson v. Nielsen* 110

3. The Supreme Court is required in reviewing an order granting a new trial to consider all of the grounds contained in the motion for new trial. If it is found that on any of them the grant was proper, the action of the district court is to be sustained. *Anderson v. Nielsen* 110

4. The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. *Olson v. Shellington* 325

5. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. *Olson v. Shellington* 325

6. The alleged errors that may be considered in the trial court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by motion or appropriate pleading. *Olson v. Shellington* 325

7. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. *Olson v. Shellington* 325

8. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. *Olson v. Shellington* 325

9. A new trial may be ordered because of the jury's neglect to follow the court's instructions as to the law governing the case. *Olson v. Shellington* 325

10. In an appeal from an order granting a new trial where the trial court has not given any reason therefor, it is ordinarily necessary to examine the entire record to ascertain whether or not the action of the court in granting the new trial finds justification. *Ireland v. Stalbaum* 630

Officers.

1. By statute, it is the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or

criminal, arising under the law of the state, in which the state or the county is a party or interested. *State ex rel. Heintze v. County of Adams* 127

2. When no relief is sought against him, a public officer who has acted under an unconstitutional statute is not a necessary party to an action brought to enjoin those public officers whose duty it is to carry out orders made pursuant thereto. *Schutte v. Schmitt* 162
3. The primary purpose of the constitutional prohibition against diminution of the salary of a public officer during his term of office is not to benefit the official but the public. It may not be construed as a private grant. It is a limitation imposed in the public interest. *Wilson v. Marsh* 237
4. The benefits of a retirement plan are deferred compensation, presently earned, but payable in the future to the beneficiary upon condition that he possesses the qualifications required by the plan and that he complies with the conditions prescribed by it. *Wilson v. Marsh* 237
5. The benefits of a retirement system are a form of compensation additional to the regular salary of the beneficiary. The increase in compensation has its inception when the grant is made and when the beneficiary begins his services under the plan and commences to earn the additional remuneration. *Wilson v. Marsh* 237
6. If the Judges Retirement Act of Nebraska is operative during the present term of the district judges it increases their compensation during their term of office in violation of the Constitution. *Wilson v. Marsh* 237
7. The retirement rights acquired by district judges by virtue of the Judges Retirement Act are vested in any event on the happening of the contingency upon which the retirement pay becomes payable and since it is an integral part of the compensation it cannot be withdrawn after it is vested. *Wilson v. Marsh* 237
8. In order to justify the issuance of a peremptory writ of mandamus against public officers it must appear that the duty is imposed by law, that the duty exists at the time the writ is applied for, and that the duty to act is clear. *Kurth v. City of Lincoln* 643
9. The discretionary powers of public officers cannot

be controlled by mandamus. *Kurth v. City of Lincoln* 643
10. The acts of public officers which are to be performed in a ministerial as distinguished from a governmental or discretionary capacity may be controlled by mandamus. *Kurth v. City of Lincoln* 643
11. Where public officers are required to examine facts and law in order to make a determination, mandamus will not lie to control the action. *Kurth v. City of Lincoln* 643

Parent and Child.

1. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Koerwitz v. Koerwitz* 411
2. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. *Koerwitz v. Koerwitz* 411

Parties.

1. Loan by an insurer to an insured, to be paid only if insured made a recovery from a third person, did not make the insurer the real party in interest. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.* 47
2. Where insurer has advanced to insured the amount of the insurance under an agreement that the amount was received as a loan to be repaid only from such recovery as might be had from any other party, insured is the real party in interest. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.* 47
3. When no relief is sought against him, a public officer who has acted under an unconstitutional statute is not a necessary party to an action brought to enjoin those public officers whose duty it is to carry out orders made pursuant thereto. *Schutte v. Schmitt* 162
4. By statute, a court is directed to bring in new parties when the determination of a controversy cannot be had without their presence. *Burke Lumber & Coal Co. v. Anderson* 551
5. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without

affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Burke Lumber & Coal Co. v. Anderson* 551

6. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant. *Burke Lumber & Coal Co. v. Anderson* 551
7. A defect of parties, not raised by demurrer or answer, is waived unless such parties are indispensable to the rendering of a final judgment consistent with equity and good conscience. *Riley v. National Auto Ins. Co.* 658
8. Under Installment Loan Act, Attorney General is authorized to bring action to enjoin violation and to obtain appointment of receiver. *State ex rel. Beck v. Associates Discount Corp.* 683
9. Where acts sought to be enjoined are threatened or being performed by more than one, all may be joined as defendants. *State ex rel. Beck v. Associates Discount Corp.* 683

Partnerships.

