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REPORTS OF CASES

DECIDED BETWEEN

JUNE 21, 1958 and FEBRUARY 26, 1959

IN THE

Supreme Court of Nebraska

JANUARY TERM 1958, SEPTEMBER TERM 1958,

and

JANUARY TERM 1959

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1958

HENRY BLOHME, APPELLANT, V. HEINZ BLOHME ET AL., APPELLEES.

91 N. W. 2d 30

Filed June 27, 1958. No. 34270.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. On motion for rehearing. See 166 Neb. 369, 89 N. W. 2d 127, for original opinion. *Motion for rehearing overruled.*

B. W. Stewart and *Ernest A. Hubka,* for appellant.

Arthur J. Denney and *Robert V. Denney,* for appellees.

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

WENKE, J., concurring.

Although I am of the opinion that in certain respects, as herein set forth, our opinion comes to an incorrect holding, I am, however, for the reasons hereinafter set forth, of the opinion that the conclusion arrived at therein is correct and for that reason concur with the court in overruling appellant's motion for rehearing.

In this motion for rehearing appellant contends we erred in holding the testimony of Elise Blohme, as to conversations she had with her deceased husband, was inadmissible. In the opinion we held: "There was testimony of Elise Blohme, to which sufficient objec-

tion was made, which if considered could be regarded as being in proof of the oral agreement alleged. This testimony was clearly inadmissible since it related to a transaction or transactions between Henry Blohme and Elise Blohme while they were husband and wife which testimony would have the effect of being antagonistic to the rights of the husband." Blohme v. Blohme, 166 Neb. 369, 89 N. W. 2d 127. We primarily based our holding therein on section 25-1203, R. R. S. 1943, which provides, insofar as here material, that: "A husband or wife can in no case be a witness against the other, * * *." Sections 25-1201 and 25-1204, R. R. S. 1943, also deal with the same subject matter. While these statutes contain many exceptions none of them relate directly to the situation before us.

However, appellant contends the admission thereof was proper, based on the fact that such conversations were had in the presence of third persons, including Elise Blohme's sister Freda Steffins. While this court has apparently never dealt directly with the question thus presented, however, it has dealt with the purpose for which these statutes were enacted. See Stocker v. Stocker, 112 Neb. 565, 199 N. W. 849, 36 A. L. R. 1063. Many state courts have dealt therewith under statutes that are similar or comparable to our own. These courts have generally come to the conclusion that a conversation, communication, or transaction between husband and wife, knowingly had or made in the presence and hearing of a third person, is not privileged. See, 58 Am. Jur., Witnesses, § 381, p. 223; 97 C. J. S., Witnesses, § 271, p. 777; Ann. Cas. 1916B 602; Preston v. Preston, 205 Mich. 646, 172 N. W. 371; Tanzola v. De Rita, 45 Cal. 2d 1, 285 P. 2d 897; Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908. As stated in 58 Am. Jur., Witnesses, § 381, p. 223: "According * * * to the great weight of authority, a conversation, communication, or transaction between husband and wife, or a statement made by one to the other, in the presence

of or overheard by a third person is not within the protection of the privileged communications rule. As has been said, it is not perceived how a communication between one spouse and a third party can be called a communication between husband and wife by reason of the fact that the other spouse overheard it. By making the communication in the presence of others the husband and wife indicate in the most unambiguous manner that they do not regard it as confidential and do not intend that it be so. It is therefore the general rule that one spouse may testify as to a communication to the other in the presence of a third person, * * *."

We have come to the same conclusion as it applies to communications between attorney and client. See Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182. As therein stated: "Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943. It is only communications which are confidential that are protected." I think this same reasoning applies to the statutes covering communications between husband and wife. That such privilege can be waived see § 25-1207, R. R. S. 1943.

Therefore, under the circumstances disclosed by the record, I would withdraw from our original opinion the language hereinbefore quoted and substitute in place thereof the following: There was testimony of Elise Blohme, to which objection was made, which can be regarded as being in proof of the oral agreement alleged. This testimony was admissible, even though it was in relation to either a transaction or conversation had between Henry Blohme and Elise Blohme while they were husband and wife, because the evidence adduced shows it was knowingly made by them in the presence and hearing of third persons.

Even though this evidence was admissible I do not

think its admission would cause me to come to any different conclusion than that reached in our original opinion because Elise Blohme's testimony is so full of inconsistencies and discrepancies, plus the fact that it is contrary to her own conduct relating to the land involved subsequent to July 19, 1937, when it was purchased, and October 11, 1943, when she was divorced from Henry Blohme who is now deceased, that it is unworthy of belief.

DONALD G. CONKLING ET AL., APPELLANTS, V. ALMA K. DELANY, JUSTICE OF THE PEACE, APPELLEE.
91 N W. 2d 250

Filed June 27, 1958. No. 34373.

1. **Prohibition.** The common law writ of prohibition is available to litigants in this state and jurisdiction to grant the same is lodged in the district courts thereof.
2. ———. The writ of prohibition is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction.
3. ———. Ordinarily prohibition cannot be resorted to when the ordinary and usual remedies provided by law are adequate and available as it is not intended to be a substitute therefor.
4. ———. However, the function of the writ has been extended to cover situations where, even though the inferior tribunal has jurisdiction, the superior court deems it necessary and advisable to issue the writ to prevent palpable and irremediable injustice, especially when it appears there exists no adequate remedy by appeal or otherwise to prevent such from occurring.
5. **Criminal Law.** Every person accused of crime should have a fair and impartial trial.
6. **Judges.** A party has a right to have his case heard and determined by a judge who is not disqualified by interest from hearing and determining it.
7. **Prohibition.** Prohibition may, in the court's discretion, be granted in a proper case where the remedy by appeal or error

is not adequate and, in this respect, each case must depend upon its own facts.

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

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, Frank E. Piccolo, Jr., and *James E. Schneider,* for appellants.

James G. McIntosh and *Donald V. Lowe,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Lincoln County. It involves the question of whether or not a writ of prohibition should be issued against Alma K. DeLany, a justice of the peace. The trial court denied the appellants such relief by dismissing the action and they have taken this appeal therefrom after their motion for new trial had been overruled.

Nebraska has, with certain limitations and restrictions not applicable here, adopted the common law of England. See § 49-101, R. R. S. 1943. Consequently the common law writ of prohibition is available to litigants in this state and jurisdiction to grant the same is lodged in the district courts thereof. See State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676.

However, with regard to our adoption of the common law of England we said, in Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383, that: "The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil Law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adher-

ence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system." And in State ex rel. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N. W. 2d 232, we held: "The common law is not immutable, but flexible, and by its own principles adapts itself to varying conditions."

In State ex rel. Wright v. Barney, *supra,* by quoting from High, Extraordinary Legal Remedies (3d Ed.) 705, we said: " 'The writ of prohibition may be defined as an extraordinary judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is an original remedial writ, and is the remedy afforded by the common law to correct encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them by law. The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law entrusted.' " See, also, 73 C. J. S., Prohibition, § 2(b), p. 13; State ex rel. Micheel v. Vamos, 144 Ohio St. 628, 60 N. E. 2d 305; Marsh v. Goldthorpe, 123 Ohio St. 103, 174 N. E. 246; State ex rel. Burtzlaff v. Vickery, 121 Ohio St. 49, 166 N. E. 894; State ex rel. Burford v. Sullivan, 86 Okl. Cr. 364, 193 P. 2d 594; State ex rel. Wester v. Caldwell, 84 Okl. Cr. 334, 181 P. 2d 843; Harrison v. Murphy, 132 Fla. 579, 181 So. 386; State ex rel. Rheinauer v. Malone, 40 Fla. 129, 23 So. 575; 42 Am. Jur., Prohibition, § 6, p. 142. In State ex rel. Burford v. Sullivan, *supra,* by quoting from Rose v. Arnold, 183 Okl. 286, 82 P. 2d 293, the court said:

" ' "Prohibition" is an extraordinary judicial writ issuing out of a court of superior jurisdiction to keep inferior courts and tribunals within the limits and bounds prescribed for them by law, and its use in proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined to the exercise of those powers with which it has been by law intrusted.' " And, as stated in Van Dyke v. Superior Court of Gila County, 24 Ariz. 508, 211 P. 576, by quoting language from In re Rice, 155 U. S. 402, 15 S. Ct. 152, 39 L. Ed. 201: " 'Where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary.' " See, also, 42 Am. Jur., Prohibition, § 7, p. 143; Redewill v. Superior Court of Maricopa County, 43 Ariz. 68, 29 P. 2d 475.

In State ex rel. Wright v. Barney, *supra,* we went on to say, by quoting from 21 Standard Encyclopedia of Procedure, 801, that: " 'The writ of prohibition (in modern practice) is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction.' "

It is the general rule that prohibition cannot be resorted to when ordinary and usual remedies provided by law are adequate and available as it is not intended to be a substitute therefor. See, 42 Am. Jur., Prohibi-

tion, § 8, p. 144; 42 Am. Jur., Prohibition, § 7, p. 143; State ex rel. Rheinauer v. Malone, *supra;* State ex rel. Burford v. Sullivan, *supra;* State ex rel. Burtzlaff v. Vickery, *supra;* State ex rel. Brickell v. Roach, 122 Ohio St. 117, 170 N. E. 866; State v. Vamos, *supra;* Harrison v. Murphy, *supra;* Eberhardt v. Barker, 104 Fla. 535, 140 So. 633; Van Dyke v. Superior Court of Gila County, *supra;* Keefe v. District Court of Corbon County, 16 Wyo. 381, 94 P. 459; Jesmer Co. v. Wurdemann-Hjelm Corp., 250 Minn. 574, 85 N. W. 2d 207; Bellows v. Ericson, 233 Minn. 320, 46 N. W. 2d 654. As stated in Harrison v. Murphy, *supra,* by quoting from 22 R. C. L., § 22, p. 23: "'It is well established that a writ of prohibition may not ordinarily be used as a process for the review and correction of errors committed by inferior tribunals. Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, both because there has been no usurpation or abuse of power, and because there exists other adequate remedies. Whatever power is conferred may be exercised, and, if it be exercised injudiciously or irregularly, it amounts to an error merely, and not to a usurpation or excess of jurisdiction.'" However, the function of the writ, as evidenced by many cases herein cited, has been extended to cover situations where, even though the inferior tribunal had jurisdiction, the superior court deemed it necessary and advisable to issue the writ to prevent palpable and irremediable injustice, especially when it appeared there existed no adequate remedy by appeal or otherwise to prevent it from occurring. See, State ex rel. Burford v. Sullivan, *supra;* 73 C. J. S., Prohibition, § 4, p. 15; Harris Foundation v. District Court of Pottawatomie County, 196 Okl. 222, 163 P. 2d 976, 162 A. L. R. 272; Harrison v. Murphy, *supra;* 42 Am. Jur., Prohibition, § 8, p. 144; 42 Am. Jur., Prohibition, § 9, p. 145. As stated in State ex rel. Burford v. Sullivan, *supra,* by quoting from Harris Foundation v. District

Court of Pottawatomie County, *supra:* " 'Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force, and the writ will not be withheld because other concurrent remedies exist; it not appearing that such remedies are equally adequate and convenient.' "

The record shows that on July 29, 1954, Elmer L. Moore, scale operator No. 38, filed a complaint in the office of appellee, a duly elected, qualified, and acting justice of the peace in Lincoln County, which complaint appellee had prepared. The complaint charged appellant Donald G. Conkling with having unlawfully operated a freight-carrying motor vehicle upon a public highway in Lincoln County, Nebraska, by reason of the fact that it weighed in excess of the limit then permitted by law. See § 39-722, R. S. Supp., 1953. Similar complaints were filed against appellants Ora Spence and Norman C. Jensen. Such complaints were properly filed in the office of the justice of the peace. See § 29-404, R. R. S. 1943.

These complaints, being within the jurisdiction of the justice court, were proper for her to hear. See, Art. V, § 18, Constitution of Nebraska; § 39-723.06, R. S. Supp., 1953. Appellants' special appearances having been overruled the appellee set the complaint for hearing at 11 a.m. on September 11, 1954. This action was filed by appellants on September 9, 1954, in behalf of themselves and "other persons similarly situated." No further action has been taken by appellee on the complaints filed.

The record shows appellee holds court on every other day for 24 hours a day and that O. A. Johnson, another justice of the peace in Lincoln County, holds court on alternate days for 24 hours a day, thus making available a justice of the peace court at all times; that appellee holds court either in the county courthouse or in her home; that in 1954 there were 833 misdemeanor

cases filed in her court; and that in 1954 she found the defendants guilty in 798 misdemeanor cases and assessed fines, although it appears that in 1954 she found a few (3) defendants not guilty. However, she did not file any claims against Lincoln County in 1954 for costs in the cases in which she found the defendants not guilty for she knew she could not recover such costs from the county unless the action, in which the costs accrued, had either been instituted with the consent of the county attorney or had been approved by him in writing after it had been instituted. See §§ 29-2709 and 29-2703, R. R. S. 1943. Neither of these requirements was complied with in these 798 cases and this seems to have been the procedure followed in succeeding years in misdemeanor cases, at least up to the time of trial of this cause, which was on October 11, 1957.

Section 33-134, R. R. S. 1943, provides, insofar as here material, that: "Justices of the peace shall receive for their services the following fees: * * * (2) in criminal matters, for any and all services rendered up to and including the judgment or dismissal of the action and the issuance of mittimus or discharge to the jailer, the sum of four dollars; * * *."

Section 29-2709, R. R. S. 1943, provides, insofar as here material, that: "Magistrates and clerks of court may furnish to the county clerks of their respective counties certified copies of any cost bills that are not collectible in cases of misdemeanor, peace warrant and juvenile causes; * * *. At the first meeting of the county board in each county in the months of April and October of each year, the board shall appropriate from the general fund a sum sufficient to pay all such bills, or parts thereof, as may be found to be lawful and just, and thereupon the board shall audit all such bills in the manner required by law; *Provided, no costs shall be allowed in any case unless the suit shall have been instituted with the consent of the county attorney, or,*

after being brought, he shall approve of such action in writing." (Emphasis ours.)

Section 29-2703, R. R. S. 1943, provides, insofar as here material, that: "No costs shall be paid from the county treasury in any case of prosecution for a misdemeanor * * * except as provided in section 29-2709."

It thus becomes evident that a justice of the peace in a misdemeanor case is dependent entirely upon a conviction for his $4 fee unless the requirements of section 29-2709, R. R. S. 1943, have been fulfilled, which is not the situation here.

Section 24-315, R. R. S. 1943, provides, insofar as here material, that: "A judge or justice is disqualified from acting as such in the county, district or Supreme Court, except by mutual consent of the parties, in any case wherein he is * * * interested, * * *." We said in Chicago, B. & Q. R. R. Co. v. Kellogg, 54 Neb. 138, 74 N. W. 403, that: "* * * the word 'interested' found in this section of the statute probably means pecuniarily interested, or, at least, it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial." And in Uerling v. State, 125 Neb. 374, 250 N. W. 243, we said: "Interest of the trial judge in the outcome of an action to disqualify must be of a pecuniary nature."

While the statute does not relate specifically to a justice of the peace court we said in Walters v. Wiley, 1 Neb. (Unoff.) 235, 95 N. W. 486, that: "This statute is declaratory of the principles of the common law and everyone must subscribe to the equity of the rule which declares that no one shall be a judge in his own case or where he is interested * * *." Therein we went on to say, by quoting from Oakley v. Aspinwall, 3 N. Y. 547, that: " 'The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality.' " Then we said: "Courts of all grades ought to regard with the most scrupulous care this pro-

vision of our statute and a justice of the peace, on his own motion, should refuse to act where he is disqualified." As stated in Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243: "There was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace. * * * There was * * * no usage at common law by which justices of the peace or inferior judicial officers were paid fees on condition that they convicted the defendants, and such a practice certainly can not find support as due process of law in English precedent."

It was held in Tumey v. Ohio, *supra,* that: "* * * it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Therein the court said: "There is * * * no way by which the Mayor may be paid for his service as judge, if he does not convict those who are brought before him; * * *." It then went on to hold: "* * * we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex.

"The Mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his

guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal."

Here, for the year 1954, appellee convicted defendants in 798 cases for which she received a fee of $4, taxed as costs against the defendant in each case, or a total of $3,192, or at the rate of $266 per month. We cannot regard the prospect of receipt or loss of such an income as an insignificant interest.

It is an elementary proposition that every person accused of crime should have a fair and impartial trial. Coxbill v. State, 115 Neb. 634, 214 N. W. 256. As therein stated: "The Constitution of the United States and of this state guarantee a fair and impartial trial to every person accused of crime, * * *." Likewise he shall not be deprived of his liberty or property without due process of law. Dutiel v. State, 135 Neb. 811, 284 N. W. 321. As therein stated: "Both the Constitution of the United States and the Constitution of the state of Nebraska provide that no person shall be deprived of life, liberty, or property without due process of law."

A party has a right to have his case heard and determined by a judge who is not disqualified by interest from hearing and determining it. North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238. As stated in Forest Coal Co. v. Doolittle, *supra*: "The authorities almost uniformly hold that when a judge of an inferior court is recused (incompetent to act) before judgment in a case in which he has an interest, such as disqualifies him, and a prohibition is applied for to restrain him from further sitting in the cause, it will be granted, if, upon the application therefor, it appears that he is disqualified. 'Prohibition is the proper remedy to prevent action by a judge who is disqualified by interest, or otherwise.' Works on Courts and their Jurisdiction, 638. 'A writ of prohibition will lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jur-

isdiction of the cause.' 23 Am. & Eng. Enc. Law, 2 Ed. 223."

The law could, in this situation, afford an individual, so charged, adequate remedy either by appeal or error proceeding. See, §§ 29-611 and 29-617, R. R. S. 1943. But, as we have already indicated, prohibition may, in the court's discretion, be granted in a proper case where the remedy by appeal or error is not adequate and, in this respect, each case must depend upon its own facts. As stated in 73 C. J. S., Prohibition, § 16, p. 90: "The question whether the remedy by appeal is adequate rests in the sound discretion of the court to which application is made. No hard and fast rule can be laid down to determine in advance whether the remedy by appeal fully meets the requirements of justice in a particular case, and the adequacy of such remedy in any given case is to be determined in the light of all the facts and circumstances. In determining the adequacy of a remedy by appeal the court will take into consideration various considerations of public interest and public policy, a possible multiplicity of suits, and irremediable injury to litigants; * * *." See, also, Brown v. Superior Court of San Francisco County (Cal. App.), 275 P. 811; Canaday v. Superior Court of Newcastle County, 49 Del. 332, 116 A. 2d 678.

Here the evidence establishes that in 1954 appellee presided as the justice in 798 misdemeanor cases wherein she convicted the party so charged when, in fact, she was disqualified to act and that such practice is being continued. Under such a situation we think, because of the public interest and concern in every one charged with a crime being tried before a disinterested and qualified judge, that the only solution to this problem is to grant the writ and prevent appellee from acting further as a justice in all cases in which she is disqualified. This would not prevent the appellee from acting as justice of the peace in such cases if she removes her disqualification by having the requirements of section

29-2709, R. R. S. 1943, complied with in each case.

In view of the foregoing we think the trial court erred in refusing to issue the writ prayed for and dismissing appellants' action. We therefore reverse its judgment doing so and remand the cause with directions to grant the relief prayed for by appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLEE, V. CITY OF ST. EDWARD, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

91 N. W. 2d 69

Filed June 27, 1958. No. 34374.

1. **Municipal Corporations: Public Utilities.** A franchise for the sale of gas granted by a city of the second class to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract.
2. ———: ———. The power of regulation rests in the Legislature until such time as it is delegated to a proper body.
3. ———: ———. The fact that the delegation of the power to another body occurs after the granting of the franchise is not material.

APPEAL from the district court for Boone County: ROBERT D. FLORY, JUDGE. *Reversed and remanded with directions.*

Earl Hasselbalch, for appellants.

James D. Conway, Elmer J. Jackson, and *Cline, Williams, Wright & Johnson,* for appellee.

Stewart & Stewart and *Sidner, Lee, Gunderson & Svoboda,* for amicus curiae Nebraska Natural Gas Co.

Paul J. Gerdes and *Smith Brothers,* for amicus curiae City of Lexington.

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

SIMMONS, C. J.

In this action plaintiff sought a judgment enjoining the defendants from preventing plaintiff putting into effect a rate schedule for the sale of gas to its customers in the defendant city.

The plaintiff is a corporation engaged in the sale of natural gas. The defendants are the city of St. Edward (a city of the second class), its mayor, and councilmen. They will be hereinafter referred to as the defendants.

Issues were made and trial was had based upon a stipulated statement of facts. It contained the following: "That the issues of this case are limited to whether the Court has jurisdiction to grant Plaintiff the injunctive relief prayed for, and if so, then (1) whether the Defendants must regulate Plaintiff's rates under the Statutes of Nebraska and under the terms of Plaintiff's Franchise in the Defendant City, or (2) whether under such Statutes and Franchise, Plaintiff's Franchise constitutes a contract to furnish gas at the rates set out therein for the life of said Franchise."

The trial court "perpetually enjoined" the defendants from preventing the plaintiff putting the proposed rates into effect.

Defendants appeal.

We find generally in favor of the plaintiff but find that it is necessary to reverse the judgment and remand the cause because of the extent of the order perpetually enjoining the defendants from preventing the plaintiff from putting the proposed rates into effect.

On October 2, 1950, the city, pursuant to the authority of section 17-125, R. S. 1943, granted the plaintiff a franchise for a period of 25 years which the plaintiff accepted on October 20, 1950. The ordinance set up a schedule of rates to be charged for natural gas. It will be quoted later herein. In March 1954, the plain-

tiff requested orally (and later in writing) an increase in rates to provide sufficient revenue to earn a fair and reasonable return on its invested capital. This request was supported by data indicating the necessity. Plaintiff requested the enactment of a new franchise ordinance and a supplemental rate ordinance. The defendants failed and refused to act on the proposed rate increase.