1. A loan or advance of money to be invested in some enterprise does not constitute the lender a partner where the lender is to have a share in the profits as a remuneration for such loan or advancement and where he has no interest in the property made the subject-matter of the business, and no power of management or control of such property. *Meisinger v. Johnson* 360
2. The burden of establishing the existence of a partnership is upon the party asserting that the relationship exists. It is a question of fact to be determined from the evidence. *Johnson v. Graf* 396
3. More convincing evidence is required to prove the existence of a partnership where the alleged partners are the only litigants than where the controversy is between a third party and the partners. *Johnson v. Graf* 396
4. Where a partnership is formed to conduct a lawful business in an illegal manner, the courts will not recognize its existence and will not lend their aid

to assist either one of the parties thereto in an action against the other. *Johnson v. Graf* 396
5. The illegality of a partnership agreement need not be pleaded as a defense, but may be taken advantage of whenever it appears in the course of a trial. *Johnson v. Graf* 396
6. When the evidence offered to prove the existence of an oral partnership is weak, unconvincing, and uncorroborated to such an extent that it cannot sustain a finding that a partnership existed, it is proper for the trial court to dismiss the action at the close of plaintiff's evidence. *Johnson v. Graf* 396

Pleadings.
1. A general demurrer admits the facts properly alleged in the pleading to which it is directed and the reasonable inferences deducible therefrom. *Wilson v. Marsh* 237
2. After appeal and remand a party may not add or substitute a defense substantially different from that relied on at the original trial. *O'Neil v. Union Nat. Life Ins. Co.* 284
3. On remand, as to matters not inconsistent or in conflict with a position taken at the former trial, the district court is clothed with a discretion to allow amendments in the further disposition of the case. *O'Neil v. Union Nat. Life Ins. Co.* 284
4. A cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject matter of the original suit. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
5. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. *Johnson v. Ruhl* 330
Blauvelt v. Beck 576
6. The rules of pleading require plaintiff in a civil suit to insert in the petition a statement of the facts constituting the cause of action in ordinary and concise language. *Johnson v. Ruhl* 330
7. The word "facts" as used in the code of civil procedure means a narrative of the events, acts, and things done or omitted which show a legal liability of defendant to plaintiff. *Johnson v. Ruhl* 330
8. A petition is sufficient if from the statement of facts

set forth therein the law entitles plaintiff to recover. *Johnson v. Ruhl* 330
9. A petition which fails to plead actionable facts is vulnerable to a general demurrer. *Johnson v. Ruhl* 330
10. The purpose of pleadings is to frame the issues upon which the case is to be tried and to advise the adversary what he is called upon to meet. *Johnson v. Ruhl* 330
11. In order to constitute actionable negligence, there must exist three essential elements: A duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery. *Scottsbluff Nat. Bank v. First State Bank* 475
12. If it is claimed that a statute is invalid because violative of the Constitution, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid. *Blauvelt v. Beck* 576
13. A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal except in case of a complete failure to state an offense. *State v. Warren* 623
14. Effect of general demurrer as an admission stated. *State ex rel. Beck v. Associates Discount Corp.* 683
15. Plaintiff may be allowed, on notice and on such terms as to costs as the court may prescribe, to file a supplemental petition alleging facts material to the case occurring after a former petition, and if redundant, scandalous, or irrelevant matter is inserted therein, it may be stricken out on motion of the party prejudiced thereby. *State ex rel. Beck v. Associates Discount Corp.* 683
16. For the purpose of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deducible therefrom. *State ex rel. Beck v. Associates Discount Corp.* 683
17. Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter. *State ex rel. Beck v. Associates Discount Corp.* 683
18. Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy,

and cannot affect the decision of the court. *State ex rel. Beck v. Associates Discount Corp.* 683

19. Under the code system of pleading, it is not necessary for plaintiff to state a cause of action in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action. *State ex rel. Beck v. Associates Discount Corp.* 683

20. A plaintiff has the right to set out his entire statement of facts constituting his alleged cause of action. Where such action is based on a series of acts, which together constitute the allegations of one complete transaction, a portion of the same may not be stricken out against plaintiff's objections. *State ex rel. Beck v. Associates Discount Corp.* 683

21. The rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for recovery upon a single primary right. *State ex rel. Beck v. Associates Discount Corp.* 683

Public Service Commissions.

1. Courts should review or interfere with administrative and legislative action of the State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Houk v. Peake* 717

2. The State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity. Such proceedings are administrative and legislative in character. *Houk v. Peake* 717

3. On an appeal from an order of the State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *Houk v. Peake* 717

4. The burden is on an applicant for a certificate of convenience and necessity to show that operation under the certificate is and will be required by the present or future public convenience and necessity. *Houk v. Peake* 717

5. Controlling questions on issuance of certificate of public convenience and necessity to a motor carrier stated. *Houk v. Peake* 717

6. The real purpose of control by the State Railway Commission is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose. In doing so primary consideration must be given to the public rather than to individuals. *Houk v. Peake* 717
7. The term "willful failure," as used in the Motor Carrier Act, is such behavier through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure of which complaint is made. *Houk v. Peake* 717
8. Where there is competent evidence to sustain the finding of the State Railway Commission that there was not a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it, an order based on such finding is not unreasonable or arbitrary. *Houk v. Peake* 717

Public Utilities.