A study by an engineering firm was then made and its finding corroborated plaintiff's request. This report was made available to the defendants. On November 1, 1954, plaintiff renewed its request for a rate increase and again the defendants failed and refused to grant it.

This was followed by litigation in the federal courts. See Kansas-Nebraska Natural Gas Co. v. City of St. Edward, 134 F. Supp. 809, and (same title) 234 F. 2d 436.

Following that litigation the plaintiff on July 30, 1956, requested the defendants to exercise the regulatory power vested in them by section 17-125, R. R. S. 1943, and section 17-528.01, R. S. Supp., 1955. (Both original sections are now repealed and as amended are contained in section 17-528.02, R. S. Supp., 1957.) The plaintiff requested the city to adopt the proposed rates. The defendants by resolution on August 3, 1956, denied the request on the ground that the existing ordinance constituted a valid contract for a period of 25 years.

Plaintiff initiated this action on August 23, 1956. It was stipulated that plaintiff's evidence would show that its costs had increased by January 1, 1954, so that the established rates did not render fair and reasonable return and were confiscatory. Defendants did not resist that showing. We accept that as a fact established for the purposes of this litigation.

Defendants here advance the contentions that the courts are without jurisdiction to interfere with the discretionary power of the city council; that the existing franchise is a valid contract; and that plaintiff is

estopped to assert a deprivation of property without due process of law and in violation of the Constitutions of the United States and of Nebraska.

The plaintiff concedes that the franchise is a contract as a matter of law but contends that by its terms there was intended a flexibility of rates; that the city has regulatory power which is explicitly and impliedly a part of the contract; and that the rates to be charged are subject to regulation. Section 4 of the franchise ordinance provided: "Grantee shall file and make effective initially the schedule of maximum rates for natural gas service set forth below, and shall furnish natural gas at such rates, or at such other reasonable, lawful, and valid rates as may hereafter be established from time to time by Grantee, subject to the approval of the proper body having jurisdiction over such rates for gas service by Grantee in said city.

SCHEDULE OF RATES:

First	500 cu.ft. per month	$ .20 Per C.C.F.
Next	1,500 cu.ft. per month	.15 Per C.C.F.
Next	1,000 cu.ft. per month	.10 Per C.C.F.
Next	7,000 cu.ft. per month	.60 Per M.C.F.
Next	90,000 cu.ft. per month	.50 Per M.C.F.
Next	100,000 cu.ft. per month	.40 Per M.C.F.
Balance		.35 Per M.C.F.
Minimum Charge		$1.00 Per Month

Gross Rate (above rate plus 10%) applied if bill is not paid within 10 days after date of bill."

The proposed schedule of rates is as follows:

First	1,000 cu.ft.	$ .20 Per C.C.F.*
Next	4,000 cu.ft.	.10 Per C.C.F.
Next	45,000 cu.ft.	.06 Per C.C.F.
Next	50,000 cu.ft.	.05½ Per C.C.F.
All Additional		.04½ Per C.C.F.

*Minimum Monthly Charge: $2.00

Delayed Payment Charge: 5% on first $20.00 of bill, plus 2% on excess.

Bills will be rendered at monthly intervals.

The above language in the franchise is subject to the reasonable construction that "initially" the rates provided in the franchise were applicable until such time, within the period of the franchise, the plaintiff established "other reasonable, lawful, and valid rates * * * subject to the approval of the proper body having jurisdiction over such rates * * *."

The question, then, is: Is the city the "proper body" having regulatory power, since it is the city that has been requested and which has refused to exercise the regulatory power?

At the time the franchise was granted, section 17-125, R. S. 1943, provided in part: "Such franchise shall fix the amount that may be charged during such period for such gas or electricity and provide that such city may, after such period, make any reasonable regulation with reference to any person, firm or corporation holding such franchise either as to charges for such gas or electricity or otherwise."

In City of University Place v. Lincoln Gas & Electric Light Co., 109 Neb. 370, 191 N. W. 432, we stated: "At the time of the adoption of the ordinance hereinafter referred to, no power had been granted by the legislature to cities of the second class to regulate the rates which a public utility corporation might lawfully charge for furnishing gas to the inhabitants of the city; such power was not granted until 1911. Rev. St. 1913, sec. 5019." (Section 5019, Rev. St. 1913, became section 17-125, R. S. 1943.)

We did not there undertake to define the extent of the regulatory power granted. Both parties here state that the language is dictum. Neither party contends that it is an erroneous statement. We hold it to be a correct statement of the law.

In 1955 the Legislature by an independent act provided: "Cities of the second class and villages shall have power to regulate and fix the rents or rates of gas, and to regulate and fix the charges for gas meters

or other device or means necessary for determining the consumption of gas." Laws 1955, c. 41, § 1, p. 156. This became section 17-528.01, R. S. Supp., 1955, and became effective September 18, 1955.

In 1957 the Legislature repealed both section 17-125, R. R. S. 1943, and section 17-528.01, R. S. Supp., 1955, and enacted what is now section 17-528.02, R. S. Supp., 1957, which provides in part: "Such city or village may make any reasonable regulation with reference to any person, firm, or corporation holding such franchise as to charges for such gas." This amendment became effective September 20, 1957, prior to the entry of the decree herein on October 10, 1957.

Defendants contend that the amendments above can have no effect on the franchise since they were not passed until after the effective date of the franchise and that the language of section 17-125, R. S. 1943, limits the regulatory power of the city to the period after the expiration of the 25 years of the franchise.

This depends on whether the power of regulation was impliedly a part of the franchise and whether the amendments, adopted afterward, apply.

Both of these questions have been directly decided by us contrary to the contentions of the defendants.

In McCook Irrigation & Water Power Co. v. Burtless, 98 Neb. 141, 152 N. W. 334, L. R. A. 1915D 1205, we had this fact situation: Contracts for water were entered into providing a fixed charge for water per acre per annum. The company desired and secured an order from the State Railway Commission materially increasing the annual per acre charge. It was contended that the contract rate was a property right with which the state, in the exercise of its regulatory power, could not interfere. We held: "* * * any contracts entered into between the irrigation company and consumers under the ditch, with reference to the annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legis-

lative control. * * * Holding the view that the contracts were entered into subject to the right of the state in the exercise of its police power to regulate and fix reasonable rates to be charged for the use of the water, the order of the railway commission does not take property without due process of law, and is not in violation of the Constitution of the United States, the fourteenth amendment, or the Constitution of the state of Nebraska."

In Marquis v. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927, we had this fact situation: An ordinance had been passed by the city of Stromsburg granting a franchise to a company in which the rates for telephone service were definitely stated. The company filed increased rates with the State Railway Commission and they were approved by that body. We held: "This court has held in a number of cases that contracts made by public service corporations are made with the right of regulation as a part of the contract, and that the power to lower excessive rates or to increase inadequate rates still rested solely in the legislature until by virtue of the constitutional amendment the same power was extended to the state railway commission. * * * The fact that at the time the franchise ordinance in question was passed the railway commission was not in existence is not material."

The reason for this rule, although not stated, is obvious. The power to regulate the rates is at all times in the Legislature or in a regulatory body to which the Legislature delegates the power. The delegation to the city here of the power does not affect the power, but provides a body competent to exercise the power.

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we discussed these cases and held: "Public service corporations in each instance sought and obtained relief before the railway commission from low rates specifically imposed by their own franchises or contractual obligations without estoppel. In other cases

they appear as objectors and have been granted or denied relief despite their own contractual obligations. The analogy is that not any understanding, implication, or express agreement by franchise between a municipality and a public service company, seeking to disrobe the paramount power of the railway commission, can have any legal force in this state. To assume that such a municipality, as a condition of favorably exercising its veto power with reference to the entry into its jurisdiction of a common carrier, could, by franchise, divest a constitutionally created regulatory body, such as the railway commission, of its jurisdiction is without logic. Appellee is not estopped by its franchise from invoking affirmative or negative action in this proceeding because to that extent the jurisdiction of the railway commission would be divested and its power to serve the people destroyed."

From these decisions the rule necessarily follows that a franchise for the sale of gas granted by a city of the second class to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract; and that power rests in the Legislature until such time as it is delegated to a proper body. This rule is necessary either to protect the public service agency from confiscatory rates or to protect the public from exorbitant rates if so fixed by a franchise. The fact that the delegation of the power to another body occurs after the granting of the franchise is not material.

We have here, then, this situation: The power to regulate the rates involved has been delegated to the defendant city. Since January 1, 1954, the rates in the franchise have been inadequate to give the plaintiff a fair and reasonable return on its invested capital and are confiscatory. The defendant city, having the power and duty to fix compensatory rates so as to give a fair and reasonable return to plaintiff, has refused to do so. Defendants make no contention that the rates proposed

by the plaintiff are in anywise excessive. They merely rest on their contract contention.

It has long been the rule that an equity court has the power to act to prevent irreparable injury.

The situation here is in many respects comparable to that presented in Smith v. Illinois Bell Telegraph Co., 270 U. S. 587, 46 S. Ct. 408, 70 L. Ed. 747, where it was held: "It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceeding, the commission for a period of two years remained practically dormant, and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief."

The court there affirmed an order enjoining the rate regulatory body from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory and from taking any steps or proceedings against the public service company by reason of the collection of charges under a higher schedule.

The trial court order here "perpetually enjoined and prohibited" defendants from preventing the plaintiff putting the proposed rates into effect and collecting

the same. It cannot be assumed that the proposed schedule of rates is in its entirety the only schedule of rates that would produce a fair, reasonable, and nonconfiscatory return. The order is subject to a construction that would deny the defendant city the exercise of its regulatory powers.

Accordingly we set aside the judgment of the trial court and remand the cause with directions to render a judgment enjoining the defendants and their successors in office from preventing the plaintiff putting the proposed rates into effect and collecting the same until such time as the city by proper action approves the same, or until such time as the city by proper exercise of its regulatory powers establishes fair, adequate, and compensatory rates to be charged by the plaintiff for gas sold to its customers in defendant city.

All costs are taxed to the defendant city.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DANIEL YSAC, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

91 N. W. 2d 49

Filed June 27, 1958. No. 34389.

1. **Rape.** The degree of force required to sustain a conviction for rape is relative, depending upon the particular circumstances, but 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.
2. ———. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances, but 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.
3. ———. In a prosecution for rape it must be shown by compe-

tent 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.

4. ———. Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside.
5. **Criminal Law: Appeal and Error.** In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon.
6. **Appeal and Error.** Alleged errors not brought to the attention of the trial court in any way in a motion for a new trial are not entitled to be considered or reviewed by this court.
7. **New Trial.** A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial.
8. ———. Where newly-discovered evidence is merely cumulative, and is not of so controlling a character that it will probably change the verdict, it is not sufficient to justify the granting of a new trial.
9. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

William E. Grubbs, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

MESSMORE, J.

Plaintiff in error, Daniel Ysac, hereinafter called defendant, was charged in an information in the district court for Scotts Bluff County with the crime of rape

under section 28-408, R. R. S. 1943. He was 19 years old at the time of the alleged offense. The prosecutrix was 15 years old at that time. The defendant entered a plea of not guilty and upon trial to a jury was found guilty as charged. Upon the overruling of his motion for new trial, he was sentenced to serve 7 years in the State Reformatory located at Lincoln. He thereupon prosecuted error to this court.

The information did not allege that the prosecutrix was previously chaste, although she was a girl 15 years of age, and there was evidence, which was not controverted at the trial, establishing her previous chastity. Under the rule stated in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, the failure of the State to allege previous chastity of the prosecutrix gives to the defendant the benefit of the defense of her consent and want of resistance on her part.

The defendant assigns as error: (1) That the evidence was insufficient to sustain the charge of rape for the reasons that the evidence showed that the prosecutrix did not offer the resistance legally necessary in order to make the admitted act of sexual intercourse rape and that the proof relating to the nonconsent of the prosecutrix to the admitted act was not established by the proper quantum of evidence; (2) that the trial court erred in admitting certain evidence over the objection of the defendant; (3) that the trial court erred in refusing to grant a new trial on the grounds of newly-discovered evidence in conformity with section 29-2103, R. R. S. 1943; (4) that the trial court erred in admitting into evidence a confession alleged to have been made by the defendant; and (5) that the sentence pronounced by the trial court upon the defendant was excessive.

The record discloses that in the early morning of July 6, 1957, the prosecutrix, Pearl Garneaux, hereafter referred to as Pearl or the prosecutrix, her stepmother, her 3 and 5 year old sisters, and Velmatena

White Magpie were walking along the street in Scottsbluff. The defendant was walking behind the prosecutrix and all of a sudden grabbed hold of her right arm. At that time a car, referred to as a "green Chevie" containing four boys, drove up close to the curb. The defendant started pushing the prosecutrix toward the car. She resisted by attempting to pull back, and the defendant pushed her harder up to and close to the car. She took hold of the door of the car. The four boys and the defendant forced the prosecutrix into the front seat of the car. She screamed, and the car drove off with the front door open. With the prosecutrix in the middle of the front seat and the defendant to her right, one of the boys drove the car 4 miles north and a quarter of a mile east of the city. During the ride the defendant, by twisting the arm of the prosecutrix behind her back and causing her pain, forced her to disrobe. During the scuffle her blouse and slip were torn. She objected, and when she did so, the defendant threatened that if she did not cooperate with his efforts she would be hurt. She cried, and was afraid they would kill her. The driver of the car stopped at a place on a gravel road where there was a rather steep bank. The defendant forced the prosecutrix from the car by twisting her arm behind her back and dragged her over the bank into a ditch on the opposite side. The defendant pushed the prosecutrix down, tied her hands above her head, and she fell backwards. The defendant started to take off his overalls. She tried to push him away but was unable to do so, and he had intercourse with her. The defendant did not let her get up, but pushed her back down. The four other boys from the car each took a turn having intercourse with her. After the last of the acts, one of the boys brought the prosecutrix her clothes, except her underpants, and she put them on. The underpants were later found on the shoulder of the road along the route the car had traveled. The prosecutrix refused to ride back to town with the

boys, and when the car disappeared from sight she began to walk toward town. The prosecutrix also testified that she had never seen the defendant or the other boys before; that she did not know them; and that at times during the ride they talked in the Mexican language which she did not understand.

The defendant's testimony was to the effect that he first saw the prosecutrix, her stepmother, and Velmatena White Magpie about 1 a.m. the morning of July 6, 1957, on the corner of Ninth Street and Ninth Avenue, and later saw them again near the corner of Ninth Avenue and Eleventh Street. The car in which he was riding pulled over to the curb and stopped. Velmatena White Magpie had a conversation with him and told him that the prosecutrix and her stepmother were on their way to a party, or had come from a party. The defendant asked if he and the other boys might go to the party and Velmatena White Magpie ran into the house where the party was supposed to have been held. During the conversation the prosecutrix was about 10 feet from the car in which the defendant was sitting. The defendant got out of the car and asked the prosecutrix if she would like to go for a ride. She did not answer, so he put his arm around her and started walking down the street with her. She appeared to have been drinking. From this point on the defendant's testimony was to the effect that the prosecutrix willingly went along on the ride, voluntarily disrobed during the course of the ride, and consented to and cooperated in the sexual intercourse had with him. Thereafter the defendant went back to the car and did not know what happened to the prosecutrix.

A police officer of the city of Scottsbluff testified that he saw the prosecutrix walking toward town and near the outskirts at about 6 a.m., on July 6, 1957. He observed that she had some dirt and weeds in her hair; that she looked ragged and dirty as if she had been lying on the ground; that her blouse was torn; and that

her arm was bruised. He took her to police headquarters and she made complaint to him of the attack at that time.

Police officer Mowrey testified that he first saw a car fitting the description of the one driven by the boys at about 3:30 a.m., on July 6, 1957. The defendant was asleep in the back seat of the car. Mowrey arrested the defendant and two boys who were with him.

The doctor who examined the prosecutrix about 8 a.m. on July 6, 1957, testified that he found bruising of the external genitalia, and that microscopic tests revealed the presence of male sperm from semen on both the external area and inner vaginal tract.

The prosecutrix testified that she was bruised considerably from the physical treatment she received during the course of the ride and the scuffling, and during the process of the attack that resulted in the defendant having intercourse with her; and that as a consequence thereof she was forced to go to bed for the most part of a week.

The stepmother of the prosecutrix testified as to the torn condition of Pearl's clothing, the bruises on her arm, and the fact that the prosecutrix was in bed for 2 days and for a part of the week following the assault.

While at the police station the defendant made a statement in writing confessing to the facts in practically the same manner as testified to by the prosecutrix.

The rule as stated in Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897, is as follows: "The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcible and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman. While the degree of resistance required is

also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated." See, also, Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; Brockman v. State, 163 Neb. 171, 79 N. W. 2d 9.

Under all the circumstances shown by this record, the jury could properly find that prosecutrix resisted the defendant in good faith and to the utmost of her ability. The evidence shows that the prosecutrix was a girl 15 years of age; that the defendant, who was 19 years of age, and four other boys forced her into a car; that her arm was twisted behind her back causing pain and distress during the course of the ride; that she was threatened and forced to disrobe; and that upon arriving at a certain point she was forced out of the car by the defendant. She was pushed, her hands were tied above her head, she was kicked in the leg, and her head held back while the defendant had intercourse with her. She endeavored to push him away, but was unable to do so. She was frightened, her clothing was torn, and her appearance could leave no doubt that unusual force was used in the commission of the act.

Whether or not the prosecutrix resisted the advances of the defendant to the extent of her ability under the circumstances presented by the evidence is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside. See Medley v. State, *supra.*

The lurid details of the crime, as shown by the evidence, beyond question demonstrate that if the State's evidence is believed, every element of the crime of

rape was established. The evidence clearly sustains the verdict of the jury.

The defendant assigns as error the receiving of testimony of police officer John Wagner. The substance of this evidence was that he found the prosecutrix walking slowly toward Scottsbluff at 6 a.m., the morning of July 6, 1957. He asked her name and told her to get into the car. He was asked if he had a conversation with the prosecutrix on the way to the police station and he replied that he did. Objection was made that such conversation was hearsay. The objection was overruled. The trial court said it would depend upon what the conversation revealed or what it was about, and overruled the objection subject to a motion to strike this evidence if it was deemed improper. Thereafter the witness testified that the prosecutrix related that some Mexican boys had taken her into the country, taken her clothes off, and taken turns with her. There was an objection to this evidence as being prejudicial and hearsay, and not sufficiently related in time and place. This objection was overruled. The witness testified that the prosecutrix related more details concerning the removal of her clothing and in connection with the assault perpetrated upon her, and how she got back to town. The police officer further testified that the prosecutrix gave him the names of the boys, and that she named the defendant. There was an objection, and the court overruled the objection. This witness further testified that the prosecutrix told him that the defendant was the main instigator, and was the first to have intercourse with her. Objection was made to this testimony, and overruled.

At the commencement of proceedings on the second day of the trial, the trial judge instructed the jury that the court had determined that the conversation which officer John Wagner related was not admissible as evidence and therefore the jury was to completely disregard the portion of the officer's testimony which con-

cerned details of the offense and to erase it from their minds.

The rule of law upon which the defendant apparently bases this assignment of error and deems applicable is stated in the case of Jump v. State, 146 Neb. 501, 20 N. W. 2d 375, as follows: "In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details." See, also, Krug v. State, 116 Neb. 185, 216 N. W. 664.

We believe that when the trial court subsequently, on its own motion, ordered this testimony stricken and charged the jurors to disregard it and erase it from their minds, it gave the defendant everything that he asked for. The defendant did not move for a mistrial on the ground that the admissibility of this evidence was prejudicial and that the error alleged to have been committed by the trial court could not be cured by this ruling or on any other ground. This matter was not called to the trial court's attention in the defendant's motion for new trial.

In Luster v. State, 142 Neb. 253, 5 N. W. 2d 705, this court said: " 'In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon.' " See, also, Wilson v. State, 43 Neb. 745, 62 N. W. 209; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

Alleged errors not brought to the attention of the trial court in any way in a motion for a new trial are not entitled to be considered or reviewed by this court. See, Luster v. State, *supra;* Hall v. State, 109 Neb. 273, 190 N. W. 898; Millslagle v. State, 138 Neb. 778, 295 N. W. 394.

This assignment of error cannot be sustained.

The defendant contends that the trial court erred in not granting a new trial on the grounds of newly-discovered evidence. To determine this contention it is necessary to review a part of the record relating thereto. On November 18, 1957, the defendant filed a motion for new trial wherein he alleged that there was newly-discovered evidence which could not have been produced at the trial by the exercise of reasonable diligence. On November 21, 1957, the defendant filed an affidavit in support of this assignment relating to newly-discovered evidence. This affidavit, in substance, was to the effect that during the trial of the defendant a witness had to be obtained from the custody of the federal marshal at Laramie, Wyoming, and that from an interview with this witness it was learned that one Phyllis Brave Heart could testify that she observed the prosecutrix drinking and acting in a manner contrary to and different from that as testified to by the prosecutrix at the time of the trial. The affidavit further stated that a subpoena had been issued for this witness in Scotts Bluff County and she could not be located in that county. On November 21, 1957, the trial court overruled this motion for new trial.