1. Statutory prohibition upon establishment of an electric light and power district that conflicted with another district related to the organization of the district. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
2. Conflict of interest provision relates to a fact condition that may be held to prevent the organization of the district, and not to a fact condition subsequently arising so as to restrict operation of organized district under its charter powers. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
3. Under power district statute, the powers and functions of the Department of Roads and Irrigation are to approve or disapprove a petition for the organization of a district. The department can exercise only those powers conferred by express enactment or by necessary implication. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300
4. Under power district statute, the Department of Roads and Irrigation is without power to approve a petition for the organization of a district subject to conditions and limitations not expressed in the petition. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

5. The public policy of this state as to public power districts is the concept of electrical energy being furnished to the ultimate consumer at the lowest cost consistent with sound business management. *Custer Public Power Dist. v. Loup River Public Power Dist.* 300

Railroads.

1. Duty of driver of an automobile approaching a railroad crossing stated. *Neusbaum v. Chicago & N. W. Ry. Co.* 754
2. If the driver of an automobile is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted. *Neusbaum v. Chicago & N. W. Ry. Co.* 754
3. Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given. *Neusbaum v. Chicago & N. W. Ry. Co.* 754

Rape.

1. The degree of force required to sustain a conviction for rape is relative, depending upon the particular circumstances. It must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good-faith resistance on her part. *Salerno v. State* 99
2. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances. She must in good faith resist to the utmost of her physical ability as long as she has the power to do so until the offense is consummated. *Salerno v. State* 99
3. In a prosecution for rape it must be shown by competent evidence beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed. *Salerno v. State* 99

Remainders.

1. Where the evidence discloses that life tenants have been reimbursed for advancements made by them to pay debts of the estate, they are not entitled to a lien on the proceeds of a sale of land belonging to the remaindermen. *Trute v. Skeede* 266
2. It is the general rule that an increase in the value of real estate in an estate belongs to the remaindermen or corpus rather than to the life tenant or equitable life beneficiary. *Trute v. Skeede* 266

Replevin.

1. There is no distinction between an appeal in a replevin action and any other civil case from the county court to the district court. *Rice v. McGrath* 511
2. In a replevin action the failure of the plaintiff to prosecute his action to final judgment can in no sense deprive the defendant of his right to have the possession of the property determined. It is the final judgment that determines the rights of the parties. *Rice v. McGrath* 511
3. If the plaintiff fails to prosecute his action to final judgment, the court should permit the defendant to proceed with the trial on his part, and thereupon to render judgment according to the testimony. *Rice v. McGrath* 511
4. Where a plaintiff has failed to prosecute his action to final judgment, the defendant has the right to have his title and the right of possession of the property replevied adjudicated and determined. *Rice v. McGrath* 511
5. The failure of the plaintiff to prosecute his action to final judgment in replevin will not oust the court of jurisdiction to retain the cause and render the proper judgment upon the proofs taken. *Rice v. McGrath* 511

Restitution.

Restitution is not a mere right. It is ex gracia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it. *Johnson v. Ruhl* 330

Schools and School Districts.

1. The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of

such municipal corporations, are legislative functions. *Schutte v. Schmitt* 162
2. A school board is a public body empowered by law to transact the business of the school district for school purposes. The members act in a representative capacity, not as individuals. *Greer v. Chelewski* 450
3. The general duties of school district officers require them to look after the interests of the district, and they should defend suits if it appears that the interests of the district demand it. *Greer v. Chelewski* 450
4. A contract to teach in the common or free schools is one of employment, and the relative positions occupied by the district represented by the board and the teacher are those of employer and employee. *Greer v. Chelewski* 450
5. Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally. *Greer v. Chelewski* 450

Statutes.
1. If a part of an act is unconstitutional and the remainder is so interrelated with the invalid part that it cannot be sustained without doing violence to the legislative intention as a whole, the entire act is invalid. *Wilson v. Marsh* 237
2. A statute without an emergency clause may become law 3 months after the adjournment of the session at which it was adopted and the operation of its provisions may be postponed to a much later time designated by specific date or by the happening of an event certain to occur. *Wilson v. Marsh* 237
3. It is not the province of the Supreme Court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains. *Wilson v. Marsh* 237
4. If an act of the Legislature is capable of more than one interpretation one of which sustains it as valid and another renders it in conflict with the Constitution the Supreme Court must adopt the former. *Wilson v. Marsh* 237
5. A basic rule in the interpretation of a statute is to ascertain the legislative intent and to give effect to it if it is a lawful one. *Wilson v. Marsh* 237
6. The Legislature when it passes an act is presumed to know the provisions and limitations of the Constitution of the state, the interpretation that the Su-

preme Court has given them, and the construction the Supreme Court has given similar legislation previously enacted. *Wilson v. Marsh* 237
7. The presumption is that the Legislature in passing an act intended it to be a valid enactment rather than one in conflict with the Constitution of the state. *Wilson v. Marsh* 237
8. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Heppe v. State* 403
9. If an act as originally passed was unconstitutional because it contained matter different from that expressed in the title, or referred to more than one subject matter, it becomes valid law, if otherwise constitutional, on adoption by the Legislature and incorporation of it into a general revision without reference to the title as originally enacted. *Peterson v. Vasak* 498
10. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality. *Peterson v. Vasak* 498
11. If it is claimed that a statute is invalid because violative of the Constitution, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid. *Blauvelt v. Beck* 576
12. A statute must be sustained if a condition of affairs exists concerning which the Legislature, exercising its conceded right to enact laws for protection of health, safety, and welfare of the people, might pass the law in question. *Blauvelt v. Beck* 576
13. If legislative action is arbitrary and an unreasonable interference with the right to engage in and carry on business and has no relation to the protection of the public within the legislative power, the act must fail. *Blauvelt v. Beck* 576
14. The reasonableness of restrictions imposed by the Legislature by the exercise of the police power is a judicial matter. *Blauvelt v. Beck* 576
15. A regulatory provision of a statute having some relation to public health, safety, or welfare but which arbitrarily and unreasonably interferes with private business and imposes unreasonable and unnecessary restrictions may not be upheld. *Blauvelt v. Beck* 576

16. The question of whether legislation is in the public interest is ordinarily one for legislative determination, but the Legislature may not, under the guise of regulation in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory. *Blauvelt v. Beck* 576
17. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment. *Blauvelt v. Beck* 576
18. When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid while under the other its validity may be doubtful, that construction which makes sure of its validity will ordinarily be given. *Starman v. Shirley* 613
19. In construing a statute or ordinance the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. *Starman v. Shirley* 613
20. The maxim, expressio unius est exclusio alterius, means that where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention. *Starman v. Shirley* 613
21. Every legislative act comes before the Supreme Court surrounded with the presumption of constitutionality. This presumption continues until the act under review clearly appears to contravene some provision of the Constitution. *United Community Services v. The Omaha Nat. Bank* 786
22. The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions. *United Community Services v. The Omaha Nat. Bank* 786
23. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what

it may not do directly. *United Community Services v. The Omaha Nat. Bank* 786

24. It is the province of the Legislature to determine the policy of the state with reference to the appropriation of public funds. *United Community Services v. The Omaha Nat. Bank* 786

25. If the purpose is public, it does not matter whether the agency through which it is dispensed is public or not since the appropriation is not made for the agency but for the object which it serves. The test is in the result, not in the means. *United Community Services v. The Omaha Nat. Bank* 786

26. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. *United Community Services v. The Omaha Nat. Bank* 786

27. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each. *United Community Services v. The Omaha Nat. Bank* 786

Street Railroads.

1. Statute giving a pedestrian the right-of-way in crossing a street does not relieve the pedestrian of responsibility for the results of his own contributory negligence. *Corbitt v. Omaha Transit Co.* 598

2. When a pedestrian suddenly moves from a place of safety into the path of a moving vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree as a matter of law and precludes recovery. *Corbitt v. Omaha Transit Co.* 598

Subrogation.

1. The application of the doctrine of conventional subrogation to any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the par-

ticular controversy under consideration. *Jones v. Rhodes* 169

2. Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable. *Jones v. Rhodes* 169

Tenancy in Common.

1. Joint tenancies are not favored and, if not expressly created by contract, the law presumes the tenancy is in common. *DeForge v. Patrick* 568
2. After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains. *DeForge v. Patrick* 568

Trial.

1. A jury should be informed as to the various items of damages which it should take into consideration in arriving at its verdict. It is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item. *Baty v. Wolff* 1
2. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not. *Baty v. Wolff* 1
   Cover v. Platte Valley Public Power & Irr. Dist. 146
3. The burden of proving negligence is on the party alleging it. *Wolcott v. Drake* 56
4. If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof. *Wolcott v. Drake* 56
5. The burden of proving a cause of action is not sustained by evidence from which negligence can only be established by surmise or conjecture. *Wolcott v. Drake* 56
6. In every case, before submission to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to

find a verdict for the party producing it, upon whom the burden of proof is imposed. *Davis v. Dennert* 65

7. Remarks of a trial judge in an action wherein a jury is waived, duly excepted to at the time, which disclose a lack of ability to consider the evidence of a party fairly and impartially are grounds for a new trial. *Dietze v. State* 80
8. Instructions which properly state the law of the case on the theory shown by the pleadings and evidence are not erroneous. *Deck v. Sherlock* 86
9. The jury is the judge of the credibility of the witnesses and the weight of their testimony. Unless the verdict of the jury is clearly wrong it will not be disturbed on appeal. *Salerno v. State* 99
10. Where competent evidence is adduced to support every element of the offense charged it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Salerno v. State* 99
11. Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. *Salerno v. State* 99
12. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Anderson v. Nielsen* 110
13. Where there is no competent evidence to support the pleaded defense of contributory negligence, it is prejudicial error to submit that issue to the jury. *Anderson v. Nielsen* 110
14. Where an instruction assumes to define the whole law of the case but omits a material element therefrom, it is reversible error even though a proper instruction has not been requested. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
15. It is prejudicial error to give an instruction on a vital issue of fact that conflicts with other instructions properly and correctly stated. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
16. Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless

clearly wrong. *Wallace v. Insurance Co. of North America* 172
Scottsbluff Nat. Bank v. First State Bank 475
17. In a jury action if there is evidence adequate to justify a finding for the party who has the burden of proof, the trial court may not disregard the proof and decide the case as a matter of law. *Barney v. Adcock* 179
Spracklin v. Omaha Transit Co. 351
18. The charge of a trial court to the jury should be confined to the issues presented by the pleadings supported by the evidence. It is error to submit to the jury an issue not pleaded in the case. *Barney v. Adcock* 179
19. Where conflicting instructions are given, it is prejudicial error unless it is apparent from the record that the jury was not misled by the charge. *Barney v. Adcock* 179
Bramhall v. Adcock 198
20. The purpose of an instruction is to guide the jury in its deliberations and to aid it in rendering a correct verdict. Hence an instruction should be clear and concise and should not concern a matter foreign to the litigation. *Barney v. Adcock* 179
21. It is prejudicial error for the district court to include in its instructions to the jury allegations of fact made in a pleading in the cause which are without evidence tending to establish them. *Bramhall v. Adcock* 198
22. It is error to charge the jury that allegations of negligence made in a pleading may be considered by it in arriving at a verdict in the cause and also to instruct the jury in effect that such allegations should be disregarded by it. *Bramhall v. Adcock* 198
23. Where a case has been remanded with general directions to proceed in accordance with an opinion which disposes of all issues to be considered on a new trial, a judgment should be entered in favor of the party in whose favor the issues were decided. *O'Neil v. Union Nat. Life Ins. Co.* 284
24. Upon reversal and remand where all issues are not decided by the Supreme Court, it is the duty of the district court to try the case and make an adjudication upon the remaining issues. *O'Neil v. Union Nat. Life Ins. Co.* 284
25. The alleged errors that may be considered in the trial court are those which appear in the record

of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by motion or appropriate pleading. *Olson v. Shellington* 325

26. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. *Olson v. Shellington* 325

27. It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When it clearly violates this duty, the court should set aside its verdict. *Olson v. Shellington* 325

28. Rule for consideration of motion for directed verdict stated. *Spracklin v. Omaha Transit Co.* 351
Hickman v. Parks Construction Co. 461
Corbitt v. Omaha Transit Co. 598
Wendel v. Carlson 742

29. If the evidence establishes that the negligence of plaintiff is more than slight as compared with the negligence of defendant, the trial court may decide the case as a matter of law and instruct a verdict for the defendant or dismiss the action. *Spracklin v. Omaha Transit Co.* 351

30. If reasonable minds may disagree on the issue of the exercise of the reasonable care required of an operator of an automobile under the circumstances of the situation in question, the issue of his negligence is one of fact to be decided by the jury. *Spracklin v. Omaha Transit Co.* 351

31. The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him. *Spracklin v. Omaha Transit Co.* 351

32. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom. *Meisinger v. Johnson* 360

33. Where defendant pleads a counterclaim and upon conclusion of plaintiff's evidence moves for and procures a proper dismissal of plaintiff's cause of action without first withdrawing his counterclaim, he thereby waives it. *Meisinger v. Johnson* 360

34. Statute authorizing interrogation of defendant as to previous conviction of a felony does not permit exploration of the charge or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed. *Lipscomb v. State* 417
35. Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction. *Lipscomb v. State* 417
36. Instructions which withdraw from the consideration of the jury material issues of fact presented by the pleadings and the evidence are erroneous. *Ring v. Duey* 423
37. When a trial has been had on the theory presented by the pleadings and so conducted in the trial court, it will be treated in Supreme Court on the same basis. *Ring v. Duey* 423
38. Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Ring v. Duey* 423
39. If a motion for directed verdict made at the close of the evidence in a case should have been sustained, it is the duty of the court to sustain motion for judgment notwithstanding the verdict and to render judgment accordingly. *Hickman v. Parks Construction Co.* 461
40. In an action involving the comparative negligence rule wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed or a verdict directed. *Hickman v. Parks Construction Co.* 461
41. If there is any evidence which will sustain a finding for a litigant having the burden of proof, the trial court may not disregard it and decide the case as a matter of law. *Hickman v. Parks Construction Co.* 461
42. Elements of application of the comparative negligence statute stated. *Hickman v. Parks Construction Co.* 461
43. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence thereof. *Hickman v. Parks Construction Co.* 461