On January 11, 1958, a second motion for new trial was filed alleging newly-discovered evidence which could not have been discovered or produced by the exercise of reasonable diligence. An affidavit by counsel for the defendant, attached to the second motion for new trial stated in substance that Phyllis Brave Heart testified at the trial of one of the other boys involved in this same incident, and that her testimony was relevant and material to a finding of not guilty in that case. Attached to the second motion for new trial was a transcript of the testimony of Phyllis Brave Heart from the trial of the other boy. A reading of this testimony discloses that the witness Phyllis Brave Heart testified to essentially the same facts as did the witness Velmatena

White Magpie in the instant case, that is, that she had observed the prosecutrix and her stepmother drinking during the afternoon preceding the assault.

There is no supplemental petition in error covering the overruling of the second motion for new trial, made after the filing of the petition in error in this court on December 20, 1957. The result is that the second motion for new trial and the order overruling it are not properly before this court for consideration.

With reference to the first motion for new trial based on newly-discovered evidence and the overruling of it, the rule is that a new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material to him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial. See Cunningham v. State, 56 Neb. 691, 77 N. W. 60.

The testimony of Phyllis Brave Heart would constitute only a reiteration and would be cumulative of the testimony given at the trial by Velmatena White Magpie. It appears that the testimony of Phyllis Brave Heart was intended to impeach the testimony of the prosecutrix. In Bailey v. State, 36 Neb. 808, 55 N. W. 241, it was said: "While the general rule is established that a new trial will not be granted because of newly discovered evidence impeaching a witness, this rule has its limitations. This court has stated the doctrine as to cumulative evidence to be that a new trial will not be granted unless such evidence be of so controlling a character as to probably change the verdict." See, also, Flannagan v. Heath, 31 Neb. 776, 48 N. W. 904; Keiser v. Decker, 29 Neb. 92, 45 N. W. 272.

The affidavit of defendant's counsel discloses that at the time the witness Velmatena White Magpie was interviewed the defendant was apprised of the content of the possible testimony of Phyllis Brave Heart. As before stated, the defendant had a subpoena issued which

was returned on the same day marked as unable to locate in Scotts Bluff County. The defendant did not request a continuance of the trial in order to make a further search for this witness. From the record it appears that it would not have been a difficult task to have located this witness. There is no proper showing that the defendant could not have, by the exercise of reasonable diligence, discovered such evidence and produced it at the trial. The defendant's assignment of error cannot be sustained.

The defendant assigns as error the admission into evidence of the confession of the defendant. No specific assignment of error is contained in the petition in error to this court in regard to the confession offered and received in evidence by the trial court. There does appear to be a statement in the testimony of deputy sheriff John Hanley that he had known the defendant for 10 or 12 years, had known his father for the same length of time, and worked with and been a good friend of the defendant's father during that time. He saw the defendant on July 6, 1957, sitting on a bench in the reception room of the office of the county attorney. He had a conversation with the defendant at that time and testified: "I believe I asked him what he was doing in here this time, what he was into, and if I remember right that's where I told him if he didn't straighten up I was going to help his old man beat the hell out of him." Shortly thereafter Hanley had an interview with the defendant in the office of the county attorney. There is no dispute in the record that no threats or undue influence were used against the defendant. This statement made by the deputy sheriff Hanley was not one that was made in all seriousness, but rather as a sort of mild chastisement. This is evidenced by the conduct of this officer in the interview with the defendant which followed the remark made in the reception room in the county attorney's office. The sheriff of the county took a statement from the defendant shortly after the foregoing interview between officer

Hanley and the defendant. He testified that the defendant was cooperative, answered questions readily, and appeared to be at ease. Lieutenant Knudtson of the Nebraska Safety Patrol was present at the questioning of the defendant and testified that the defendant was cooperative, at ease, and made a statement voluntarily. To the same effect was the testimony of the chief of police of Scottsbluff.

This alleged error was not pointed out to the trial court in the defendant's motion for new trial and a ruling obtained thereon as is a prerequisite to a review of such error by this court. See, Luster v. State, *supra;* Fisher v. State, *supra.* The defendant's assignment of error cannot be sustained.

The defendant contends that the sentence is excessive. 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. See, Truman v. State, 153 Neb. 247, 44 N. W. 2d 317; Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380.

The sentence in the instant case was not the maximum or in the upper range that the court could have imposed, and neither was it the minimum. We conclude that under all of the facts and circumstances presented by the record the trial court did not abuse its discretion.

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

AFFIRMED.

CARTER, J., participating on briefs.

TWENTY CLUB, A CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLEE.

91 N. W. 2d 64

Filed July 3, 1958. No. 34382.

1. **Eminent Domain: Witnesses.** In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.
2. ———: ———. Appraisers in condemnation proceedings may testify as any other witness when the proper foundation is laid, but in no event must evidence of the award of such appraisers be admitted as evidence to go to the jury.
3. **New Trial.** Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted.
4. **Trial: Appeal and Error.** While declarations made in opening statements of attorneys and preserved in a bill of exceptions may not be used as evidence or stipulation in determining issues in a case, it is proper to refer to them for the purpose of ascertaining the theory on which the case was presented.
5. **Eminent Domain.** The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Eugene D. O'Sullivan and *Francis M. Casey,* for appellant.

Clarence S. Beck, Attorney General, and *Harold S. Salter,* for appellee.

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

YEAGER, J.

The action here was commenced by the State of Nebraska through its Department of Roads and Irrigation

by petition in the county court of Sarpy County, Nebraska, to condemn certain real property of the Twenty Club, a corporation, lying immediately to the east of U. S. Highway No. 73, which is a state highway. The property taken extends from the Platte River on the south northward about 3,640.3 feet. From the south line to the north for about 1,768 feet the width ranges from 42 feet to 42.7 feet. The land to the north for the next 1,407 feet ranges from 26.4 feet to 26.9 feet. The remaining distance to the north ranges from 26.4 feet to 117.2 feet. It comprises about 3.12 acres of land. About 1,768 feet of the land to be taken is south of a county highway which extends from U. S. Highway No. 73 eastward through the real property from which the strip of land is to be taken and about 1,872.3 feet of the strip is to the north of this county highway.

In the petition in the county court it was alleged that in the opinion of the State Engineer, in the interest of public safety and general welfare, it was necessary that the right of egress and ingress be limited to the locations thereinafter described. No means of egress or ingress was described but the petition stated: "There will be no right of access from the above described land (land to be taken by condemnation) on to the remaining property of the condemnee." The effect of this was to say, and concerning this there is no dispute, that the only means of ingress or egress is over the county highway which extends eastward through the property of the Twenty Club from U. S. Highway No. 73, and from the county highway north and south onto the Twenty Club property.

On the basis of the petition condemnation was had and as a result the Twenty Club was awarded damages in the amount of $2,636.

From the award the Twenty Club took an appeal to the district court for Sarpy County, Nebraska. In that court it became plaintiff and will be hereinafter so denominated. The State of Nebraska, Department of Roads

and Irrigation, became defendant and will be referred to hereinafter by that designation.

On perfection of the appeal the plaintiff filed a petition and later an amended petition. The action was presented to the court on the amended petition, hence no further attention to the original petition is required.

In the amended petition the plaintiff waived any objection to the taking of the property described in the condemnation proceedings and it in no wise objected to the proceedings or any formality involved therein, or to the legality or constitutionality of any statute or statutes pursuant to which the proceedings were instituted or controlled.

By the petition it asked for adequate compensation for property taken and for diminution of the value of the property which remained, which it said it had not been allowed by the condemnation award.

It was further substantially pleaded that the taking would deprive the club of the use of access which it had to the property for about 35 years to its irreparable damage and injury, the right to which access is guaranteed to it under the Constitution and laws of the State of Nebraska and of the United States of America. The prayer responded to the allegations of the petition. An answer was filed whereby there was a joinder of the issues tendered by the petition.

The case was tried to a jury. A verdict was returned in favor of the plaintiff and against the defendant for $2,740. Judgment was rendered on the verdict. By order of the court it was declared that the judgment should bear interest at the rate of 6 percent per annum from June 19, 1956. A motion for new trial was duly filed which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff appealed.

The plaintiff has set forth in its brief as grounds for reversal four assignments of error. The first is divided into three parts. They are that the verdict and judgment are contrary to the law; that the verdict and judg-

ment are contrary to the evidence; and that the verdict and judgment are not sustained by the law and the evidence.

The answer to these propositions will effectually dispose of the third assignment by which it is asserted that the court erred in the admission of the testimony of a witness called by the defendant as to the damage sustained by the plaintiff.

On the trial the plaintiff called one witness who testified that the amount of the damage was $41,933.53. Three witnesses were called by the defendant as to damage. One, Clay Thomas, testified that the damage was $2,436; one, Hal Easton, $3,256; and a third, Lester Hauschild, $2,044. The basic qualifications of none of these witnesses to give testimony as to damage to property such as this has been attacked. The only attack as to Easton is that the amount fixed by him is too low. An attack as to Thomas is made on the ground that he related his testimony to 59 acres of land whereas the total acreage owned by plaintiff is 59 acres of deeded land and an additional amount of accretion bringing the total to about 120 acres.

It may be said that in fixing the amount of damage he did relate his testimony to the 59 acres, but in response to further questioning he in clear substance stated that in considering the entire acreage the damage would not be greater since there would be no damage additional to that to the 59 acres. This witness, as well as the other two called by the defendant, was shown to be competent to give testimony as to damage. The appropriate rule is: "In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation." Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833. See, also, Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328. The foundational requirements of

this rule as to all of these witnesses was met.

It is objected also that the testimony of the witness Hauschild was incompetent for the reason that he was one of the appraisers in the original condemnation proceeding in the county court. This contention is contrary to what this court has said on this subject. The fact that he was such an appraiser did not render his testimony as to damage incompetent. The rule in this respect is as follows: "Appraisers in condemnation proceedings may testify as any other witness when the proper foundation is laid, but in no event must evidence of the award of such appraisers be admissible as evidence to go to the jury." Pierce v. Platte Valley Public Power & Irr. Dist., 143 Neb. 898, 11 N. W. 2d 813. See, also, Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201.

Thus the objection to the testimony of Hauschild inhering in the first assignment of error and that to which specific attention is called in the third assignment are disposed of unfavorably to the plaintiff.

Further referring to the first assignment of error the plaintiff in argument insists that the verdict is contrary to the weight of the evidence and therefore the verdict should be set aside. The true rule however is the following as it is correctly stated in plaintiff's proposition of law: "Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted." See, Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465; Stewart v. City of Lincoln, 114 Neb. 362, 207 N. W. 511.

From an examination of the testimony of the witnesses, one for the plaintiff and three for the defendant, as to damages, and an examination of the testimony as to qualifications to give testimony, this court cannot with propriety say that the verdict is clearly against the weight and reasonableness of the evidence. The contention of the plaintiff in this respect must be rejected.

In the light of these observations it must be said that

the decision on all points presented by the first and third assignments of error are resolved against the plaintiff.

By the second assignment of error the plaintiff asserts that "* * * the arbitrary limitation of access was a denial of appellant's constitutional rights." The determination upon this assignment requires a consideration of the facts relating to the condemnation and the consequences thereof as disclosed by the record.

Before any improvement or change was made, U. S. Highway No. 73 was for some miles north of the Twenty Club property south to the Platte River, which is the south boundary of the Twenty Club property, a two-lane paved highway with one lane for northbound and one for southbound traffic. A new design and plan was adopted for the construction of two new lanes for southbound traffic to the west with an unpaved area between the new and old paving of about 38 feet. The design called ultimately for the repaving of the old road. The old road before and after repaving was to be used for northbound traffic. The level of the elevations of the new road to the west and the old road when repaved was to be about 2.7 feet above the elevation of the old road. Pursuant to this plan the condemnation here took place and the new road to the west was constructed. Access which remained to the property of plaintiff was over the entrance onto the county road which has been mentioned which was about 20 feet in width and hard surfaced, thence onto its property. This county road extends eastward about three-fourths of the way across plaintiff's property and then leaves this property at the northeast corner. The plaintiff has buildings used for club and other purposes starting about 400 feet east of U. S. Highway No. 73 and to the north of the county highway. Prior to the condemnation, the plaintiff had an access road which entered its property from U. S. Highway No. 73 immediately to the north of the county highway and extended in a northeasterly direction to its facilities. It had been used for about 35 years. By the

condemnation this access was eliminated and thereafter in order to get onto the portion of its land north of the county highway and to the facilities it became necessary to enter upon the county highway and to turn off it to the left. To facilitate access for vehicles coming from the north a paved strip wide enough to contain vehicles and 80 feet in length was provided east of the east line of the new paving and immediately north of a passageway across the new and old paving and a 38-foot area between the old and the new into the county highway where its west end joined the east side or edge of U. S. Highway No. 73.

It is the accomplishment of the things which have been described and their effects that the plaintiff contends by the second assignment of error amount to a denial of its constitutional rights.

Whether or not arbitrary limitation of access in an appeal by a property owner from an award in a condemnation proceeding may be treated as a denial of constitutional rights does not require determination in this case. While it is true that the amended petition presented this as an issue, the issue was never presented by the theory on which the case was presented at or during the trial by motion, request for instructions, or otherwise. A fair examination of the record discloses that the theory on which the plaintiff presented the case was that the action was one for damages alone. Moreover, that this was the sole theory on which the case was presented appears in the opening statement of one of the attorneys for plaintiff which statement was preserved in the bill of exceptions. In that statement the attorney said: "* * * but we are conscious of the fact—and the Court will probably tell you—that the State has the right, since three years ago, to cut off your access road and give you another, but they have got to give you just compensation for doing it, if your road is established a long period of time."

It is not contended here that this statement may be

regarded as evidence or stipulation which may be resorted to for the purpose of determining the issues because it may not. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N. W. 349. It may be used however as an aid in determining the theory on which the case was presented. Bronnenkant v. Kucera, 141 Neb. 408, 3 N. W. 2d 913.

The plaintiff, having tried the case on the theory of damages alone in the district court, on this appeal is restricted to the theory on which the case was there tried. Kimball v. Lincoln Theatre Corp., 129 Neb. 446, 261 N. W. 842; Horbach v. Butler, 135 Neb. 394, 281 N. W. 804; Behle v. Loup River Public Power Dist., 138 Neb. 566, 293 N. W. 413; Bronnenkant v. Kucera, *supra.*

The legal merits contained in the second assignment of error are not properly before the court for consideration in this case.

The fourth assignment of error is an attack upon the third, seventh, and ninth instructions given by the court on its own motion. The attack on these instructions is collective rather than several. They are attacked on the ground that they imposed upon the plaintiff the burden of proving by a preponderance of the evidence its damages. It contends such a burden should not be imposed in an appeal from a condemnation award.

Up to and including Langdon v. Loup River Public Power Dist., *supra,* this question remained in doubt, but there can no longer be any doubt that one in the position of the plaintiff herein must carry the burden of proving his right to damages and the amount thereof by a preponderance of the evidence. The general rule is as follows: "The general rule is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate the damages." Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. See, also,

Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741.

In the light of the conclusions reached as to the matters presented by the appeal herein the judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

EARL H. BURKET ET AL., APPELLEES, V. R. E. KRIMLOFSKI ET AL., APPELLANTS.
91 N. W. 2d 57

Filed July 3, 1958. No. 34395.

1. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
2. **Waters.** Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.
3. ———. The rights of riparian owners upon the Missouri River to land formed by accretion are the same as if the river were not navigable.
4. ———. Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.
5. ———. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
6. ———. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

7. ———. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.
8. ———. Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.
9. ———. Land, to be riparian, must have the stream flowing over it or along its border.

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

Roy I. Anderson and *Swarr, May, Royce, Smith, Andersen & Ross,* for appellants.

Spier, Ellick & Spire, for appellees.

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

SIMMONS, C. J.

In this action plaintiffs seek a decree quieting title in them to certain accretion and reliction lands. The action was against defendants Krimlofski and all other persons having or claiming an interest in the lands involved.

Defendant R. E. Krimlofski answered claiming title by adverse possession to the land involved. He prayed for a decree quieting title in him.

The trial court rendered a decree for the plaintiffs. Defendants filed a motion for a new trial, in part on the ground of newly discovered evidence. A hearing was held on this motion. Defendants offered, and there were received in evidence, maps and aerial photographs.

The trial court denied the motion and defendants appeal. We reverse the judgment of the trial court and remand the cause with directions.

The cause is here for trial de novo. Both parties here

treat the exhibits, introduced on the motion for a new trial, as in evidence and each relies on them. The plaintiffs contend that they were not properly newly discovered evidence; that a hearing on that ground should not have been had; and that the exhibits should not have been admitted. Plaintiffs do not cross-appeal. We consider the exhibits as evidence for our consideration.

Defendants assign error in the refusal of the trial court to admit two photographs in evidence. Each was cumulative of other evidence in the record. It is not necessary to further consider the assignments.

Defendants further complain of error in admitting on cross-examination testimony of Mr. Krimlofski as to a conversation had with Mr. Burket obviously for the purpose of exploring the possibility of a settlement. The evidence possessed no controlling influence on the decision here made. This assignment will not be considered further in this opinion.

Without dispute plaintiffs in 1932 became the owners of a tract of land referred to as Tax Lot 5, lying west of the Missouri River with the east bank of the land described in the deed as "along the west bank of the Missouri River." The deed also described "And all accretions thereto." The evidence shows that there was then a county road along the west bank of the river and at that time was a few feet therefrom. Defendants contend that whatever accretions attached to the land attached to the county road and that they belong to the county and not the plaintiffs. There is no evidence in the record showing the title of the county to the roadway other than that which points toward an easement based on use. We do not consider the contention of controlling merit, and put it aside.

Defendants' claim of title rests on a claim of adverse possession to an island in the Missouri River. Defendants are husband and wife. This island first appeared as a sand bar in 1926. The evidence shows that they took

possession of this sand bar in 1926, planting willows on it and sinking anchor weights so as to dock boats on it. They built duckblinds on it and fished from it. By 1927 willows were growing on it. In a few years it became timbered with cottonwoods, willows, and underbrush. They then conceived the idea of making a wild life sanctuary of it. They put up "No Trespassing," "No Hunting," and similar signs. Whenever others came upon it they claimed ownership of it, ordered them off, and made their control effective. When others built hunting blinds on the island, they destroyed them. In later years they policed the property to put out and prevent fires. They granted permission to friends to use the island. At the time of the trial this island was heavily timbered, with trees going to a height of 40 to 50 feet in parts of it.

Without reciting the evidence in detail, we deem it sufficient to establish the existence of the island and adverse possession to it as such under the rules last stated in Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384: The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

The established rule is: Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430. See Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

We come then to the question of fact as to whether the accretion and reliction land involved here belongs to the defendants as owners of the island or to plaintiffs as owners of the mainland.

The land in dispute extends directly east from the plaintiffs' land.

Defendants contend that the island was originally in Iowa and now by compact between the states is in Nebraska. That situation does not enter into the decision here. Nor are we concerned with the question of the navigability of the Missouri River. The rule is: "* * * the rights of riparian owners upon the Missouri river to land formed by accretion are the same as if the river were not navigable, and * * * the common law applies in full force." Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N. W. 744, 121 Am. S. R. 740, 7 L. R. A. N. S. 316. See, also, Worm v. Crowell, *supra.*

The rules also are: Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. Ziemba v. Zeller, 165 Neb. 419, 86 N. W. 2d 190. Accordingly we will refer to the lands herein involved as accretion land without making an effort to determine where accretion ends and reliction begins.

Reference will be made to the work of the U. S. Army Engineers in controlling the Missouri River and its effect on the creation of the problem here presented. The rule as to that is: The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from

acquiring title thereto. Ziemba v. Zeller, *supra.*

We go now to the evidence as to the accretion involved.

We have referred above to the situation that the evidence shows existed in the river, in 1926 and following, showing the development of the island. The evidence is that in the early years the Missouri River had two channels, one on the Iowa side to the east of the island, and one on the Nebraska side touching within a few feet of the border of plaintiffs' land.

We discuss the exhibits chronologically. Exhibit 16 is a picture offered by defendants taken on the island in 1927 showing small willows growing thereon. This picture was excluded on the ground that it was not within the issues of the case. Parol evidence of that fact had been admitted. We deem its exclusion an obvious error and consider it here.

Exhibit 15 is a picture offered by defendants showing the existence of the island in the river, with water beyond to the east. This was taken from a point on the mainland to the immediate north of plaintiffs' land.

Exhibit 6 is an exhibit offered by plaintiffs. It is a map prepared by the U. S. Army Engineer's office in September 1930. This map shows a large island with the legend "willows" on it. The southern end lies to the east of plaintiffs' land. It shows the main channel of the river to the west of the island and touching the plaintiffs' land to the immediate east of the county road.

Exhibit 2 is a map offered by plaintiffs based on a survey made in 1931. It shows the Missouri River touching plaintiffs' land to the immediate east of the county road.

Exhibit 10 is a photograph taken in January 1935 and offered by plaintiffs. It shows the high bank of the river close to the road and ice in front where plaintiffs' son is skating.

Exhibit 9 is a picture taken in October 1935 offered by plaintiffs taken from a cabin site on a high point on their land. It is a picture looking down from an eleva-

tion on the river bank. It shows the main channel of the river in the immediate foreground and the island beyond with trees growing upon it and water between the island and the Iowa mainland.

Exhibit 22 is a map offered by the defendants prepared by the U. S. Army Engineer's office on October 29, 1936. It shows a large island in the river east and north of the plaintiffs' land with an indication of sand bars accreted thereto extending down to and opposite plaintiffs' land. It shows the main channel of the river touching plaintiffs' land as before described. It also shows dike piling and revetments completed across the main channel some distance to the north. This fixes the first definite date of the commencement of control work by the U. S. Army Engineers.

Exhibit 23, offered by defendants, is a map prepared by the U. S. Army Engineer's office dated May 5, 1937. It shows additional dikes completed across the main channel of the river to the north. It shows the island as before but not as distinct as in the previous exhibit.

Exhibit 24 is a map offered by the defendants prepared by the U. S. Army Engineer's office dated October 21, 1938. It shows additional dikes and revetments completed across the former main channel of the river. It shows a larger island to the north but nothing directly to the east of plaintiffs' land. It shows a channel to the west of the island and touching plaintiffs' land as above described.

Exhibit 25 is a like map offered by defendants dated May 1, 1939. It shows the main channel to the east of the large area of land located where the island began.

Exhibit 26 is a like map offered by the defendants dated March 20, 1940. It shows the main channel of the river to the east of the island with the island extending down to and opposite plaintiffs' land with an open water area to the west of the island.

Exhibit 7 is a like map offered by the plaintiffs dated March 29, 1940. It shows a large island extending down

to and almost opposite plaintiffs' land with an open water area to the west.

Exhibit 27 is an aerial photograph offered by defendants taken August 15, 1941, by the U. S. Department of Agriculture. It shows the main channel of the river to the east of a large island that extends down to the east of plaintiffs' land and about half the distance of their eastern boundary. It shows an open channel from the north to the south running the full length of the island to its west. This is now described in the evidence as a chute. It shows definitely for the first time a narrow accretion area, wider at the south, attached to plaintiffs' land.

Exhibit 8 is a U. S. Army Engineer's map dated 1946-1947, offered by plaintiffs. It shows the main channel of the river fully established to the east of the land here involved. To the west is a solid area of land bearing the legend "willows." This extends for the full distance and beyond the boundaries of plaintiffs' land extended to the east. It shows the chute between this land and the mainland to the west.

Exhibit 28 is an aerial photograph offered by defendants taken by the U. S. Department of Agriculture dated July 31, 1949. This shows the island now extended downstream well beyond plaintiffs' land. It shows the main channel of the river to the east. It shows the channel of the chute, then largely dry land. It shows the accretion to plaintiffs' land, above mentioned, to the west of the chute channel, and vegetation growth both to the west and east of the chute channel.

In 1954 the defendants fenced in the land on the west side. The exact location of the fence is not determinable. The discovery of the fence by the plaintiffs seems to have precipitated this controversy.

Exhibit 29 is an aerial photograph offered by defendants taken by the U. S. Department of Agriculture on June 7, 1955. It shows the main channel of the river to the east of the area involved with vegetation-covered

land extending to the west to the road on plaintiffs' land. The old outline of the bed of the chute, then dry land as described by witnesses, is clearly visible with greater growth of vegetation on a narrow strip of land to the west attached to plaintiffs' land and to the east of the chute bed also.

Exhibit 18, a photograph offered by the defendants, taken in 1956, shows this vegetation to be trees of a substantial size.

The parol testimony supports the story shown by the exhibits. We will not extend it by the recital of it more than has been done.

It is clear that an island formed in the river, in 1926 and following, between the two large channels of the river. As recited herein defendants established title to the island by adverse possession. Beginning then, as a result of the work of the Army Engineers, the main channel of the river was consolidated and flowed to the east of the island. Accretions began to form on the island and over the years its boundaries were extended to the west and south by that process, leaving for a time a channel west of the island, herein referred to as the chute. Accretions began to form then to the east of plaintiffs' land to the west of the chute and these attached to plaintiffs' land. Finally as a result of reliction the chute also became dry land.

We conclude that the accretion land east of the chute attached to and became a part of the island in defendants' ownership. The accretion land to the west of the chute attached to and became a part of plaintiffs' land.

The Supreme Court of North Dakota recently stated the applicable rule for determining the dividing line, in Hogue v. Bourgois, — N. D. —, 71 N. W. 2d 47, 54 A. L. R. 2d 633, as follows: "* * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland

eventually meet, the owner of each owns the accretions to the line of contact."

In Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34, we found "no fault" with a contention that the owners of land were entitled to all accretions to the thread of the closed channel as a matter of right.

Accordingly we find that plaintiffs are entitled to a decree quieting title in them to the accretion land here involved attached to their land from its old bank, east to the thread of the chute channel as it existed before it became dry land by reliction as shown on exhibit 29.

The defendants are entitled to a decree quieting title in them to the accretion land here involved which attached to the island which lies generally east of the thread of the chute channel as shown by exhibit 29 as it existed before it became dry land by reliction.

The plaintiffs advance the contention here that defendants must prove adverse possession, not alone to the island, but also to the land attached thereto by accretion and reliction. Such a rule, of course, would nullify any rights resting on accretion or reliction. In Roll v. Martin, *supra,* we found no fault with the contention that one who owned an island was not required to take possession of accretion land in order to establish his claim thereto as a matter of right unless someone actually had established the right thereto by adverse possession. Plaintiffs' evidence falls short of proving adverse possession to the accretion land.

Plaintiffs further argue that one of the reasons for the riparian right rule is to assure the owner of riparian lands continued access to the water of a stream and accordingly he has the right to have his land follow the stream so as to preserve his riparian right of access to the water.

Plaintiffs rely on a statement found in City of St. Louis v. Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941. That case in turn relies on Mulry v. Norton, 100 N. Y. 424. A reading of these cases reveals that the court was there

dealing with the rights of conterminous owners of mainland. The problem here presented does not seem to have been involved.

The rule is: Land, to be riparian, must have the stream flowing over it or along its border. Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486.

The fact here is that plaintiffs' land, although once riparian, is no longer riparian and it does not now have those rights that once attached to the land.

A somewhat comparable case is that of Wholey v. Caldwell, 108 Cal. 95, 41 P. 31, 49 Am. S. R. 64, 30 L. R. A. 820. There land that was once riparian, by natural forces became nonriparian. The owner claiming riparian rights asserted the right to go upon the land of others and to restore the water to its former channel. The court held that when the flow was lost, the riparian rights were lost with it.

We find no merit in the contention.

The judgment of the trial court is reversed and the cause remanded with directions to render a judgment quieting title to each of the parties to the land involved as above indicated.

If the parties cannot agree as to the location of the common boundary line, then the court is directed to receive evidence limited to that issue and to determine the exact location by metes and bounds of the thread of the chute as it appears on exhibit 29 and to decree that such line is the boundary line.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

JAMES D. LONSDALE, APPELLANT, V. UNION INSURANCE COMPANY, A MUTUAL INSURANCE COMPANY, APPELLEE.

91 N. W. 2d 245

Filed July 3, 1958. No. 34405.

1. **Pleading: Appeal and Error.** An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court.
2. **Insurance.** An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made.
3. ———. The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.
4. ———. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.
5. **Contracts.** In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract.
6. **Insurance.** The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Affirmed.*

Robert B. Waring and *John C. Gewacke,* for appellant.

Healey, Davies, Wilson & Barlow and *Patrick W. Healey,* for appellee.

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

WENKE, J.

This appeal is from the district court for Fillmore County. It involves an action brought by James D.

Lonsdale against the Union Insurance Company, a mutual insurance company, based on the medical pay coverage of a "Combination Automobile Policy." The trial court dismissed the action. Plaintiff thereupon filed a motion for new trial and this appeal is from the order overruling that motion.

Appellee issued to appellant a "Combination Automobile Policy" covering appellant's 1956 Ford Fordor Victoria with motor serial number M6FF246919. This policy was effective from September 11, 1956, to Sepember 11, 1957, and, for a premium charge of $5, covered "Automobile Medical Payments" for each person covered up to a maximum of $500.

Appellant also owned a 2-ton "15-foot box cab-over-engine" truck which he used in connection with his business of farming. The truck was not covered by the policy issued to appellant. On November 3, 1956, while appellant was using this truck to haul cattle, it overturned at a point on a public road about 2 miles north of Ruskin, Nuckolls County, Nebraska. As a result of the truck turning over appellant, who was driving it, and his wife, who was riding with him, were seriously injured. The wife subsequently died as a result of injuries she suffered in the accident.

Admittedly appellant incurred expenses of the type enumerated in the medical payment provisions of the policy in excess of $500 for both him and his wife as a result of the injuries each suffered in the accident. He herein seeks to recover the sum of $500, the maximum limit payable under the policy, for each of them, together with a reasonable attorney's fee. The question thus presented is, were appellant and his wife covered by the medical payment provisions of the policy while riding in appellant's truck?

Appellant contends that certain provisions of the policy are not printed in the size type required by subsection (4) of section 44-712, R. R. S. 1943, and, because of that fact, are not in effect but are, in fact, out of the

policy. This issue was neither raised by the pleadings filed nor by the evidence adduced in the district court. It is raised for the first time in this court on appeal. Under this situation the question is not here for our consideration. See, Hardy v. Hardy, 161 Neb. 175, 72 N. W. 2d 902; Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497; Horbach v. Butler, 135 Neb. 394, 281 N. W. 804. As stated in Horbach v. Butler, *supra*: "An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the supreme court."

In construing the policy the following principles are applicable:

"An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made." Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874. See, also, Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N. W. 903, 24 A. L. R. 191.

"The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted." Koehn v. Union Fire Ins. Co., *supra*. See, also, 29 Am. Jur., Insurance, § 166, p. 180.

"* * * in the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract." Eastep v. Northwestern Nat. Life Ins. Co., 114 Neb. 505, 208 N. W. 632.

"* * * the parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled

to have such exceptions and limitations construed and enforced as expressed." 29 Am. Jur., Insurance, § 166, p. 184.

Generally, the policy provides: "Union Insurance Company * * * Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, *exclusions, conditions* and other terms of this policy: * * *." (Emphasis ours.)

As to automobile medical payments the policy provides generally that: "Coverage C - To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services: * * *."

Division 1, under coverage C, provides: "To or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon or while entering into or alighting from *the automobile,* provided the automobile is being used by the named insured or his spouse if a resident of the same household, or with the permission of either; * * *." (Emphasis ours.)

Under the factual situation herein disclosed recovery under division 1 of coverage C, when read in connection with other provisions of the policy, particularly subsection (1) of section IV(a), is limited to when a person sustains bodily injury caused by an accident while in, upon, entering into, or alighting from appellant's 1956 Ford Fordor Victoria, the automobile specifically covered by the policy.

Division 2 of coverage C provides: "To or for each insured who sustains bodily injury, sickness or disease, caused by accident, while in or upon, or while entering into or alighting from, or through being struck by, an automobile." It is primarily with this provision that we are here concerned. The word "automobile," as therein

contained, would include the appellant's truck. See the last paragraph of subsection (4) of section IV(a) of the policy. Likewise both appellant and his wife were "insureds" within the meaning thereof. See subsection (b) of section III, "Definition of Insured." Standing alone, as thus qualified, division 2 of coverage C would cover the situation here presented. Under "Exclusions" it is provided: "This policy does not apply: * * * (i) under division 2 of coverage C, to bodily injury to or sickness, disease or death of an insured sustained while in or upon or while entering into or alighting from an automobile owned by any insured; * * *." This provision had the effect of excluding from coverage for medical payments under division 2 of coverage C any automobile owned by the appellant, an "insured" thereunder. It provided coverage for each "insured" under division 2 of coverage C as defined by subsection (a) of section III of the policy, for bodily injuries caused by accident while in, upon, entering into, or alighting from an automobile, within the meaning thereof as described by the policy, which was owned by any other person than an "insured." If appellant desired medical pay coverage for persons riding in his truck he could have provided for it under division 1 of coverage C by having the policy specifically cover it and pay a premium accordingly. This he did not do. No forfeiture is here involved for, as has already been herein stated, the question is, did the policy provisions cover under the factual situation here presented? We find that it did not.

On the back of the policy appears the following:

"When you have
Medical Expense Coverage . . .
. . . It's a comfort to know

You Your Family Your Friends	Are protected for the necessary medical, surgical, ambulance, hospital or professional nursing expenses incurred by reason of injury or death while rid-

ing in, entering or alighting from *my automobile.*
The cost is low . . .
See your agent." (Emphasis ours.)

Appellant contends this should be considered a part of the policy, citing Hessler v. Federal Casualty Co., 190 Ind. 68, 129 N. E. 325, 14 A. L. R. 1329. Therein the court said: "But, in construing a policy of accident insurance, words printed on the back of the policy, purporting to sum up what is embraced by it, constitute a part of the contract, and are to be taken into consideration in its construction." We think this language is an accurate description of the coverage actually available under division 1 of coverage C under "Automobile Medical Payments." It is in no way misleading as "my automobile" would normally be understood by any reasonable reader thereof to mean the automobile described in the policy of which it is a part.

In view of what has been said we find the judgment of the trial court dismissing appellant's action to be correct. We therefore affirm its action doing so.

AFFIRMED.

IN RE APPLICATION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT, V. SAVE THE TRAINS ASSOCIATION, APPELLEE.

91 N. W. 2d 312

Filed July 3, 1958. No. 34430.

1. **Public Service Commissions: Appeal and Error.** An order of the Nebraska State Railway Commission granting a rehearing after the case has been decided on the merits is a final order subject to review by the Supreme Court.
2. **Railroads: Public Service Commissions.** Where an application is made by a railroad company to discontinue an existing service

operated at a loss, the primary question to be determined is the public convenience and necessity therefor.

3. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable.
4. **Constitutional Law: Public Service Commissions.** Property may be as effectively taken without due process of law by long-continued and unreasonable delay in putting an end to railway commission orders on the application of an injured party, which have become confiscatory as by an express affirmance of them.
5. ———: ———. Where it appears that there is no public necessity present for the operation of passenger trains daily in each direction between two points within the state, and that such trains can be operated only at great loss to the railroad company, an order of the railway commission requiring their operation is arbitrary and unreasonable, and amounts to a confiscation of the railroad company's property without compensation.

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

Neely, Otis & Neely, Carl McGowan, and *Edgar Vanneman, Jr.,* for appellant.

Viren, Emmert, Hilmes & Gunderson, for appellee.

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

CARTER, J.

The Chicago and North Western Railway Company commenced this proceeding before the Nebraska State Railway Commission to secure permission to discontinue passenger trains Nos. 13 and 14 which operate daily between Omaha and Chadron. Objections were filed by the Save the Trains Association. The commission, after a public hearing, granted the application. The commission thereafter granted a rehearing. The railway company has appealed from the order granting a rehearing, contending that such order was arbitrary and unreasonable.

The railway company filed its application with the commission on August 15, 1956. The hearing on the application was held by the commission at Valentine, Nebraska, on July 29 through August 2, 1957. On February 7, 1958, the commission entered its findings of fact and ordered the trains discontinued as of March 15, 1958. A motion for a rehearing was filed on February 17, 1958. On March 7, 1958, the commission entered an order granting a rehearing, ordered the continued operation of the trains, and indicated that further hearings would be held at an undetermined date in the future. It is from the latter order that this appeal was taken.

The record made in this case is very voluminous, but the controlling facts are comparatively simple. The railway company shows a net loss of $5,529,000 in 1956. In 1955 it had a net income of $1,506,000. In 1954 it had a net loss of $5,249,000. Its freight revenues have been consistently good since 1951, while the operation of passenger trains has been at a progressively greater loss since 1952. The over-all picture demonstrates that freight operations have been carrying the losses in passenger operations. The evidence shows that a change in the management of the railway company was made on April 1, 1956, for the purpose of eliminating the losses that had been incurred. One of the primary purposes of the new management was to eliminate as many of the sources of loss as possible, including the elimination of passenger trains which were being operated at great loss to the company. Trains Nos. 13 and 14 are two that have been extremely costly to the railway company. For the year 1956 the loss sustained by the operation of these two trains over and above revenues was in excess of $227,000. The witness Larry S. Provo, vice president and comptroller of the railway company, estimated the actual loss in operating these trains at $750,000 to $1,000,000 per year. The out-of-pocket loss which is savable to the railway company is in excess of $623 per day.

There is evidence that some users will be inconven-

ienced by the removal of these trains from service. By and large, the evidence deals with freight service, the necessity for adequate service in moving grain, livestock, and other similar commodities. The application is for the removal of two passenger trains, and in no way interferes with the handling of freight by the railroad. It is argued that mail service will be seriously affected by the elimination of these trains. The carrying of mail is not a common-carrier function of the railroads and inconvenience with reference to it is not material to the issues. Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery, 166 Neb. 32, 87 N. W. 2d 616. It is contended that the trains are needed for the handling of express and baggage. The record does show that shipments of cream are quite heavy at times on these trains. The evidence shows that other forms of transportation are available for the movement of such commodities. Numerous truck lines operate throughout the area which have adequate facilities for the movement of such products. It is clear from the record that adequate means are available to adequately serve the communities in this respect after the discontinuance of trains Nos. 13 and 14.

It is the public necessity as distinguished from local convenience that affords the primary consideration in determining if trains operated at great loss may be discontinued. Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery, *supra*. There is a general duty imposed upon railroads to provide service when such service is necessitous. But where such public necessity does not exist, and adequate service can be had from other forms of transportation, it is the duty of the railway company to seek and the commission to approve the elimination of such unneeded and costly service. In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157; Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N. W. 2d 662; Chicago, B. & Q. R. R. Co. v. Burgess, 166 Neb. 29, 87 N. W. 2d 630.

The purpose of commission control of railroads is to

secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the investments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated. But where, as the evidence in this case demonstrates, passenger trains are operated at great loss due to a large decrease in passenger traffic, and no real public need exists for their continuance, the railway company is entitled to an order discontinuing such trains. The evidence shows that the wages of the train crews exceed by two and one-half times the passenger revenues derived from the passenger service here involved. The operation of these trains has become a drain upon the other sources of revenue by the company. The financial structure of the company has become so precarious that necessary repairs and maintenance of track, trains, and equipment has been delayed for such a period of time that their unsatisfactory condition can no longer be ignored.

The record shows that the railway company and the association, during 1954 and 1955, cooperated in an effort to increase the revenues from these two trains to avoid the necessity of their discontinuance. Additional losses occurred irrespective of these efforts. In its order of February 7, 1958, the commission stated: "Without question, there never was a more intent, sustained or lengthy campaign to divert business back to the railroad than was engaged in by all concerned than in the instant matter, but the fact is that the loss kept growing larger and larger." The evidence sustains this conclusion.

The evidence clearly demonstrates that we are in a period of economic change insofar as the transportation industry is concerned. This is particularly true of railroad passenger service. The utility of the automobile makes it much more convenient than local passenger

service. As the number of automobiles increases, passenger service on the railroads correspondingly decreases. Buses, trucks, and airplanes are contributing to the losses of the railroads in the operation of passenger trains. The elimination of branch-line passenger trains and a reduction in mainline passenger service appear certain because of the desire of the public to use other forms of transportation. The change is consistent with the desires of the public which will not be prevented or stayed by the orders of regulatory commissions. A failure to recognize the existing situation can only result in costly operations and great losses in railroad investments.

The record in this case conclusively sustains the findings of the commission in its order of February 7, 1958, authorizing the discontinuance of trains Nos. 13 and 14 as of March 15, 1958.

On February 17, 1958, the Save the Trains Association filed a motion for a rehearing. On March 7, 1958, a rehearing was granted and trains Nos. 13 and 14 ordered continued in service. No additional evidence was produced in support of the motion for a rehearing. The reasons given by the commission in its order were that progress was being made by the new management of the railway company in improving its financial structure and that the results of operations during the first 6 months of 1958 should be examined before a final determination of the issues was made. There was nothing to indicate that the public had any greater need for the trains than before. The reasons for granting the rehearing were either specious or based on pure speculation and conjecture.

We point out that the application was filed on August 15, 1956. For 2 years prior thereto every effort had been made by the parties to put these trains on a paying basis without success. The application was pending from August 15, 1956, to February 7, 1958, a period of almost 18 months before the commission entered its order. This unreasonable delay, and the losses sustained by the

railroad as a result thereof, is for all practicable purposes a taking of its property without due process of law. In Ann Arbor R. R. Co. v. Michigan Public Service Commission, 91 F. Supp. 668, the court aptly stated this principle in the following language: "Where there is no public necessity present, an order compelling the plaintiff to operate its trains under the circumstances of this case and under the conditions set out by the defendant Commission, is arbitrary and unreasonable, and carries with it the confiscation of the plaintiff's property without compensation, and denies to the plaintiff the equal protection of the laws, in violation of the Constitution of the United States." In Chicago, B. & Q. R. R. Co. v. Illinois Commerce Commission, 82 F. Supp. 368, the court commented on a similar situation in the following language: "The Illinois Commerce Commission's custom and practice of substituting a sham, for a fair, hearing by the device of granting repeated continuances for frivolous reasons with the result that an average of 18 months is required to hear and decide train-discontinuance cases that ought to be heard in 3 days and decided within 30 days thereafter involves an illegal and arbitrary dissipation of plaintiff's public utility assets in violation of plaintiff's rights under the 14th Amendment of the United States Constitution, in disregard of said Commission's obligation under the Illinois Public Utilities Act, in disregard of the policy of economical railroad operation enjoined by Congress in the Transportation Act and to the damage of the larger public interest."

But irrespective of the conclusiveness of the evidence, the commission has compelled the continued operation of these trains. When this appeal was taken the case stood in the same position as when the application for the removal of the trains was filed on August 15, 1956. The procrastination and delay on the part of the commission has resulted in a minimum loss of $623 per day since March 15, 1958. The only justification attempted is an expressed dissatisfaction with the evidence, although the

evidence on the material issues stands wholly uncontradicted. In Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 46 S. Ct. 408, 70 L. Ed. 747, the Supreme Court of the United States discussed a similar situation as follows: "For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by a long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in Okla. Gas Co. v. Russell, 261 U. S. 290, 293; Prendergast v. N. Y. Tel. Co., 262 U. S. 43, 49; Pacific Tel. Co. v. Kuykendall, supra, p. 204; and Banton v. Belt Line Ry., 268 U. S. 413, 415."