44. Ordinarily the comparison of negligence under the comparative negligence statute is for the jury. *Hickman v. Parks Construction Co.* 461
45. If on a comparison the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight it is the duty of the court to determine the question as a matter of law in favor of the defendant. *Hickman v. Parks Construction Co.* 461
46. When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination. *Scottsbluff Nat. Bank v. First State Bank* 475
47. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of inferences reasonable deducible from it. *Scottsbluff Nat. Bank v. First State Bank* 475
48. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. *Corbitt v. Omaha Transit Co.* 598
49. Rule for consideration of motion for judgment notwithstanding the verdict stated. *Corbitt v. Omaha Transit Co.* 598
50. On appeal to the Supreme Court in a prosecution for a violation of a city ordinance, it will be presumed, nothing appearing to the contrary, that the facts before the district court were sufficient to sustain a finding of a violation of the ordinance. *State v. Warren* 623
51. The word "manure" has no technical meaning and has not acquired a commercial one different from its ordinary use. Manure is a common product universally known and hence an ambiguity or indefiniteness cannot arise from the use of the term. *State v. Warren* 623
52. An offense charged in a prosecution for a violation of a city ordinance is required to be proven by a preponderance of the evidence only to justify a conviction. *State v. Warren* 623
53. Where a stipulation has been entered into that a witness or witnesses if called would give testimony

of a particular kind or character or in a particular manner, such evidence is not necessarily binding upon the triers of the facts. *Ireland v. Stalbaum* 630

54. A general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. *Ireland v. Stalbaum* 630

55. Where the evidence conclusively establishes that a verdict is excessive, it will ordinarily be set aside for that reason. *Riley v. National Auto Ins. Co.* 658

56. Where the evidence discloses that the trial court unduly restricted the oral argument of defendant's counsel in submitting its case to the jury, it constitutes reversible error unless it is shown not to have prejudiced the defendant's case. *Riley v. National Auto Ins. Co.* 658

57. Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Shanahan v. State* 676

58. In determining the sufficiency of evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence. *Benedict v. Andersen* 735

59. Where instructions considered as a whole state the law fully and correctly, error will not be predicated therein merely because a separate instrument considered by itself might be subject to criticism. *Uldrich v. State* 746

60. The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case. A duty is imposed on the Supreme Court on appeal to give consideration to the fact that the trial court did view the premises. *Town of Everett v. Teigeler* 769

61. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact and, second, that he is entitled to a judgment as a matter of law. *Hoke v. Welsh* 831

Trusts.

1. Ordinarily the violation by a trustee of a duty

laid upon it by law, whether willful or fraudulent, or done through negligence or arising through oversight or forgetfulness, is a breach of trust which forms the basis of an action in damages. *First Nat. Bank of Wayne v. Gross Real Estate Co.* 343

2. The burden of establishing a resulting trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Meisinger v. Johnson* 360

3. The burden of proving the termination of an admitted trust is on the party making such assertion. *Scully v. Scully* 368

4. Where discretion is conferred upon a trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse of discretion. *Scully v. Scully* 368

5. The extent of the discretion conferred upon a trustee is measured by the settlor's manifestation of intention, and the manner in which a trustee shall exercise his function rests ordinarily within his own discretion and judgment. *Scully v. Scully* 368

6. In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act. *Scully v. Scully* 368

7. The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee. *Scully v. Scully* 368

8. If discretion is conferred upon a trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. *Scully v. Scully* 368

9. Where a trustee is directed to terminate the trust if in the opinion of the trustee the beneficiary is competent to manage the property, the beneficiary can ordinarily compel the trustee to transfer the trust property to him if it would be an abuse of discretion for the trustee to refuse to transfer it to him. *Scully v. Scully* 368

10. Elements stated for determining whether or not a trustee has abused his discretion in exercising or

failing to exercise a power conferred. *Scully v. Scully* 368

Usury.

1. Any loan made by a licensee under the installment loan law in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for is void and the licensee shall have no right to collect or receive any principal or interest. *Powell v. Edwards* 11
2. An installment loan in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for, which would be void if made by a licensee under the installment loan law, is void and the lender shall have no right to collect or receive any principal or interest. *Powell v. Edwards* 11
3. The permissive provisions of the Installment Loan Act apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible. *State ex rel. Beck v. Associates Discount Corp.* 683
4. In determining whether a transaction is usurious, it is the duty of the court to examine the substance of the transaction as well as its form. The right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument. *State ex rel. Beck v. Associates Discount Corp.* 683
5. A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in price may exceed lawful interest for a loan. *State ex rel. Beck v. Associates Discount Corp.* 683
6. The rule permitting a sale on time at a price in excess of the cash price does not apply where it is proved that the transaction was not made in good faith but was a device and subterfuge pursued to evade the operation against it of ursury statutes. *State ex rel. Beck v. Associates Discount Corp.* 683
7. The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent

transaction will cure it. Further, any compensation paid or to be paid for any extension or forebearance of a loan may not exceed the permissible statutory maximum. *State ex rel. Beck v. Associates Discount Corp.* 683

Vendor and Purchaser.