A railroad company is not required to prove its case with mathematical precision in requesting permission to remove a passenger train from service. In Baltimore & O. R. R. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209, the court described the nature of the evidence required as follows: "The burden on appellants, heavy though it is, does not require them to prove with arithmetical accuracy the cost of the transportation covered by the challenged divisions or the value of the property used to perform it, or the proportion attributable to that service. It is enough, if the evidence preponderating in their favor reasonably warrants findings sufficient to support the decree sought. Many is-

sues as to which demonstrable accuracy is impossible have to be decided by the courts. In ascertaining cost of transportation of one out of many commodities hauled by railroads it is impossible to attain precision. Mere lack of it is not ground for objection either to the evidence offered or the facts which it tends to prove." The commission is bound to follow the evidence where no substantial conflict exists. It may not make arbitrary orders based on the aspirations of communities for the best railroad passenger service, or for standby service for modes of transportation generally used, or to satisfy the demands of employees that existing jobs be continued. As we have many times said, public need constitutes the main issue, and where such need is not shown, a railway company will not be required to uneconomically operate trains and thereby deplete its assets and reduce the quality of other services it is compelled to render.

It is argued by the appellee that the Nebraska State Railway Commission has the sole power to decide applications seeking the discontinuance of trains in passenger service, and that this court is without power to regulate common carriers. This is a correct statement of the law.

When the people of this state entrusted the regulation of public utilities to the railway commission, they did not grant it a power that could be whimsically exercised. It was power that was to be exercised with reasonable promptness under law with a due regard to established facts. The exercise of power by the commission without a proper application of the law to established facts is an arbitrary exercise of power which the courts cannot condone. The fact that the regulation of public utilities was placed with a commission having some attributes of legislative, executive, and judicial authority does not clothe it with an indiscriminate discretion in the handling of its business. Its discretion is a legal one. If this were not so it could well give rise to an administrative tyranny over common carriers and public utilities similar

to that suggested in In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809.

It is urged that the order of the commission appealed from is not a final order. The case is properly before the court on the authority of In re Application of Airline Ground Service, Inc., *supra.*

We conclude that the order of the commission granting a rehearing was arbitrary and unreasonable. The commission's order of March 7, 1958, granting a rehearing is reversed, leaving in effect the order of February 7, 1958.

REVERSED.

CARIL ANN FUGATE, A MINOR, BY AND THROUGH JOHN MCARTHUR, HER NEXT FRIEND, APPELLANT, V. HERBERT A. RONIN, COUNTY JUDGE, APPELLEE.

91 N. W. 2d 240

Filed July 3, 1958. No. 34443.

1. **Statutes.** If a statute is unambiguous courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.
2. ———. A statute is not available for construction as a matter of course. If it is unambiguous there is no room for construction and courts may not search for its meaning beyond the statute itself.
3. **Courts: Infants.** Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws.
4. ———: ———. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same.
5. ———: ———. The words "the case," as used in the mandatory provision of section 43-211, R. R. S. 1943, as they relate to justices of the peace and police magistrates in counties having a population of more than 50,000, refer to criminal matters of which those courts have jurisdiction and which the presiding magistrates thereof have authority to adjudicate and, whenever such provision applies, it is mandatory upon the pre-

siding magistrate and not an optional privilege which may be exercised in behalf of the minor so charged.

6. **Criminal Law.** A preliminary hearing on a felony charge is not a "case" within the meaning of section 43-211, R. R. S. 1943.
7. **Statutes.** It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done.
8. ———. The constitutionality of a statute will not be determined unless necessary to a proper disposition of the pending case.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

John McArthur and *Edmund O. Belsheim,* for appellant.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, BOSLAUGH, JJ., and NEWKIRK, District Judge.

WENKE, J.

This is an appeal from the district court for Lancaster County. It involves an action brought therein by Caril Ann Fugate, a minor, by and through John McArthur, her next friend, against Herbert A. Ronin, county judge of Lancaster County, seeking a writ of prohibition against him as such county judge. The district court denied plaintiff the writ. She thereupon filed a motion for new trial and this appeal was taken from the overruling thereof.

The writ of prohibition, and under what circumstances a litigant is entitled thereto, is fully set out and discussed in Conkling v. DeLany, *ante* p. 4, 91 N. W. 2d 250. See, also, State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676.

At all times herein material appellee was the duly elected, qualified, and acting county judge in and for Lancaster County. On February 3, 1958, the county attorney of Lancaster County filed a complaint in said

county court charging the appellant with murder in the first degree on two counts. Appellant was arraigned thereon before appellee on February 3, 1958, and entered a plea of "Not Guilty" to both counts. Thereupon appellee ordered a preliminary hearing to be held thereon at 9:30 a. m. on March 8, 1958. On March 8, 1958, on motion of the county attorney and by agreement of the parties, the preliminary hearing was continued to March 29, 1958, at 9:30 a. m. On February 19, 1958, appellant filed a motion requesting an order of the county court transferring the case to the juvenile court of Lancaster County on the ground that at the time the alleged offenses charged were committed (January 27, 1958) appellant was 14 years of age. The record shows appellant was born July 30, 1943. Appellee overruled this motion on March 22, 1958. Thereupon this action was commenced to prohibit appellee, as county judge, from holding a preliminary hearing upon the complaint and from taking any other or further action thereon.

The fundamental question raised by this action is whether or not the appellee, as county judge of Lancaster County, was under a mandatory duty to transfer the complaint to the juvenile court. It is appellant's thought that section 43-211, R. R. S. 1943, imposed a mandatory duty upon the appellee to transfer the complaint to the juvenile court for Lancaster County when she made a motion requesting the court to do so.

The purpose of the Juvenile Court Act (Laws 1905, c. 59, p. 305), which deals with the treatment and control of dependent, neglected, and delinquent children and is now a part of Chapter 43, article 2, R. R. S. 1943, and the constitutional right of the Legislature to enact legislation in regard thereto in the manner that it did have been fully discussed by this court in State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804; Laurie v. State, 108 Neb. 239, 188 N. W. 110; Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122.

Consequently no useful purpose would be served by again dealing therewith in this opinion.

Section 43-211, R. R. S. 1943, provides: "When in any county where a juvenile court is held, as provided in section 43-204, a child under the age of sixteen years is arrested with or without warrant, such child may, instead of being taken before a justice of the peace or public magistrate, be taken directly before such court, or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court, and the officer having the child in charge, to take the child before that court. In any case the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon complaint or affidavit as herein provided. In any case, the court shall require notice to be given and investigation to be made as in other cases under this act and may adjourn the hearing from time to time for that purpose."

Section 43-204, R. R. S. 1943, referred to in section 43-211, R. R. S. 1943, and which relates to Lancaster County because its population is over 50,000, provides: "In counties having a population of more than fifty thousand, the judges of the district court, on being inducted into office, shall select one of their number to preside over what shall be termed the 'juvenile court.' The judge so selected shall serve throughout his term, unless the judges choose, in the same manner as the original selection was made, another of their number to so act. The judge of the juvenile court shall hear all cases arising under the provisions of this act, and shall give precedence thereto. He shall also hear such other cases as may be assigned to him but may transfer such other cases to another judge for hearing or trial. A special courtroom, to be designated as the 'juvenile courtroom,' shall be provided for the hearing of cases arising under the provisions of this act. The finding of the court in

such cases shall be entered in a book or books kept especially for the purpose, one of which shall be known as the 'juvenile record.' "

Section 43-202, R. R. S. 1943, provides: "The district courts of the several counties in this state, and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this act; the county court in each county shall have concurrent jurisdiction with the district court, but in counties having a population of more than fifty thousand such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county. Where a proceeding has been instituted under this act before any county court, the jurisdiction of this court over such proceedings shall continue until the final disposition thereof; Provided, appeal may be had to the district court in the same manner as is provided by law in civil cases. In all trials under this act where a delinquent child is charged with a crime, any person interested therein may demand a jury or the judge of his own motion may order a jury to try the case; Provided, in cities having a population of forty thousand and upward, the police judge thereof shall have jurisdiction under this act concurrent with the county judge, within the limit of such city."

In the construction of these statutes the following principles apply:

"If a statute is unambiguous courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.

"A statute is not available for construction as a matter of course. If it is unambiguous there is no room for construction and courts may not search for its meaning beyond the statute itself." Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

It will be noted that the mandatory provision of section 43-211, R. R. S. 1943, does not specifically refer to

county judges but only to justices of the peace and police magistrates. We have already construed this statute in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101. Therein we held: "It thus clearly appears that there is a concurrent jurisdiction between these several courts. While we are inclined to the view that the juvenile court of each county in the state has a broad discretion in the handling of all cases involving dependent, neglected and delinquent minors, however, other courts also have concurrent jurisdiction under the general criminal laws of our state, and complaints can properly be brought before all such courts by the county attorney." In this respect we held: "The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same." State v. McCoy, *supra.* We repeated this holding in Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716. Therein we held: "In 1905 the Legislature created the juvenile court. Legislation relating thereto will presently be found as Chapter 43, article 2, R. R. S. 1943. A careful study of the act clearly indicates it is not intended the juvenile court shall have exclusive jurisdiction and control of all juveniles. As stated in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101: 'Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated our laws.'

"And, 'The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same.' State v. McCoy, supra."

These holdings are in keeping with the provisions of section 83-465, R. R. S. 1943, which are applicable here. See § 83-490, R. R. S. 1943. Section 83-465, R. R. S. 1943, provides: "When a boy of sane mind, under the age of eighteen years, has been found guilty of any crime, except murder or manslaughter, in any court of record in this state, the court may order that the boy be committed to the state industrial school. A copy of the order, under

the seal of the court, shall be sufficient warrant for delivering the boy to the school and committing him to the custody of the superintendent." As we said in Lingo v. Hann, *supra*: "While we think the intent of the Juvenile Court Act is that offenders under 16 years of age, except when convicted of murder or manslaughter, should, if a sentence of confinement is imposed, be committed to the Boys' Training School rather than to the penitentiary, however, we find nothing in the law to prevent the district court from sentencing such juvenile to the penitentiary when convicted of a felony in that court." See, also, Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83.

We think the words "the case," as used in the mandatory provision of section 43-211, R. R. S. 1943, as they relate to justices of the peace and police magistrates in counties having a population of more than 50,000, refer to criminal matters of which those courts have jurisdiction and which the presiding magistrates thereof have authority to adjudicate and, whenever such provision applies, it is mandatory upon the presiding magistrate and not an optional privilege which may be exercised in behalf of the minor so charged. This is in keeping with section 83-467, R. R. S. 1943, which is applicable here. See § 83-490, R. R. S. 1943. Section 83-467, R. R. S. 1943, provides: "When a boy of sane mind, under the age of sixteen years, has been convicted before a justice of the peace or other inferior court, of any crime, it shall be the duty of the magistrate to send the boy, together with all papers filed in his office on the subject, under the control of some officer, to a judge of a court of record. The judge shall then issue an order to the parent, guardian or the person in charge of the boy or with whom the boy last resided, or any one known to be a close relative of the boy, or if the boy be alone and friendless, then to the person whom the judge shall appoint as guardian ad litem, requiring him to appear at a time and place stated in the order, to show cause why the boy should not be committed to the state industrial school." Thus con-

strued these statutes provide a uniform system throughout the state for the handling of children under 16 years of age coming before justices of the peace or magistrates of other inferior courts on criminal matters within the jurisdiction thereof. This is in keeping with the principle that: "It is the duty of the court, so far as practicable to give effect to the entire language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible." Ledwith v. Bankers Life Ins. Co., *supra.*

The functional purpose of a preliminary hearing is stated in section 29-506, R. R. S. 1943. It is in no sense a trial of the person accused in regard to his guilt or innocence. Its purpose is to ascertain whether or not a crime has been committed and whether or not there is probable cause to believe the accused committed it. If it is found that the foregoing exist then the accused should be held for trial in the district court which has jurisdiction to try the matter but failure to find that they do exist is not an adjudication of the matter and no bar to another complaint, setting forth the same charges, being filed in the same or other courts having jurisdiction to hear the same for that purpose, which would include district courts. See, Lingo v. Hann, *supra;* Callies v. State, 157 Neb. 640, 61 N. W. 2d 370; Van Buren v. State, 65 Neb. 223, 91 N. W. 201; State v. Dennison, 60 Neb. 192, 82 N. W. 628. Consequently we do not think a preliminary hearing on a felony charge is a "case" within the meaning of section 43-211, R. R. S. 1943.

We have examined the cited opinions of other courts dealing with this subject. They are of little use here because they deal with statutes relating to juveniles which are either entirely different than ours or much broader in their scope.

Constitutional questions have been raised by appellee which are not without merit if appellant's contention as to the meaning of section 43-211, R. R. S. 1943, is cor-

rect. In State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N. W. 200, we said: "It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done." In view of our holding that the mandatory provision of section 43-211, R. R. S. 1943, does not apply to preliminary hearings on felony complaints the following has application here: "Constitutionality of statute will not be determined unless necessary to proper disposition of pending case." Banning v. Marsh, 124 Neb. 207, 245 N. W. 775.

We find the trial court was correct in denying the writ and therefore affirm its action doing so.

AFFIRMED.

IN RE APPLICATION OF THE FRENCHMAN VALLEY IRRIGATION DISTRICT, A CORPORATION.

THE FRENCHMAN VALLEY IRRIGATION DISTRICT, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. EARL SMITH ET AL., APPELLEES AND CROSS-APPELLANTS.

91 N. W. 2d 415

Filed July 11, 1958. No. 34340.

1. Waters. Section 46-194, R. R. S. 1943, makes no specific requirement as to the form of notice to be given the electors with reference to an election to be held to approve or disapprove a contract to be entered into between an irrigation district and the United States of America for the sale of the irrigation facilities of such a district.
2. ———. By statute, the board of directors of any irrigation district heretofore or hereafter organized may, in its discretion, before or after making any contract with the United States of America, or the taking of any particular steps or action, commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of the terms thereof, or the

taking of any particular steps or action, shall be judicially examined, approved, and confirmed, or disapproved and disaffirmed.

3. ———. By federal statute, the Secretary of the Interior is granted authority to enter into contracts with existing irrigation districts, provided that no contract with an irrigation district shall be binding on the United States of America until the proceedings on the part of the district for the authorization of the execution of the contract with the United States of America shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid.

4. ———. By statute, the board of directors of an irrigation district may enter into any obligation or contract with the United States of America for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the federal Reclamation Act, and all acts amendatory thereof or supplemental thereto, and the rules and regulations established thereunder, or the board may contract with the United States of America for a water supply under an Act of Congress providing for or permitting such contract.

5. ———. By statute, the board of directors of any irrigation district organized under the laws of this state may enter into contracts for a supply of water for the irrigation of lands within such irrigation district with the United States of America.

6. ———. By statute, when the officers of the United States Bureau of Reclamation shall determine that any water so developed or stored is in excess of the needs of the project as then completed or is flood or unused water, the United States may contract to furnish such developed, stored, flood, or unused water, under the terms and conditions imposed by Act of Congress and the rules and regulations of the United States, to any person who may have theretofore been granted a permit to appropriate a portion of the normal flow of any stream, if the water so appropriated, shall during such portion of the year, be found insufficient for the needs of the land to which it is appurtenant. The United States and every person entering into a contract shall have the right to conduct such water into and along any of the natural streams of the state, but not so as to raise the waters thereof above the ordinary high-water mark, and may take out the same again at any point desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for losses in transit, the amount of such allowance to be determined by the Department of Roads and Irrigation.

7. ———. The contract must be construed with reference to the federal and state statutes, which are as much a part thereof as though incorporated into the body of it.
8. ———. The duty of water is such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops.
9. ———. By statute, the United States of America and every person intending to appropriate any of the public waters of the state shall, before commencing the construction, enlargement, or extension of any works for such purpose, performing any work in connection with the same, or taking any water from any constructed works, make application to the Department of Roads and Irrigation for a permit to make such appropriation.
10. ———. By federal statute, the Secretary of the Interior is authorized and directed to locate and construct irrigation works for the appropriation, development, and storage of flood and unused waters for irrigation. The federal government under the laws of this state, has a right to appropriate flood and unused waters in connection with any irrigation project constructed by the United States.
11. ———. By statute, the United States of America is authorized, in conformity to the laws of this state, to appropriate, develop, and store any unappropriated flood or unused waters, in connection with any project constructed by the United States pursuant to the provisions of an Act of Congress approved June 17, 1902, being an act providing for the reclamation of arid lands (32 Stat. L. 388), and all acts amendatory thereof and supplemental thereto.
12. ———. By federal statute, the United States is authorized to enter into contracts in a form to be approved by the Secretary of the Interior with an irrigation district organized under state law for the construction or rehabilitation of irrigation works, and providing for payment of the costs thereof by the district during the time they are in control of the United States in not more than 40 years.
13. ———. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the state, and the state shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner

in excess of 160 irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior.

14. ———. Congress has the undoubted power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of any one landowner. Having the power to dispose of the right to the use of water made available by the completion of a reclamation project, Congress is in a position to fix the terms and conditions of the use and to authorize the Secretary of the Interior to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying its legislation into full force and effect.

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

Russell & Colfer, for appellant.

Charles M. Bosley and *Robert C. Bosley,* for appellees.

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

MESSMORE, J.

This is a special proceeding brought by the Frenchman Valley Irrigation District in the district court for Hitchcock County for the approval of the organization of the district and the proceedings of the board of directors leading up to and including the making of a contract and the validity of the terms thereof, between said district and the United States of America for the sale by the district of its diversion dam and main canal, including easements, rights-of-way, and all appurtenances thereto, except natural flow water rights, and for the

purchase of storage waters through works to be constructed by the United States to supplement the district's natural flow water rights.

For convenience we will refer to the parties as designated in the district court, or to the Frenchman Valley Irrigation District as the district, and the United States of America as the United States.

The issues set forth in the pleadings are in substance as follows.

The plaintiff's petition alleged that the Frenchman Valley Irrigation District, a corporation, was duly organized under and by virtue of the irrigation laws of Nebraska on February 12, 1912, and ever since said date has had a duly elected and qualified board of three directors, and has acted as an irrigation district and conducted its business since said date, with its offices in Culbertson, Hitchcock County, Nebraska; that the said district is located in Hitchcock County, Nebraska; that the United States, through the Department of the Interior, proposed to purchase the district's irrigation system consisting of its diversion dam, main canal, easements, and rights-of-way, and all appurtenances thereto, except existing water rights, and to enlarge and rehabilitate the entire system and provide the district with storage waters from the government reservoir at Enders, Nebraska, to supplement its natural flow of waters from the Frenchman River and Stinking Water Creek; that a contract covering the subject matter was submitted to the board of directors of the district and election was held October 2, 1956, at which the electors of the irrigation district voted in favor of the contract for the sale of the irrigation system to the United States and to contract for a supplemental water supply from the government reservoir; and that on November 7, 1956, a contract was executed by the board of directors and the United States with reference to the foregoing. The prayer was for an order approving and confirming the organization of the irrigation district and the proceedings of the board

of directors leading up to and including the making of said contract, and the validity of the terms thereof.

The defendants, in their answer and objections, alleged that the lands owned by them and other persons likewise situated have been continuously irrigated from the Frenchman Valley Irrigation District and its predecessors in title under the rights and privileges granted in the opinion of R. B. Howell, State Engineer, given and entered under date of December 31, 1895, as based upon findings for the appropriation of waters from the Frenchman River and Stinking Water Creek; and that the water appropriated and owned by said Frenchman Valley Irrigation District is all of the natural flow of the Frenchman River and Stinking Water Creek for the uses and benefits of the lands irrigated by the district. The defendants then set forth certain reasons why they objected to the sufficiency of the notice in calling an election for the purpose of approving or disapproving the contract as stated in the plaintiff's petition, and alleged that certain provisions of the contract violated the Constitution of Nebraska and the Constitution of the United States, particularly Article V of the Amendments thereto, to deprive the landowners and water users in this district of their property without due process of law, and to take private property for a public use without just compensation therefor. The prayer was that the court disapprove and disaffirm said contract.

The plaintiff's reply to the answer, and answer to the objections of the defendants, specifically denied that the water appropriated and owned by the Frenchman Valley Irrigation District was all of the natural flow of the Frenchman River and Stinking Water Creek as alleged in the answer of the defendants, and alleged that the water to which said irrigation district is entitled has been fixed and limited by the Department of Roads and Irrigation of the state; and that the electors of said irrigation district were fully informed in advance of the election held on October 2, 1956, as to the contents of

the contract to be entered into between the Frenchman Valley Irrigation District and the United States. Each and every allegation contained in the said answer and objections, which were not admitted, were denied.

The trial court found that the landowners within the irrigation distrct were entitled to the beneficial use of water for irrigation from the Frenchman River and Stinking Water Creek not to exceed 1 cubic foot per second of time for each 70 acres; that the United States stored water in its reservoir from the Frenchman River during the season of the year when the flow of said river is not used for irrigation; and that by virtue of the appropriations of the district all the natural flow in the Frenchman River and Stinking Water Creek, whether impounded in a reservoir during the nonirrigation season or permitted to flow during the irrigation season, is appurtenant to the lands within said district and the right to said water is vested in the respective owners of the land in the district.

The court decreed the excess-acres provisions contained in articles 16, 17, and 18 of the contract limited and impaired the vested rights of the landowners to use the natural flow and storage waters impounded in the Enders Reservoir without due process of law; and that such provisions, except as to subparagraph a and the last sentence in subparagraph b in article 18, were inapplicable, unenforceable, and void. The court decreed that in all other respects the contract be confirmed, ratified, and approved.

The court further decreed that the organization of the district and the proceedings of the board of directors of said district relating to the election for the sale of the dam, canal, easements, and rights-of-way of the district, including the election, and the proceedings of the board leading up to and including the making of the contract be approved and confirmed.

The plaintiff filed a motion for new trial. The defendants filed a motion for modification of the decree or,

in the alternative, a motion for new trial. Both of the above motions were overruled. The plaintiff appealed and the defendants cross-appealed.

The evidence adduced at the trial consisted of records, testimony offered by the plaintiff, and stipulations as to certain facts. The defendants offered no sworn testimony, and there is little dispute in the facts. The matters in dispute resolve themselves into questions of law. For the purpose of this opinion, the facts may be stated in substance as follows.

The Frenchman Valley Irrigation District is a corporation duly incorporated as an irrigation district on February 12, 1912, to purchase an irrigation system known as the Culbertson Irrigation Ditch, and to operate it under the irrigation laws. Its boundaries are described in the plaintiff's petition and need not be set out as there is no dispute with reference thereto. On March 12, 1913, it purchased the irrigation system and all of the property in connection therewith, including all the title and interest and the water appropriation from the owner thereof. It has operated the irrigation system since that date. The water appropriated was by virtue of notices of appropriation filed by the predecessor in title in 1890, and claim for such water was filed July 18, 1895. On December 31, 1895, the State Board of Irrigation, by R. B. Howell, engineer, found and determined the priority of the appropriation from the Frenchman River and Stinking Water Creek for the lands receiving water under it dated from May 16, 1890, and determined the land to be irrigated amounted to about 15,120 acres. It was adjudicated and determined that the amount of the appropriation should not exceed 215 cubic feet per second; that neither should it exceed the capacity of said canal, nor the least amount of water that experience should thereafter indicate would be necessary for the production of crops, in the exercise of good husbandry; and further, that said appropriation should be limited, as a maximum, to 1 cubic foot per second of time, for each

70 acres to which water has been actually and usefully applied on or before September 1, 1900. The district now comprises 9,331.7 acres susceptible to irrigation.

The capacity of the canal at the present time is such as to allow irrigation every 15 days. The capacity of the new canal will permit irrigation every 10-day period. The water is taken from the Frenchman River at a point north of Palisade. There is a diversion dam at that point. The district's irrigation system is in need of repair. More water is needed by the district than it is getting with its present facilities. The present ditch will not carry the amount of water that can be diverted from the Frenchman River.

The district includes land subject to irrigation rights under the same appropriation which is located in Hayes County, based on the notice of appropriation of the waters of the Frenchman River and Stinking Water Creek filed under date of May 16, 1890.

An adjoining district is referred to in the contract. It is the Frenchman-Cambridge project, a new district, either organized or in the process of being organized, which would receive benefits by using the main canal of the district.

The property of the district proposed to be transferred by the contract is the diversion dam and the main canal. The distribution and lateral system remains in the district for operation, maintenance, and repair by the district.

It was stipulated that defendants own irrigated lands in the district as follows: Earl Smith, 117.47 acres; V. G. (Virgil) Fassler, 110.5 acres; Barbara Wagner, 269.05 acres; Wilbert H. and Patty Lou Wagner, 40 acres; and Nathaniel H. Meeker, Jr. and Gladys E. Meeker, 102.75 acres. Nathaniel H. and Gladys E. Meeker are not residents of the State of Nebraska.

The United States, through the Secretary of the Interior, filed an application with the Department of Roads and Irrigation to store water in Enders Reservoir for

the purpose of flood control and irrigation by the construction of a dam across the Frenchman River. On August 6, 1947, the application was approved subject to the rights of the riparian owners and the water rights of all persons who had acquired a right to the use of water from the river. The government has water stored at Enders by a dam constructed in 1950 in the Frenchman River. There is a device to measure the water as it goes behind the dam, and there is a measuring device for the water as it leaves the dam, so the district gets its natural flow.

The United States, through the Bureau of Reclamation, proposed to purchase the irrigation system of the district, to enter into a contract for the rebuilding and enlarging of the system, and to furnish a water supply to the district. The amount of the repayment contract is based on 20,000 acre feet provided in the contract. This was the average of water used over a period of years. The board had the government's proposal under consideration for several years.

An election was held on October 2, 1956, on the question of the sale of the irrigation works to the government and a contract for water supply. The election was in favor of the sale and contract for a water supply. The contract between the district and the United States was apparently signed November 7, 1956.

The contract provides that the district shall sell its irrigation system to the government, and in return the government will reconstruct and enlarge the system and provide the district with a regulated water supply from its storage reservoir on the Frenchman River at Enders. The contract is not for the sale of water by the government, but is to provide a service in the delivery of water for which reimbursement is to be made based on the cost of the reconstruction and enlargement of the irrigation system. It provides that storage water will not be supplied for more than 160 acres held by any one owner, and that no storage water will be furnished for any acre-

age in excess of that amount unless the owner executes a contract for the sale of the excess acres.

The purchase price of the irrigation district's facilities heretofore referred to is $247,000, payment to be made in the form of 40 annual credits of $6,180 each, to be applied as part of the amount of the district's obligation for water service covering a period of 40 years. The credit is applied on the district's annual service charge of $14,880, leaving the net amount payable by the district in the sum of $8,700. The amount of the service charge or repayment is to enable the government to recover a part of the cost of rebuilding and enlarging the system based on a delivery of 20,000 acre feet of water. The additional amount of water required for the district's needs will vary from year to year. The district will receive its natural flow, but will pay $1.50 per acre foot in addition to the annual service charge for all water delivered in excess of 20,000 acre feet, to give the district its natural flow and additional water above the natural flow to meet its needs and requirements. It was deemed more economical for the district to contract for 20,000 acre feet and thus reduce the amount of the repayment contract, even though it is necessary to pay $1.50 per acre foot above 20,000 acre feet. If the district contracted for a larger amount than 20,000 acre feet, the repayment contract would be increased. If more water is needed, it can be purchased; if not needed, the district will not pay for water under a larger repayment contract that is not used. If the amount for which the district contracts is more than needed, it can be expected that the excess will be wasted. The desire of the government is to conserve water.

The defendants contend in their cross-appeal that the trial court erred in failing to sustain their objection that the notice given by the district was insufficient, and not in accordance with the provisions of law therefor, for the election held in the district upon the contract involved in this cause.

Section 46-129, R. R. S. 1943, provides in part: "Notice of such election shall be given by posting notice thereof in three public places in each of the election precincts in the district for at least twenty days and also by publication of such notice in some newspaper published in the county where the office of the board of directors is kept, once each week for three successive weeks. Such notice shall specify the time and place of holding the election and shall contain a brief summary of the proposition involving the proposed conveyance. Such election shall be held and the result thereof determined and declared in conformity with the provisions of law governing the election of officers in such district, as nearly as may be practicable. No informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted."

The record discloses that the secretary of the Frenchman Valley Irrigation District posted notices of the election to be held October 2, 1956, in said district, one copy of the notice in the Bank of Culbertson and one in the United States post office of Culbertson. The posted notices were identical to notices published in two newspapers, namely the Culbertson Progress and Palisade Times.

An affidavit by an employee of the district stated that on September 10, 1956, he posted a notice of election to be held October 2, 1956, in said district, which notice was identical with the published notices in the two newspapers heretofore mentioned. This notice was posted in the Frenchman Valley Bank at Palisade, Hitchcock County, Nebraska.

Without detailing the exhibits relating to the notices given with reference to the election due to the length of the subject matter contained therein, suffice it is to say that the notices of election stated the purpose thereof in a general way by setting forth the question of whether or not the irrigation district should enter into a contract with the United States for the sale of its irrigation sys-

tem, but not including its natural flow rights, for $247,000 payable by giving the district credit in 40 annual installments; that the contract provided for the rehabilitation of the irrigation district and for the delivery of water to the district from storage works to supplement the district's natural flow waters; and that the district pay the United States an annual charge for the delivery of water, less the annual credit to the district. The electors were informed that the proposition to be voted upon involved the sale and a contract with the United States for a water supply.

As noted, the statute requires publication in one newspaper. However, notices were published in two newspapers in the county in order to make certain that the electors were notified of the election to be held. The notices stated that a copy of the proposed contract could be examined at the Bank of Culbertson and at the office of the irrigation district in Culbertson. In addition, it was stated that copies of the contract would be posted at the polling place on the day of the election. Copies of the contract were available to the electors at the Bank of Culbertson and the office of the irrigation district 20 days prior to the election, and there were several copies of the contract at the polling place on election day.

There were three meetings of the electors held prior to the election at which the matter of entering into the contract was thoroughly discussed. The secretary of the district mailed each of the electors a notice of the meetings. The first meeting was held on September 29, 1955. At the meeting, the contract was read and the matter discussed. The next meeting was held on March 16, 1956, at which time the contract was read and discussed, and notice was given to the electors of such meeting. The last meeting was held on September 27, 1956. The electors were given written notice in advance of such meeting. The contract was read and discussed at each meeting. At the meeting in March 1956,

a mimeographed sheet showing the high points of the contract was handed out to the electors. Copies of the same were mailed to the electors with the notice of the meeting.

The question of the sale of the irrigation works and the matter of entering into a contract for water supply with the United States government was a matter of wide interest and was thoroughly discussed by the electors for a period of over a year prior to the election. The board of directors had this proposal under consideration for several years prior to the election.

The requirements for notice of election are contained in several sections of the statutes. In section 46-1,145, R. R. S. 1943, it is said: "If such contract provides for payments to be made extending for a period of more than one year from the date of making the contract, the board of directors of such irrigation district shall submit the contract to the legal voters of the district at any general election, or at a special election called therefor for the approval or disapproval of the contract." It is further provided in this section: "The notice of the election need not give the entire contract but shall be sufficient if it shall state in a general way the substance of the proposed contract." In addition this section provides: "If a special election is called for such purpose the notice of election, conduct of the election and canvass of votes shall so far as practicable be the same as elections held for the purpose of voting upon the issuance of bonds."

Section 46-194, R. R. S. 1943, provides in part: "Notice of such election must be given by posting notice in three public places in each election precinct in the district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks."

The defendants contend that there is a vital variance

in the proposition submitted by the notices and as stated upon the ballot from the actual provisions of the contract itself; that the notices and ballot directly state that the United States shall deliver storage water to supplement the district's natural flow of water from the Frenchman River; that the contract states that additional water may be supplied if available; that no mention is made of water originating and flowing in the Stinking Water Creek, which is under the district's original water rights and a part thereof; and that the matter as submitted by the notice and ballot states the sale to be for the consideration of $247,000, however article 10 of the contract adds the provision that any money expended to adequately acquire title to said property shall be deducted from the stated consideration.

The record discloses, from the testimony of Paul H. Berg, a civil engineer and project manager employed by the Bureau of Reclamation, in explanation for the reason for inserting the words "if available," that the amount of water cannot be guaranteed during the year when the total flow of the river is not sufficient to fulfill the contract, but the district would get all of the natural flow of water from the Frenchman River. It is obvious that if due to moisture conditions there is no water in storage, it is impossible to deliver to the district more than the natural flow of the river.

With reference to the complaint made by the defendants that no mention was made in the notices or ballot of the water originating and flowing in the Stinking Water Creek, which is under the district's original water rights, we believe there is no basis for this complaint, because the contract provides that the district shall have all of its natural flow water rights and, in addition, the two streams merge at a point above the point of diversion, so the Frenchman River carries its flow and that of the Stinking Water Creek after they merge and from that point the stream is known only as the Frenchman River.

With reference to the contention that the notice and ballot stated that the sale price of the irrigation works was for $247,000 but that article 10 of the contract provided that any money expended to adequately acquire title should be deducted from the consideration, the sale of the irrigation works is no different than any other sale. If the district does not have title to any of its system of works, the district must compensate the government for the amount expended to acquire title. This provision of the contract, as well as others, was fully explained to the electors. The record shows no complaint made with reference thereto.

From our research, recognizing the various types of notices that must be given relating to elections, the manner in which the same are given or should be given, and the sufficiency or insufficiency thereof, the statement in 18 Am. Jur., Elections, § 110, p. 248, is pertinent. It states: "The effect of an irregularity in the giving of the prescribed notice may depend upon, or be affected by, the character of the election. It is clear that since an entire failure to give the notice required by statute does not necessarily avoid a general election, an imperfect or defective notice which does not mislead electors so that they lose the right to exercise their franchise certainly will not do so. It is equally clear in the case of special elections wherein the necessity for notice is so much more urgent that the rule as to compliance with statutory requirements in the giving of notice should be much more strictly enforced. Considerable liberality is, however, allowed even in these elections and it is a rule of pronounced authority that the particular form and manner pointed out by a statute for giving notice is not essential, provided, however, there has been a substantial compliance with statutory provisions. Following this rule, it has been held that where the great body of electors has actual notice of the time and place of holding the election and of the questions submitted, the requirement as to notice is satisfied. Thus, the formali-

ties of giving notice, although prescribed by statute, are frequently considered directory merely in the absence of an express declaration that the election shall be void unless the formalities are observed. This liberal rule is based upon the theory that where the people have actually expressed themselves at the polls, the courts are strongly inclined to uphold, rather than to defeat, the popular will." See, also, 29 C. J. S., Elections, § 73, p. 97.

In Hemmi v. James, 164 Wash. 170, 2 P. 2d 750, the following was quoted with approval from State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 P. 958, 58 Am. S. R. 39: "The rule established by an almost unbroken current of authority is that the particular form and manner pointed out by the statute for giving notice is not essential, and where the great body of the electors have actual notice of the time and place of holding the election, and of the questions submitted, this is sufficient. The vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election." Many cases are cited in Mullen v. Doherty, *supra,* to the same effect. See, also, Natural Products Co. v. DuPage County, 314 Ill. 74, 145 N. E. 298; England v. McCoy (Tex. Civ. App.), 269 S. W. 2d 813.

Section 46-194, R. R. S. 1943, makes no specific requirement as to the form of notice to be given to the electors with reference to an election to be held to approve or disapprove a contract such as in the instant case. As we view the record and the authorities heretofore cited relative to the notice given in the instant case, we conclude that there was substantial compliance with the statutory provisions requiring notice. There is no evidence that the electors were in any respect misled. We conclude that the defendants' assignment of error cannot be sustained.

Section 46-1,151, R. R. S. 1943, provides in part: "The

board of directors of any irrigation district heretofore or hereafter organized may, in its discretion, before or after the making of any contract with the United States * * * or the taking of any particular steps or action, commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of any of the terms thereof, * * * or the taking of any particular steps or action, shall be judicially examined, approved and confirmed, or disapproved and disaffirmed."

The Act of Congress of May 15, 1922, 43 U. S. C., § 511, p. 6320, grants authority to the Secretary of the Interior to enter into contracts with existing irrigation districts: "Provided, That no contract with an irrigation district under this section and sections 512 and 513 of this title shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

Section 46-126, R. R. S. 1943, provides in part: "The board (board of directors of an irrigation district) may enter into any obligation or contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the Federal Reclamation Act, and all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any Act of Congress providing for or permitting such contract, * * *."

Section 46-1.143, R. R. S. 1943, provides in part: "The board of directors of any irrigation district organized under the laws of this state may enter into contracts for a supply of water for the irrigation of lands within such

irrigation district with * * * the United States of America. The source of supply of such water may be either within or without the boundaries of the State of Nebraska, and the water supply may be either the entire supply of water for such district or to supplement an appropriation already made by such district."

Section 46-273, R. S. Supp., 1955, provides in part: "When the officers of the United States Bureau of Reclamation shall determine that any water so developed or stored is in excess of the needs of the project as then completed or is flood or unused water, the United States may contract to furnish such developed, stored, flood, or unused water, under the terms and conditions imposed by Act of Congress and the rules and regulations of the United States, to any person who may have theretofore been granted a permit to appropriate a portion of the normal flow of any stream, if the water so appropriated, shall during such portion of the year, be found insufficient for the needs of the land to which it is appurtenant. The United States and every person, entering into a contract as herein provided, shall have the right to conduct such water into and along any of the natural streams of the state, but not so as to raise the waters thereof above the ordinary high water mark, and may take out the same again at any point desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for losses in transit, the amount of such allowance to be determined by the Department of Roads and Irrigation."

The foregoing statutory provisions disclose that a special proceeding may be had in the district court with reference to the confirmation of a contract between an irrigation district and the United States. In addition, the above sections of the statute disclose that the board of directors of an irrigation district may enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of waters therefrom and for

a supply of water to supplement an appropriation already made by said district under the provisions of the federal Reclamation Act and the statutes of Nebraska.

The purpose of the contract in the instant case is to provide the district with a supplemental supply of water from storage works and to have water available in larger quantities for use during the growing season so the landowners may irrigate more often than they do at the present time.

In the case of Livanis v. Northport Irrigation Dist., 121 Neb. 777, 238 N. W. 757, this court said: "However, the contract must be construed with reference to the federal and state statutes, which are as much a part thereof as though incorporated into the body of it. The powers, duties and liabilities of the district and the United States are only such as each is authorized by statute to assume. The federal statute applicable to this case is 43 U. S. C. A., secs. 523, 524. These statutes authorize the secretary of the interior to dispose of surplus water impounded for the purpose of irrigating public lands to, among others, irrigation districts. * * * Does this create a new type of irrigation district? Possibly not, considered as a corporate entity. But it does enable the district to contract for delivery at the land for water, without liablity for negligence in the construction, operation and maintenance of the ditches of another, who is a common carrier so far as the owners of land in the district are concerned. * * * The statutes of the state may not create a new type of district, but they do place upon districts a different function and duty, and they do specificially authorize such a contract as the one in question."

This court has held that an irrigation district may enter into a contract with the United States for a water supply as provided in sections 46-1,147 to 46-1,150, R. R. S. 1943, and have an adjudication by a special proceeding in rem for the approval and confirmation of the organization of the district and the proceedings of the board of directors thereof leading up to and including

the making of a contract. See Frenchman-Cambridge Irrigation Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692.

In the case of Frenchman-Cambridge Irrigation Dist. v. Ferguson, *supra,* it is said: "It will be observed that the very provisions of the statute itself gave the district court jurisdiction, power, and authority to decide the issues presented in such a proceeding, which the district by its own petition identically prayed that it should do. Only recently this court recited the legal history, attested the constitutionality of similar confirmatory proceedings, and called attention to the fact that they were special proceedings in rem, wherein, upon proper legal notice, jurisdiction was given the district court to render a valid judgment upon the issues appropriately involved in the particular case presented. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N. W. 2d 397."

The above language indicates that the court, in the construction of a contract, has power to declare an objectionable article thereof to be invalid. See, Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. M. 287, 258 P. 2d 391; Owl Creek Irrigation Dist. v. Bryson, 71 Wyo. 30, 253 P. 2d 867.

We make this observation at this point for the reason that the defendants, in their cross-appeal, attack certain articles of the contract.

The plaintiff assigns as error the following: (1) The trial court erred in determining that the Frenchman Valley Irrigation District has a vested right in all the natural flow of the Frenchman River and Stinking Water Creek; (2) the trial court erred in finding that the right to the floodwater and unused water in the reservoir of the United States at Enders, Nebraska, which is stored when not needed for irrigation, is vested in the landowners in the Frenchman Valley Irrigation District by virtue of a prior appropriation by said irrigation district; (3) the trial court erred in finding that the use of the

storage water cannot be limited by contract between the United States and the irrigation district to 160 irrigable acres; (4) the trial court erred in finding that the provisions of the contract for the sale of land owned by an individual in excess of 160 acres as a condition precedent to the right to receive storage water for more than 160 acres are in violation of the due process of law provisions of the federal and state Constitutions and are inapplicable, unenforceable, and void; and (5) the trial court erred in overruling the plaintiff's motion for a new trial, or in the alternative to vacate and set aside that part of the decree in which articles 16, 17, and 18 of the contract between the United States and the Frenchman Valley Irrigation District were held to be invalid, and to approve said articles and the contract in its entirety.

While the answer of the defendants indicates that the landowners in the district are the owners of the appropriative water rights which run to each and every acre of the district by virtue of the water right granted to the district and that the landowners of the district have a vested right in all of the flow of the Frenchman River and Stinking Water Creek, the defendants' brief indicates that they do not contend that the district owns all of the water of the Frenchman River and Stinking Water Creek, but do contend that the district and the landowners in it possess the sole right to the use of the natural flow of such streams to the extent required for irrigation purposes.

We believe the law is well settled in this state that the appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes in the growing of crops and within the limits of the capacity of the diversion works, and all waters not so needed or used are subject to subsequent appropriations for similar purposes. The appropriator of water of a stream does not acquire ownership of such water. A clear indication of the right of landowners to use water for irrigation purposes is exemplified by the following cases.

In Enterprise Irrigation Dist. v. Willis, 135 Neb. 827, 284 N. W. 326, the court recognized the principle of the beneficial use of water in the following language which would be applicable to the district in the instant case under its appropriative rights: "It is a principle of the common law that one may not divert more water, even under a valid appropriation, than he can put to a beneficial use. While many elements must be considered in determining whether water has been put to beneficial use, one is that it shall not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops. The extent to which landowners need and are entitled to have the benefit of irrigation water under a vested appropriation ordinarily depends upon aridity, rainfall, location, soil porosity, adaptability to particular forms of production and the use to which the irrigable lands are put. In other words, the duty of water may be defined as such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops. 2 Kinney, Irrigation and Water Rights (2d ed.) secs. 902 and 903."

In Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. S. R. 647, 60 L. R. A. 889, the court recognized that a riparian owner's property right in water is usufructuary only. It was held: "The riparian owner acquires title to his usufructuary interest in the water when he secures the land to which it is an incident, and the appropriator acquires title by appropriation and the application of the water to some beneficial use; * * *." The court said: "In the light of the provisions of the act of congress as construed by the supreme court of the United States, the different acts of the legislature of this state relating to the appropriation of the waters flowing in the streams thereof, and taking notice of those historical facts connected with the development of which we have made mention, the conclusion appears to us irresist-

ible that every appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto, or who has lost his right, once acquired by either grant or prescription. Assuming, then, as we think should be done, that the right of acquiring an interest in the use of water by appropriation when applied to the beneficial purposes of agriculture has existed in this state since its early settlement in those portions where irrigation is found to be necessary, * * *."