1. Conditions under which default in payment of contract for sale of real estate operates as a forfeiture stated. *Johnson v. Ruhl* 330
2. A stipulation in a contract for the sale of land that in the event of default in payment of the purchase price the vendor shall be entitled to the possession of the premises is valid and enforceable. *Johnson v. Ruhl* 330
3. If a contract contains a stipulation for the investiture of the vendor with the right of possession of the premises and he peaceably obtains possession thereof he may, after default of the vendee, maintain it until the purchase price is fully satisfied. *Johnson v. Ruhl* 330
4. If a litigant seeks to recover damages for the unlawful detention of property he must establish his right to the possession thereof during the period for which he seeks to recover and that the party against whom he seeks relief unlawfully withheld possession thereof. *Johnson v. Ruhl* 330
5. The remedy for a deficiency in quantity in real estate conveyed by deed ordinarily is to grant the purchaser an abatement of the purchase price in the same proportion the deficiency bears to the tract conveyed. *Hoke v. Welsh* 831
6. When the sale is in gross there is no remedy afforded the grantor or grantee for an excess or a deficiency unless such excess or deficiency is so great as to raise a presumption of fraud. *Hoke v. Welsh* 831

Waters.

1. The Department of Roads and Irrigation has statutory authority to adjudicate all matters pertaining to the granting and cancellation of water rights and priorities. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22
2. When an application for the appropriation of public waters has been adjudicated it becomes a final order unless an appeal is taken to the Supreme Court.

North Loup River P. P. & I. Dist. v. Loup River P. P. Dist. 22

3. Statute relating to cancellation of water appropriations for nonuser does not fix the time in which an appropriator must put water to a beneficial use. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

4. The time in which water must be put to a beneficial use by applying it to the lands designated in the application must be determined from the terms, conditions, and limitations of the adjudicated appropriation. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

5. The grant of an appropriation is a conditional right which becomes a perfected appropriation only when the irrigation works are completed and the water put to a beneficial use. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

6. The volume of water to be diverted, the rate of its diversion, and its priority as to time are controlled by the limitations of the adjudicated appropriation and, unless appealed from, it becomes final and is not subject to collateral attack. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

7. The Department of Roads and Irrigation has no authority to grant an extension of time to perfect an adjudicated appropriation, except where such authority is expressly granted by statute. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

8. Under the public policy of this state an appropriator is not permitted to retain an interest in public waters, to which he has a valid appropriation, which are not put to a beneficial use within a reasonable time. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

9. It is the function of the Department of Roads and Irrigation to determine what constitutes a reasonable time to put waters to a beneficial use at the time the application for an appropriation is adjudicated and, if any interested party is dissatisfied with the findings of the department, the remedy is by appeal to the Supreme Court. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.* 22

10. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This

is a continuing duty. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
Town of Everett v. Teigeler 769
11. In order for a flood to come within the term act of God, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
12. A party engaged in public work, the construction of which involves change of the flow of waters in a natural drainway, is negligent if such party fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
13. It is sufficient to constitute an act of God that the operation of natural forces should be such as human foresight could not reasonably be expected to anticipate. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
14. To be a defense an act of God must be the sole proximate cause of damages without negligent participation of defendant. The burden of proving such defense by a preponderance of the evidence rests upon defendant. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
15. Where an act of God and the negligence of defendant concur in proximately causing damages, the defendant is liable as though the damages had been caused by his negligence alone. *Cover v. Platte Valley Public Power & Irr. Dist.* 146
16. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *Town of Everett v. Teigeler* 769
17. Injunction is the proper remedy to prevent obstruction of flow of surface water in a well-defined course. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Town of Everett v. Teigeler* 769
18. Surface water is a common enemy and the proprietor may by embankment or dike or otherwise

defend himself against its encroachments. The proprietor must however exercise ordinary care and not unnecessarily and negligently injure another. *Town of Everett v. Teigeler* 769

19. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a neighboring proprietor to his injury. *Town of Everett v. Teigeler* 769

20. Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage. *Town of Everett v. Teigeler* 769

21. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow. *Town of Everett v. Teigeler* 769

22. It is not a reasonable use of one's property to construct a dike across a natural drain for the sole purpose of preventing the flow of water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted. *Town of Everett v. Teigeler* 769

23. A lower proprietor cannot complain because the upper proprietor, in the exercise of good husbandry, by the use of ditches changes the course of drainage upon his own premises, but permits the water to flow without an appreciable increase in volume upon the servient estate in a natural drain, where it would have appeared if the ditches had not been constructed. *Town of Everett v Teigeler* 769

24. The statute, which authorizes a proprietor to drain his land by tile or open ditches so constructed as to discharge water into any depression or draw upon his own premises, does not authorize him to dam up and permanently obstruct a natural drain. *Town of Everett v. Teigeler* 769

Wills.