Section 46-233, R. S. Supp., 1955, provides in part: "(1) The United States of America and every person hereafter intending to appropriate any of the public waters of the State of Nebraska shall before (a) commencing the construction, enlargement, or extension of any works for such purpose, (b) performing any work in connection with the same, or (c) taking any water from any constructed works, make an application to the Department of Roads and Irrigation for a permit to make such appropriation."

Under Title 43, U. S. C., § 371, p. 6290, et seq., the Secretary of the Interior is authorized and directed to locate and construct irrigation works for the appropriation, development, and storage of flood and unused waters for irrigation. The federal government, under the laws of the State of Nebraska, has a right to appropriate flood and unused waters in connection with any irrigation project constructed by the United States, as indicated in section 46-233, R. S. Supp., 1955, and also as provided for in section 46-273, R. S. Supp., 1955, on the appropriation of said waters, in part, as follows: "The United States of America is hereby authorized, in conformity to the laws of the State of Nebraska, to appropriate, develop, and store any unappropriated flood or unused waters, in connection with any project constructed by the United States pursuant to the provisions

of an Act of Congress approved June 17, 1902, being an act providing for the reclamation of arid lands (32 Stat. L. 388), and all acts amendatory thereof and supplemental thereto."

Pursuant to the above sections of the statutes, the Secretary of the Interior of the United States filed an application with the Department of Roads and Irrigation of this state to store water in Enders Reservoir for the purpose of flood control and irrigation by the construction of a dam in the Frenchman River. The Department of Roads and Irrigation of this state approved the application and a permit was granted for such purpose, subject to the rights of prior appropriators.

In the case of United States v. Tilley, 124 F. 2d 850, in discussing the above provisions of the Nebraska statutes, the court said: "This language certainly evidences no intention to restrict in any respect the scope of the rights that might be acquired by the United States under a general appropriation, but rather, in a hospitable spirit, to give the fullest recognition to such rights and to their free use in the development and accomplishment of the purpose of the reclamation project."

The trial court invalidated the right of the United States to appropriate and store water in Enders Reservoir and to dispose of it as state and federal laws require. The landowners in the district do not have a vested right in the flood and unused waters. The trial court erred in so holding.

The defendants contend that articles 16, 17, and 18 of the contract here involved violate the due process clause of the state and federal Constitutions. The above articles were inserted in the contract pursuant to the requirements contained in section 46 of the act of May 25, 1926, 43 U. S. C., § 423e, p. 6302.

Article 16 provides: "a. As used herein, the term 'excess land' means that part of the irrigable lands within the District in excess of 160 acres held in the beneficial ownership of any single person; or in excess of 320 acres

held in the beneficial ownership of husband or wife as joint tenants or as tenants in common. The term 'large landowner' means an owner of excess lands, and the term 'nonexcess land' means all irrigable land under the project which is not excess land as defined herein.

"b. Each large landowner as a condition precedent to the right to receive water for any of his excess lands shall: (1) Before the initial delivery date or before the expiration of six months from the announcement thereof, whichever occurs first, execute a valid recordable contract in form satisfactory to the Secretary, agreeing to the provisions herein contained and agreeing to dispose of his excess lands in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved appraised value of such excess land, and within a period of ten years after the date of the execution of said recordable contract, and agreeing further that if said land is not so disposed of within said period of ten years, the Secretary shall have the power to dispose of said land subject to the same conditions on behalf of such large landowner subject to conditions all as herein provided; and the District agrees that it will refuse to deliver water to any large landowner other than for his nonexcess lands until such owner meets the conditions precedent herein stated."

Subparagraph (2) thereunder makes reference to notice, which we deem unnecessary to set out.

Article 17 relates to the valuation and sale of lands, the appointment of appraisers, and other matters relating to the subject of the sale of excess lands.

Article 18 relates to existing water rights. Paragraph "a" thereunder provides: "Water diverted to the District pursuant to this contract to which the District has existing rights as water of natural flow at the time of diversion is herein termed 'natural flow water.' All other water diverted and furnished to the District pursuant to this contract is herein termed 'project water.' The

natural flow water and the project water must of necessity be transported through the same project facilities to reach District lands. Notwithstanding such mingling of water, the provisions of Articles 16 and 17 shall be applicable to the quantity of water representing project water and shall not affect the quantity of water representing natural flow water."

Paragraph "b" provides: "The District will provide and maintain separate outlets from its distribution system for nonexcess and excess lands, as defined in Article 16 not covered by recordable contract. The District will install, operate, and maintain water measuring equipment at delivery points to excess lands not covered by recordable contract. Measuring devices installed and maintained by the United States in works constructed by the United States will be used to measure both the District's natural flow water and project water delivered to the District pursuant to this contract."

The controlling language on this phase of the contract is the portion of 43 U. S. C., § 423e, p. 6302, which authorizes the United States to enter into contracts in a form to be approved by the Secretary of the Interior with an irrigation district organized under state law for the construction of irrigation works, and providing for payment of the cost thereof by the district in not more than 40 years. Apparently desirous of taking advantage of this legislation, the state enacted sections 46-126 and 46-1,143, R. R. S. 1943, heretofore set out.

The part of section 423e, 43 U. S. C., above mentioned, dealing with excess land, or 160-acre limitation, reads as follows: "Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing

and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; * * *."

It was the excess-acres provision that the trial court refused to approve on the ground that the landowners in the district had a vested right in the water appropriated by the government and that such provisions constituted a taking of property without due process of law. As noted by a reading of article 18, the excess-lands provisions of the contract under articles 16 and 17 of the contract are made applicable only to the project water and not to the natural flow water as it is defined in the contract. Referring to article 18a, it is specifically provided that the excess-acres provision shall not affect the quantity of water representing natural flow water. The position of the defendants is that they have a vested right to all of the water from the Frenchman River and Stinking Water Creek by virtue of water right granted to the irrigation district.

There is nothing in the Reclamation Act which compels an individual who owns more than 160 acres of land to sell any of his land as a condition to receiving water sufficient for 160 acres. He may retain all of his land, receiving federal project water for the first 160 acres, and irrigate the remainder of his land under his natural flow

water rights. It is only where he elects to request delivery of project water for the portion of his land in excess of 160 acres that he may be compelled to dispose of the excess land within a period of time fixed by the Secretary of the Interior.

The 160-acre limitation provisions of the reclamation laws have been specifically considered in several cases, and have been a controversial issue in the courts of this country over a considerable period of time. It would unnecessarily lengthen this opinion to analyze all of the cases relating to this subject. However, we deem it necessary to set out at some length a few of such cases to disclose what the majority of the courts of this country hold with reference to this part of such a contract.

In Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 153 P. 425, the irrigation district filed a petition for the examination, approval, and confirmation of a contract between the district and the United States under which the district was to be supplied with supplemental water through the works to be constructed by the United States. The contract was written under the provisions of the Warren Act which provided that water should not be delivered to any one landowner in excess of an amount sufficient to irrigate 160 acres. The defendant, who was the owner of land in excess of 160 acres, objected to the contract and the provision thereof relating to excess acres. The court, in discussing this limitation, pointed out that the restriction related to the use of water, and in sustaining the contract said: "It will, therefore, be observed that the act of Congress of February 21, 1911, known as the Warren Act, and the subsequent act of Congress passed August 13, 1914, known as the Reclamation Extension Act, make no provision for residence upon the lands to be irrigated from the waters of a government project. The acts of June 17, 1902, and of February 21, 1911, both provide, however, that water shall not be furnished from any such

reservoir or delivered through any such canal or ditch to any one land owner in excess of an amount sufficient to irrigate 160 acres. Consequently, any owner of land within a government project or an irrigation district cannot secure the use of water from a government project in excess of an amount sufficient to irrigate 160 acres, whether he owns more than that amount of acreage in such district or not.

"The regulations of the Secretary of the Interior, heretofore referred to, contain the following provision: 'Holders of more than 160 acres of irrigable land within a reclamation project must sell or dispose of all in excess of that area before they can receive water.' * * *

"This provision of the contract is strenuously protested against by appellants for the reason, as they contend, that a land owner within the district who owns land in excess of 160 acres would be forced to dispose of all the lands he possesses in excess of 160 acres, or suffer the consequences of being taxed for all his lands, yet be denied water for the same in excess of 160 acres. The restriction under the above regulation is to the use of water. The land owner who has land in excess of 160 acres may permit the whole thereof to be assessed with a government water right rather than insist that only 160 acres be so assessed, as, although he might be able to secure only enough water to irrigate 160 acres for his own use, the balance of his land would be provided with a permanent water right which he might dispose of within a reasonable time; or, upon the apportionment of benefits, it may be determined that none of his land would be liable to assessment of benefits for a water right, or that no greater portion of his land than 160 acres would be susceptible of irrigation and to the assessment of benefits.

"There can be no doubt that Congress has the power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of an individual, * * *." The contract with the

160-acre limitation was approved. The court held: "Congress has the undoubted power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of any one land owner. Having the power to dispose of the right to the use of water made available by the completion of a reclamation project, Congress is in a position to fix the terms and conditions of the use and to authorize the Secretary of the Interior to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying its legislation into full force and effect. * * *" See, also, In re Goshen Irrigation Dist., 42 Wyo. 229, 293 P. 373; Klamath County v. Colonial Realty Co., 139 Or. 311, 7 P. 2d 976; Saylor v. Gray, 41 Ariz. 558, 20 P. 2d 441.

One of the more recent cases is Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. M. 287, 258 P. 2d 391, decided in 1953. This case upheld the validity of the 160-acre limitation of the federal Reclamation Act. This was an action to determine the validity of the contract between the United States and the district. The contract involved the delivery of water under vested rights as well as supplemental water provided through the construction of the project works which had previously been constructed, and under the contract they were being reconstructed and rehabilitated. Section 32 of the contract provided: "The irrigation water supply furnished through the project works constructed or rehabilitated in pursuance of this contract shall be delivered in accord with the excess land provisions of the Federal Reclamation laws and regulations of the Secretary promulgated thereunder; Provided, that nothing in such regulations shall interfere with any vested water right as provided in Section 8 of the Reclamation Act of June 17, 1902, * * *."

The Justice who wrote the opinion on the validity of the contract apparently was under the impression that

the 160-acre limitation applied to vested water rights, and said: "The attempt to limit the delivery of water to those having vested rights to more than sufficient to irrigate 160 acres is, in my opinion, clearly unconstitutional, although I freely admit the right of the United States to limit the use of new or additionally developed water to 160 acres. As the majority hold otherwise, my views on this point become my dissent on this point."

The Chief Justice concurred in the opinion on the validity of the contract, except that part with reference to invalidity of the 160-acre limitation, to which he dissented, and was joined by other members of the court in the dissent. This resulted in sustaining the excess-acre limitation as contained in the contract. The Chief Justice on this phase of the contract said: "The opinion proposed by Mr. Justice McGhee for disposition of this appeal meets with my approval in the main, indeed, in all respects except as disagreement with it shall be pointed out in what is said hereinafter.

"The first question resolved by him which brings about conflict in our views is the excess-land provision, sometimes called the 160-acre limitation. His discussion of it is initiated by quoting 1941 Comp., Sec. 77-3112, declaring the limitation to be in accord with the declared public policy of this state, followed by quoting Article 32 of the contract providing * * * (which we have heretofore set out) and closing with the proviso: '* * * Provided, that nothing in such regulations shall interfere with any vested water right as provided in Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388), and in Section 203 Title II, Flood Control Act of June 30, 1948 (62 Stat. 1171).'

"Now just what is the excess-land proviso, or 160-acre limitation, to be found in the contract over which division in the court has developed as disclosed by a statement of the views of Mr. Justice McGhee on the subject in the opinion prepared by him? The controlling language on this phase of the contract is a por-

tion of the Federal Reclamation law to be found in U. S. C. A., Title 43, as section 423e; authorizing the United States to enter into contracts in a form to be approved by the Secretary of the Interior with an irrigation district or districts organized under state law for the construction or rehabilitation of irrigation works; and providing for payment of the cost thereof by the districts during the time they are in control of the United States, in not more than forty years. It was to enable irrigation and conservancy districts in our state to take advantage of the spirit of cooperation reflected by legislation such as this enacted by the Congress that caused the New Mexico legislature to enact L. 1939, c. 148, pursuant to which the contract before us was executed. * * * (The portion of the section dealing with the excess lands, or 160-acre limitation we have previously quoted in the opinion and will not repeat here in connection with the cited opinion.)

"We should not, without a thorough understanding of just what the excess-acreage limitation does, strike it down as overriding constitutional barriers sought to be raised against it. It is not a confiscation of the water user's land. Even though he refuses to comply with the conditions imposed by the limitation, he is not denied water for the 160 acres within the limitation. The excess acreage limitation does not require that he sell excess land on the penalty of a denial of further government service. It merely limits him to 160 acres' irrigation of land held in beneficial ownership, or 320 acres held by husband and wife in beneficial ownership as joint or community property. Water from unavoidable seepage or percolation is not forbidden 'furnishing' of water under the contract. The owner has 10 years within which to make any sale of excess land at its fair bona fide value at date of appraisal in a manner prescribed by Secretary of Interior. The land will carry its fair market value as irrigated and as enhanced by any existing construction but must exclude any

increment of value arising from the construction of the project about to be undertaken."

The Chief Justice quotes the following from 38 Cal. Law. Rev. 603 (1950): " 'The acreage limitation provisions of the federal reclamation laws, are not new. The first such provision of general application appeared in Section 5 of the original Reclamation Act of 1902. The most recent enactment of general application is Section 46 of the Omnibus Adjustment Act of May 25, 1926. This particular federal statute is the one applicable to the Central Valley Project, and the inclusion of its requirements in water service and repayment contracts with irrigation districts in the Central Valley therefore is a mandate by the Congress, and not open to a bargaining process during contract negotiations.' "

The Chief Justice further said: "It is interesting to note that although the excess acreage limitation, in one form or another, has been a part of the Federal Reclamation law for more than 50 years, not a single case in an appellate court can be cited holding it invalid, or subject to constitutional barriers invoked against it. It has been involved to a greater or less extent in certain decisions of several western states and in one federal case coming to our attention. See Nampa & Meridian Irr. Dist. v. Petrie, 28 Idaho 227, 153 P. 425; Saylor v. Gray, 41 Ariz. 558, 20 P. 2d 441, 444; Klamath County v. Colonial Realty Co., 139 Or. 311, 7 P. 2d 976; In re Goshen Irr. Dist., 42 Wyo. 229, 293 P. 373; Shoshone Irr. Dist. v. Lincoln Land Co., D. C., 51 F. 2d 128."

On June 23, 1958, the Supreme Court of the United States released its opinion in the following four cases: The Ivanhoe Irrigation District and the State of California, Appellants, v. Courtney McCracken, et al.; The Madera Irrigation District and the State of California, Appellants, v. Carl F. Steiner, et al.; The Madera Irrigation District, Appellant, v. Phillip and Jane E. Albonico; The Santa Barbara County Water Agency, Appellant, v. Maurice A. Balaam, et al., 356 U. S. —,

78 S. Ct. 1174, 2 L. Ed. 2d —. The background and history of these four cases is deemed unnecessary to relate. Specifically involved in the cases were two statutory enactments. The one of primary interest here is section 5 of the Reclamation Act of 1902, 32 Stat. L. 389, 43 U. S. C., § 431, p. 6304, substantially reenacted in section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. L. 524, 43 U. S. C., § 423e, previously referred to in this opinion.

Also involved is section 8, 32 Stat. L. 390, 43 U. S. C., §§ 372, 383, pp. 6290, 6293. This section provided in substance that nothing in the act should be construed as affecting or intending to affect or to in any way interfere with the laws of the state relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of the act should proceed in conformity with such laws, and nothing therein should in any way affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; provided, that the right to the use of water acquired under the provisions of the act should be appurtenant to the land irrigated, and beneficial use should be the basis, the measure, and the limit of the right.

The trial court in the Santa Barbara County confirmation case, contrary to the action in the other cases, upheld the contract and granted confirmation. The other cases, relating to the excess-land provision, declared the same invalid and unenforceable, and as conflicting with both the state law and the Reclamation Act. In other words, the court found the application of the excess-land provision to be unconstitutional.

In its opinion, the Supreme Court of the United States said: "From the beginnings of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits there-

from be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water. See Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L. J. 477."

The court further said: "Appellees urge, however, that the federal statutes requiring insertion of these provisions in the contracts are unconstitutional as a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments. They assert that the excess acreage provisions amount to a taking of vested property rights both in land and irrigation district water, and discriminate between the nonexcess and the excess landowner. We cannot agree. * * * In any event, the provisions under attack are entirely reasonable and do not deprive appellees of any rights to property or water. It is beyond dispute that excess land will be benefitted by delivery of water to neighboring and nearby nonexcess land. This fact was recognized by the California Supreme Court in the Santa Barbara case. 47 Cal. 2d 699, 712, 306 P. 2d 875, 883. * * * We deem it unnecessary to discuss other claims in this area, but repeat in connection therewith that if the United States takes any compensable water or property right the courts are open for redress.

"As to the claim of discrimination in the 160-acre limitation, we believe that it overlooks the purpose for which the project was designed. The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in dispro-

portionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes. In short, the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed."

The court held the excess-land provision of the contract to be constitutional in all respects and reversed the California Supreme Court in the cases holding to the contrary.

As we view it, under the terms of the contract the natural flow water rights of the landowners are in no manner impaired, and under the reasoning of the foregoing-cited authorities the excess-acres provisions of the contract are valid. We hold that the trial court erred in not holding the same to be valid, and conclude that this portion of the contract should have been approved.

The defendants, in their cross-appeal, attack certain paragraphs of the contract as infringing upon and impairing the vested rights of the landowners of the irrigation district to the natural flow of the water in the Frenchman River. We deem it unnecessary, in the light of what we have heretofore said, to take up and analyze the objections made by the defendants to the different paragraphs of the contract.

We note that the defendants, in their cross-appeal, quote from an exhibit the amount of water diverted in April and through October for the years 1945 through 1956, and state that 28,885 acre feet was the average natural flow of the Frenchman River to which the landowners are entitled by virtue of their vested rights in the appropriation of said water, that is, that the landowners of the district have the exclusive property right to the natural flow of the Frenchman River, and that the amount of the natural flow thereof may not be reduced without the consent of the respective landowners.

Reference is made to the testimony of Paul H. Berg, project manager of the Bureau of Reclamation, to the

effect that there was no way of determining the amount of water that was delivered to the lands within the district. He testified that he obtained the figures from the State Engineer from about 1919, and that 20,000 acre feet was the average of what was used for irrigation purposes by the landowners in the past. The 20,000 acre feet, as it appears in the contract, was determined on the basis of a study of the usage of water for irrigation purposes. The 28,885 acre feet the defendants quote as being the average natural flow is the water that passed through the headgate, and not what was used for irrigation purposes. The defendants do not say what amount of water was actually used for irrigation purposes. The repayment contract is based on the minimum of 20,000 acre feet. If the amount had been larger, the repayment contract would have increased accordingly. The formula for the repayment based on the amount of 20,000 acre feet appeared to be sufficient on the average for irrigation purposes in the district, and for that part of water above 20,000 acre feet, the contract provided payment at the rate of $1.50 per acre foot.

As we view the record, the 20,000 acre-feet limitation is for contract purposes, and more accurately discloses the amount of water used for irrigation purposes by the landowners of the district. The figure of 28,885 acre feet does not take into account the waste, evaporation, seepage, and water that is spilled into the river, and measurements are not made as to the amount of water each farmer receives. The district does not have a dam or any means by which the water is impounded so that it can be delivered as needed. The water is measured at the headgate only, and it is not known what amount of water is used or turned into the spillways.

The purpose of the Reclamation Act is to develop lands for irrgation, and to have water in storage allotted to the districts so it will be used for beneficial purposes. As stated in the contract, its fundamental purpose is to

enlarge, rehabilitate, and modernize the district's irrigation system which is in a bad state of repair, and the canal is not large enough to convey the water appropriated. In addition, the purpose of the contract is to provide the district with a supplemental water supply.

Some reference is made to another irrigation district which would use part of the facilities of the district here involved. Such irrigation district is involved here only to the extent that it might participate in the joint use of the main canal, in other words, the main canal would service the two districts, and this only as a means of economy and would in no manner constitute an infringement upon the vested water rights of the landowners in the Frenchman Valley Irrigation District to the natural flow of the water in the Frenchman River.

The contract specifically recognizes the natural flow rights of the district and in no manner attempts to, nor does it, limit or impair those rights. The contract clearly differentiates between the part of the district's annual supply that is delivered from the natural flow under the district's existing water rights, and that part delivered from storage. The contract specifically recognizes the natural flow rights as remaining in the landowners of the district. Reference is made to articles 9b, 10, 18a, 18b, and the preliminary statement in the contract so set forth.

The defendants' objections to the contract relate primarily to the proposition that the vested water rights of the district may be impaired. We believe a sufficient answer to this contention is that the property rights of the district are not impaired but fully recognized by the contract.

In the light of our conclusion as hereinbefore set out, we deem further discussion of the defendants' cross-appeal unnecessary.

For the reasons herein given, the judgment of the trial court is reversed with reference to the part thereof disapproving certain parts of the contract.

We reverse the judgment and remand the cause with directions to render judgment in favor of the plaintiff in accordance with this opinion, approving the contract in its entirety.