1. In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. *Trute v. Skeede* 266

2. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. *Trute v. Skeede* 266
3. Where life tenants under a will accept a conveyance of real estate in lieu of a mortgage, such acceptance does not have the effect to enlarge or change the nature of the original bequest and devise given in the will. *Trute v. Skeede* 266
4. A change in the form of the estate under the power expressly given in the will does not have the effect to enlarge or change the nature of the original title thereto. *Trute v. Skeede* 266
5. When a life estate is expressly created by a will and unlimited power of disposition is given thereunder to the life tenants with the remainder over in whatever part remains undisposed of at the death of the life tenants, the part of the property undisposed of passes to the remaindermen unless otherwise provided. *Trute v. Skeede* 266
6. The words "profit" and "income" as used in the will under consideration in the instant case mean the same thing. *Trute v. Skeede* 266
7. Property acquired by the testator after the making of his will passes in like manner as if possessed at the time of making the will, if it manifestly appears by the will to have been the intention of the testator. *Bennett v. Blue Mound Cemetery Assn.* 636
8. A will speaks as of the date of the death of the testator. *Bennett v. Blue Mound Cemetery Assn.* 636
9. A will which makes defined bequests and devises to individuals and persons named, and contains a general residuary clause, will, as against collateral heirs, be held to dispose of all the property of the estate, unless the contrary appears from the language of the will itself. *Bennett v. Blue Mound Cemetery Assn.* 636
10. The residuary clause of a will is just as much a part of the will as any other provision contained therein. A disposition of the property to which it applies is just as effective as a disposition pursuant to any other provision. *Bennett v. Blue Mound Cemetery Assn.* 636
11. The test of power of disposition by a residuary clause is whether the property belonged to the testator, and not whether the testator knew that the property was his. It includes such property as the

testator may have forgotten or overlooked, or to which he may not have known that he had title. *Bennett v. Blue Mound Cemetery Assn.* 636

12. The probate jurisdiction of the county court is original and exclusive in all matters concerning the probate of wills. *Clutter v. Merrick* 825

13. A final order of the county court in a proceeding for probate of a will may be the subject of an appeal to the district court by any person against whom it is made or who may be affected thereby. *Clutter v. Merrick* 825

14. A proceeding for the probate of a will is in rem and all persons interested therein are parties thereto. A person affected thereby may appeal from a final order of the county court to the district court without regard to whether or not he appeared and contested the probate of the will in the county court. *Clutter v. Merrick* 825

Witnesses.

1. Rule stated as to distinction between contradiction and impeachment of a witness. *Davis v. Dennert* 65

2. A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses. *Lipscomb v. State* 417

3. Hypothetical questions to experts must be framed so as to fairly reflect facts either admitted or proved by other witnesses and must not assume as proved that which has not been, nor should they be based upon conclusions of fact which can only be found by a jury. *Hoffman v. State* 806

4. It is error to permit an expert to answer a question based upon a hypothesis which hypothesis assumes facts not proved by other witnesses. *Hoffman v. State* 806

5. If a fact constituting a deficiency in a hypothetical question is admitted or proved by the opposing party the error becomes harmless and in consequence may not be regarded as ground for reversal. *Hoffman v. State* 806

Work and Labor.

One who undertakes for a consideration to do work requiring special skill impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require. If he is to furnish his own tools, implements, or

machinery, there is an implied representation as to their fitness for the use to which they are to be put. *Numon v. Stevens* 339

Workmen's Compensation.

1. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. *Feagins v. Carver* 116
   Fidelity & Casualty Co. v. Kennard 220
2. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Feagins v. Carver* 116
3. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Feagins v. Carver* 116
4. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Feagins v. Carver* 116
5. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable injury. *Feagins v. Carver* 116
6. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Feagins v. Carver* 116
7. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant shall prove his right to compensation nor does it permit a court to award compensation where the requisite proof is lacking. *Feagins v. Carver* 116
8. Under the Workmen's Compensation Act either party at interest may file a petition in the Workmen's Compensation Court. *Fidelity & Casualty Co. v. Kennard* 220
9. All disputed claims for workmen's compensation must be submitted to the Workmen's Compensation

Court for a finding, award, order, or judgment. *Fidelity & Casualty Co. v. Kennard* 220
10. The Workmen's Compensation Act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself. *Fidelity & Casualty Co. v. Kennard* 220
11. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable. *Fidelity & Casualty Co. v. Kennard* 220
12. Where the work, or an incident thereto, exposes the employee to the happening of an event causing an accident, the accident arises out of the employment. *Fidelity & Casualty Co. v. Kennard* 220
13. The right to tax attorney's fees in workmen's compensation cases is purely statutory. *Fidelity & Casualty Co. v. Kennard* 220
14. By statute the right to attorney's fees in a workmen's compensation case relates to a specific situation. An employee failing to come within the statute is not entitled to attorney's fees to be allowed and taxed as costs. *Fidelity & Casualty Co. v. Kennard* 220

Zoning.

1. A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization. *Peterson v. Vasak* 498
2. The words of a municipal zoning ordinance are interpreted according to their natural import in common and accepted usage. *Peterson v. Vasak* 498
3. If the operation and effect of a zoning ordinance deprive the owner of the value and use of real estate, it creates a specific instance of unnecessary hardship making an exception to zoning requirements. *Peterson v. Vasak* 498
4. A board of appeals authorized by zoning act is vested with discretion in the determination of matters within its province to decide. Its acts are judicial in their nature and are subject to review and reversal if they constitute an abuse of discretion and are arbitrary. *Peterson v. Vasak* 498