REVERSED AND REMANDED WITH DIRECTIONS.

COUNTY OF KEARNEY, NEBRASKA, APPELLANT, V. COUNTY OF BUFFALO, NEBRASKA, APPELLEE, IMPLEADED WITH THE BETHPHAGE INNER MISSION ASSOCIATION OF NEBRASKA, A CORPORATION, AND A. C. WITTERA, GUARDIAN, APPELLEES.

91 N. W. 2d 304

Filed July 11, 1958. No. 34419.

1. **Counties: Domicile.** By county of legal settlement as the term is used in section 83-351, R. R. S. 1943, is meant the county in which a person had a residence at the time of becoming incompetent.
2. **Domicile.** Intention and bodily presence are essential elements in the establishment or change of residence.
3. ———. As a general rule persons under legal disability or restraint or persons in want of freedom are incapable of losing or gaining a residence, domicile, or settlement by acts controlled by others.
4. **Counties: Insane Persons.** The duties and obligations of counties with relation to claims for support by one county against another of mentally ill persons in state hospitals are controlled by section 83-351, R. R. S. 1943.
5. **Limitations of Actions.** The statute of limitations applies to claims by one county against another for maintenance of incompetent persons in state hospitals.

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

Deane C. Tucker, for appellant.

Richard A. Dier, for appellee County of Buffalo.

Anderson, Storms & Anderson, for appellee Bethphage Inner Mission Assn.

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

YEAGER, J.

This is an action, as originally instituted, by the County of Kearney, Nebraska, plaintiff, appellant herein, against the County of Buffalo, Nebraska, one of the appellees herein, to recover the cost of maintenance of one Emma Strolberg, an incompetent, in the Hastings State Hospital at Ingleside, Nebraska, which was paid by the plaintiff, which it is alleged was the obligation of the named defendant, and which the plaintiff was entitled to recover. After the commencement of the action The Bethphage Inner Mission Association of Axtell, Nebraska, and A. C. Wittera, guardian of Emma Strolberg, were impleaded as defendants.

After joinder of issue a jury was waived and the case was tried to the court, at the conclusion of which a judgment was rendered denying a recovery to the plaintiff against the defendant County of Buffalo, Nebraska. By the judgment there was a dismissal of any claim as to The Bethphage Inner Mission Association of Nebraska, and the judgment was rendered without prejudice to the right of any party to in the future make claim for any funds in the hands of A. C. Wittera, the guardian.

The plaintiff perfected an appeal from the judgment which was rendered. In its briefs it presents no request for relief from the judgment as it relates to either of the impleaded defendants. No relief is requested against this part of the judgment by any other party and no cross-appeal has been presented. In the light of this, the issue before this court is that of whether or not the trial court erred in its adjudication that the plaintiff was not entitled to recover a judgment against the County of Buffalo, Nebraska, which will be referred to as the defendant.

The factual situation upon which the determination must be made is not in dispute and it is not complicated.

It is presented by stipulations of the parties and preserved in a bill of exceptions. In 1923 Emma Strolberg was a resident of Buffalo County. In that year as an incompetent person she was placed under guardianship by the county court of that county. She had an interest in real estate in that county which was her homestead.

In March 1923 she was committed to and became confined in the Hastings State Hospital at Ingleside, Nebraska, where she remained until August 1933, at which time she became an inmate of The Bethphage Inner Mission Association, a nonprofit, charitable, and eleemosynary institution located at Axtell in Kearney County, Nebraska. This transfer took place pursuant to a contract between the association and Emma Strolberg by Ed Hagg, her then guardian. A matter which is pointed out here is that in this instrument it was agreed that the residence of Emma Strolberg should be changed to Axtell, Kearney County, Nebraska, and that the guardianship would also be so transferred. The record discloses no transfer of the guardianship from Buffalo to Kearney County.

Emma Strolberg remained at the mission until February 10, 1947, when she was recommitted by the board of commissioners of insanity of Kearney County to the Hastings State Hospital at Ingleside. The warrant of admission recited that her legal settlement was found to be in Kearney County, Nebraska. The only inference to be drawn from the record is that she was at all times an incompetent person under guardianship.

From February 10, 1947, to the date this action was commenced the plaintiff had paid for the maintenance of Emma Strolberg in the state hospital at the rate of $2.90 a day or a total of $7,455.35. The propriety or reasonableness of the rate is not brought into question. It was this amount that the plaintiff sought to recover in the district court.

The basic theory of the cause of action is that at all times of concern Emma Strolberg had a legal settlement

in the County of Buffalo rather than in the County of Kearney in consequence of which the burden for her support belonged to the defendant, and the plaintiff having paid for the support it is now entitled to recover it back from the defendant. The right to recover is claimed under the following from section 83-351, R. R. S. 1943: "Expenses incurred by one county, on account of a mentally ill person whose legal settlement is in another county of the state, shall be refunded, with lawful interest thereon, by the county in which the patient has his legal settlement; such expenses shall be presented to the county board of the county sought to be charged, which shall allow and pay them the same as other claims."

There can be no doubt that at all times under consideration Emma Strolberg had her legal settlement in the County of Buffalo and that it was at no time in Kearney County.

County of legal settlement as used in this section of the statute means the county in which a person had a residence at the time he or she became incompetent. See Clay County v. Adams County, 69 Neb. 106, 95 N. W. 58. The record points unequivocally to the fact that she was incompetent from her original commitment to the state hospital henceforth.

Intention of a person to establish or change residence is an essential element thereof. In this connection there are two essential elements, they being bodily presence and intent. See, 17A Am. Jur., Domicil, § 25, p. 215; 77 C. J. S., Residence, p. 295.

The presence of the person must be voluntary and not the result of disability, restraint, or compulsion. As a general rule persons under legal disability or restraint or persons in want of freedom are incapable of losing or gaining a residence, domicile, or settlement by acts controlled by others. 17A Am. Jur., Domicil, § 20, p. 211, § 25, p. 215.

In this case it is clear that Emma Strolberg was

physically present in Kearney County for a long period of years but during that entire period she was apparently under the control of others and incapable, within the meaning of law, of changing her residence or settlement from Buffalo County to Kearney County.

If it be assumed that at some time during this period of years she became capable of maintaining an intent to change there is no evidence she ever did so.

In the light of this and the statutory provision which has been quoted herein the obligation to support and maintain her in the state hospital was the obligation of Buffalo County. Also Buffalo County is obligated to repay Kearney County the amount which has been paid unless, as the defendant contends, the plaintiff has by its acts or failure to act deprived itself of the right to recover the amount sued for in whole or in part, or because of some legal or constitutional inhibition it is estopped from recovering.

By the answer the defendant pleaded estoppel based on failure of the board of commissioners of insanity (now county board of mental health) to give prior notice to the defendant or any of its officials or to the legally appointed and acting guardian of Emma Strolberg of the board's action of February 10, 1947, by which action Emma Strolberg was committed to the state hospital. As another defense the constitutionality of the statute authorizing the board of one county to commit a resident of another county to a state hospital without notice to the other county is pleaded. As another defense the statute of limitations is pleaded.

To support the first of these defenses the defendant relies on the provisions of section 83-349, R. R. S. 1943. The section by its terms carries a directly opposite significance to that contended for by the defendant. The notice mentioned in the section is required to be given after commitment and not before. Furthermore the notice mentioned is not notice by a county to a county, but a notice by a county board of mental health to

another county board of mental health. This section therefore has no pertinence to the question presented.

The duties and obligations of counties with relation to claims for support by one county against another of mentally ill persons in state hospitals, as has been pointed out, are controlled by section 83-351, R. R. S. 1943. The manner of presentation as pointed out is as follows: "* * * such expenses shall be presented to the county board of the county sought to be charged, which shall allow and pay them the same as other claims."

There is no statutory condition precedent to the presentment of a claim such as involved here except the incurrence of expense by one county for a mentally ill person who has a settlement in another county. There is no condition precedent to the right to maintain action to recover the expense except the presentment of a claim.

In the stipulation on which the case was tried it was agreed that the defendant was notified on November 12, 1955, that plaintiff believed that Emma Strolberg was a resident of Buffalo County at the time she was committed to the state hospital on February 10, 1947, and had been a resident of that county at all times thereafter. On the same day a claim was submitted for the cost of care up to that time. The claim was denied on December 7, 1955. This action was commenced on March 1, 1956, and summons was served on March 2, 1956.

All conditions of statute having been complied with the contention of the defendant with regard to failure to give statutory notice is without merit.

The defendant urges that the statute permitting a county to commit an incompetent person having a residence or legal settlement in another county to a state hospital without notice to the county of legal settlement or residence, and thereafter pay for maintenance of the person committed, and then recover back the amounts

paid for maintenance is unconstitutional under the due process provisions.

The cases cited do not sustain the contention and we have found none that do. The cases cited go only to the point of saying that burdens may be imposed only if notice and opportunity is afforded to resist and defend against the burden sought to be imposed.

The purpose of this action is to require the defendant to make reimbursement of an obligation which belonged to it from the beginning if Emma Strolberg had a legal settlement in and was a resident of Buffalo County. Full opportunity was afforded under the statute for a determination of the true issues involved. The contention is without merit.

The defense of the statute of limitations is meritorious and it must be said that the plaintiff is entitled to recover for the period of 4 years immediately before filing the claim on which this action is based. § 25-206, R. R. S. 1943.

In Bryant v. Cedar County, 122 Neb. 853, 241 N. W. 538, it was said: "The statute of limitations * * * applies to claims against counties."

In County of Adams v. Ernst, 158 Neb. 15, 62 N. W. 2d 110, it was said: "The maxim that lapse of time does not bar the right of the state is an attribute of sovereignty and applies only to the state and not to counties and other political subdivisions of the state."

In County of Adams v. Ernst, *supra,* this court, dealing with the cost of maintenance of an insane person in a state hospital, under facts different from those herein but involving like principles, said of such costs: "It is not a continuing open account as contended by the county; * * *." In the light of the conclusion so reached it was held that the statute of limitations was available and that payments for only 4 years from the date of presentation of claim were available.

For the reasons herein stated the judgment of the district court in favor of the defendant Buffalo County

and against the plaintiff is reversed and the cause remanded with directions to render judgment in favor of the plaintiff and against the defendant in accordance with this opinion. Otherwise the judgment is affirmed.

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

EDWIN MAAS ET AL., APPELLANTS, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A CORPORATION, APPELLEE.

91 N. W. 2d 409

Filed July 18, 1958. No. 34409.

1. **Landlord and Tenant: Actions.** A lessee of real estate has, by virtue of his lease, capacity to contest an action brought against him to deprive him of his leasehold.
2. **Landlord and Tenant.** A tenant is entitled to exclusive possession and use of the demised premises in the absence of reservations or restrictions in his lease.
3. **Adverse Possession.** One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the interest or title of his adversary.
4. ———. A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of 10 years.
5. ———. There must be privity shown between adverse claimants of land before the possession of one may be tacked to the possession of the other for the purpose of completing title by prescription.

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

Dryden & Jensen, for appellants.

Hamer, Tye & Worlock and *James M. Knapp,* for appellee.

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

BOSLAUGH, J.

Appellants seek to have quieted in them title to accretion land which they claim has become an addition to real estate they own by purchase and conveyance, and to have Platte Valley Public Power and Irrigation District enjoined from claiming any right therein because of specified instruments of record. Nebraska Public Power System was designated as a party defendant. A special appearance on its behalf was sustained by the trial court, no further proceeding was had in reference to it, and the order of the court became final. The parties to this appeal are Edwin Maas and Laura P. Maas, husband and wife, appellants, and Platte Valley Public Power and Irrigation District, appellee.

The substance of the cause of action alleged by appellants to the extent necessary to be here stated is as follows: Appellee is a corporation engaged in dispensing power and irrigation by virtue of the statutes of Nebraska. Appellants are owners of property adjacent to the Platte River in Buffalo County described as Lots 6, 7, and 8 of Section 4, Township 8 North, Range 18, in that county. They acquired Lots 7 and 8 and the accretions thereto by deed from Grace H. Berdine, widow, to appellants dated February 4, 1950, and recorded March 1, 1950, in book 151, page 5, of the deed records of the county, and they acquired Lot 6 and the accretions thereto by deed from Albert Schurr and Martha A. Schurr, husband and wife, to appellants dated February 2, 1950, and recorded March 1, 1950, in book 152, page 69, of the deed records of the county.

John F. Daul and his wife executed and delivered a warranty deed December 18, 1917, to Kearney Water and Electric Powers Company and it was recorded in the deed records of the county February 1, 1918, in book 103, page 72. It described and conveyed to the grantee a part of Sections 3 and 4, Township 8 North, Range 18, in Buffalo County, including a part of Lots

6, 7, and 8 above described. Any rights secured under the deed last described constitute a cloud on the title of appellants to the property of which they are the owners. Appellee claims some rights under and by virtue of the deed last described and such deed and claim of rights to the real estate of appellants are inferior to and subject to the rights and title of appellants.

During the past 20 years or more accretions have formed and become attached to the real estate owned by appellants by virtue of the fact that said land is adjacent and contiguous to the river bank of the Platte River. The property owned by appellants has filled in for a considerable area to the south of the original southern boundary of their land and the accretion is directly connected with the real estate owned by appellants. The predecessors in title of appellants have for more than 10 years prior to the acquisition of the title to the property owned by appellants claimed to own the accreted land to the thread of the stream of the Platte River as it flows in an easterly direction past the land of appellants, and the predecessors in title openly, notoriously, exclusively, and under claim of right and color of title, ran cattle upon said accreted land and over the premises purported to be conveyed by the deed last above described.

The property purported to be conveyed to the Kearney Water and Electric Power Company by said deed was abandoned by it and was unused for a period of more than 20 years prior to the acquisition of title by appellants of said Lots 6, 7, and 8 of Section 4, Township 8 North, Range 18, in Buffalo County. The premises purported to be conveyed by the deed last above described have been occupied and used under claim of right by appellants and their predecessors in title for more than 20 years last past and by virtue thereof any successor in interest of the grantee in said deed is estopped to claim any rights under it and specifically appellee is estopped to claim any rights arising under said

deed. The deed and the claims of appellee are a cloud on the title of appellants to the land owned by them as aforesaid. They are without adequate remedy at law and entitled to an adjudication of the court annulling any claims under said deed and enjoining appellee from going upon the premises.

The amended answer of appellee admitted its corporate status; the ownership by appellants of some interest in Lots 6, 7, and 8 of Section 4, Township 8 North, Range 18, in Buffalo County; the execution and delivery of the deeds to appellants as alleged in the petition; the execution and delivery of the deed recorded in book 103, page 72, of the deed records of Buffalo County; and that appellee has and claims rights and interest in and to the lands and accretions thereto located in Lots 6, 7, and 8 above described arising from the deed last referred to. The appellee denied all other allegations of the petition.

The trial court found generally in favor of appellee and against appellants; that the deed last described above did not constitute a cloud on the title of appellants to the land owned by them; that appellants had not acquired any right, title, or interest in and to any part of the premises involved in this action by adverse possession; that appellee was since August 1, 1941, in possession of the real estate involved in this case under and by virtue of a lease agreement with Consumers Public Power District; and that the real estate involved herein is described in the deed recorded in book 103, page 72, of the deed records of Buffalo County. The trial court adjudged that the case should be and it was dismissed. The motion for new trial was denied and appellants prosecute this appeal.

The land now owned by appellants and the land deeded to The Kearney Water & Electric Powers Co. was owned by John F. Daul, who is sometimes mentioned in the record as John Daul. John F. Daul and Addie E. Daul, his wife, executed and delivered to The

Kearney Water & Electric Powers Co., a corporation, a warranty deed dated December 18, 1917, filed for record February 1, 1918, and recorded in the public records of Buffalo County in book 103 on page 72 of deeds. The description of the premises conveyed by the deed is by metes and bounds. It is very lengthy. It is sufficient for the present purpose to say that it conveyed to the grantee all of Lots 6, 7, and 8 of Section 4, Township 8 North, Range 18, in Buffalo County, south of the north line of the right-of-way of the grantee on which a part of its original canal, referred to in the record as Blue Hole, was located and constructed across the lots from west to east. The distance from the northwest corner of the southwest quarter of said Section 4 to the north line of the right-of-way at the west line of the section was 1354.9 feet. The distance from the south line of the highway right-of-way north of the above-described lots along the east line of Lot 8 to the north right-of-way line on which the canal was located was 913 feet. The course of the canal across the lots from west to east was somewhat irregular and angled toward the northeast.

The real estate described in the deed last above referred to was conveyed by the grantee therein, The Kearney Water & Electric Powers Co., to Central Power Company by warranty deed dated July 23, 1919, filed for record August 2, 1919, and recorded in the office of the register of deeds of Buffalo County. Central Power Company conveyed the same real estate to Consumers' Public Power District by warranty deed dated January 7, 1941, filed for record January 31, 1941, and recorded in the deed records of said county. Consumers Public Power District on August 1, 1941, by instrument in writing duly executed and delivered, leased the property owned by it and conveyed to it by the Central Power Company as shown by the deed last identified and described, to the Loup River Public Power District, The Central Nebraska Public Power and Irri-

gation District, and the Platte Valley Public Power and Irrigation District. The property leased to the lessees above named included the property conveyed to Consumers Public Power District by the deed last above identified and described.

A written supplemental agreement was made December 22, 1943, to the lease agreement of August 1, 1941, by the parties thereto in which it was evidenced that for convenience in carrying on the business of the parties thereto, it was agreed that the name "Nebraska Public Power System" should be used and whenever used it should be understood to mean Loup River Public Power District, The Central Nebraska Public Power and Irrigation District, and Platte Valley Public Power and Irrigation District; that the name Nebraska Public Power System when used referred to the affairs of the districts and should be binding on them in the same manner as if the individual names of the three districts were used; and that by these provisions the districts did not create any kind of a legal entity. The supplemental agreement did not change or modify the original lease agreement of August 1, 1941, concerning any matter involved in this case. It only clarified the original lease agreement in certain respects and specifically ratified, confirmed, and continued in force the original lease agreement.

The title to the land owned by appellants was conveyed to them by deeds as follows: Grace H. Berdine, widow, executed and delivered a warranty deed to Edwin Maas and Laura P. Maas, husband and wife, as joint tenants, in which were described Lots 7 and 8, plus accretions, of Section 4, Township 8 North, Range 18, in Buffalo County. The date of the deed was February 4, 1950. It was filed for record March 1, 1950, recorded in book 151, page 5, of the deed records of that county, and it was by provision therein made subject to the deed recorded in book 103, page 72, of the deed records of Buffalo County in which the grantors

were John F. Daul and Addie E. Daul, husband and wife, and The Kearney Water & Electric Powers Co. was grantee. Albert J. Schurr and Martha A. Schurr, husband and wife, executed and delivered a warranty deed to Edwin Maas and Laura P. Maas, husband and wife, as joint tenants, in which was described Lot 6, plus accretions thereto, of Section 4, Township 8 North, Range 18, in Buffalo County. The date of the deed was February 2, 1950. It was filed for record March 1, 1950, recorded in book 152, page 69, of the deed records of the county, and it excepted from the conveyance the land conveyed to the Kearney Water and Electric Power Company by the deed to it from John F. Daul and Addie E. Daul, husband and wife, recorded in book 103, page 72, of the deed records of the county.

The deed from Grace H. Berdine and husband to Albert J. Schurr and Martha A. Schurr, husband and wife, as joint tenants, dated March 2, 1946, for Lot 6 of Section 4 did not exclude from that conveyance by any provision therein the land conveyed by the deed from John F. Daul and wife to The Kearney Water & Electric Powers Co. recorded in book 103, page 72, but the deed to Grace H. Berdine from Octives Johnson and wife dated October 23, 1933, for that lot excluded from the conveyance the land conveyed by the deed recorded in book 103, page 72, of the deed records of the county and as above stated the deed from Albert J. Schurr and wife to appellants contained a like exception.

Appellants executed and delivered a mortgage to The Prudential Insurance Company of America, dated January 16, 1950, on Lots 6, 7, and 8 of said Section 4 except the land conveyed to the Kearney Water & Electric Powers Co. by deed recorded in book 103, page 72, of the deed records of Buffalo County. The mortgage was filed March 1, 1950, and recorded in the real estate mortgage records of the county. Edwin Maas testified he read the mortgage before he signed it and

he knew what was in it. He was furnished an abstract of title to the real estate he acquired in Section 4 by the conveyances to him and his wife above described. He had it examined and was advised concerning it by a well-known, active attorney of Kearney. Maas examined the deed to him when he bought the property. Notwithstanding all these admissions, he testified he bought all of the 3 lots of Section 4 except a strip of land across them 99 feet wide occupied by a canal. There was no land south of that conveyed to The Kearney Water & Electric Powers Co. as shown by the deed recorded in book 103, page 72. The land described therein and conveyed thereby was bounded on the south by the south line of Sections 3 and 4, Township 8 North, Range 18, Buffalo County, which was out in the Platte River. The conveyances detailed above concerning which there is no dispute conclusively establish that appellants acquired by purchase and conveyance no part of Lots 6, 7, and 8 of said Section 4 south of the north line of the real estate conveyed to The Kearney Water & Electric Powers Co. exhibited by book 103 on page 72 of the deed records. The accretion land described and claimed by appellants is attached to and has become a part of the land described in and conveyed by that deed.

Appellants insist that the trial court was incorrect in finding that appellee had a legal interest in the property, the subject of this litigation. The petition alleged that appellee claimed rights and an interest in the subject of the suit but that they were inferior to the rights and interest of appellants. The property and rights of The Kearney Water & Electric Powers Co., including the land described in and conveyed by the deed in book 103, page 72, referred to above, were by mesne conveyances herein detailed vested in Consumers Public Power District on January 7, 1941. It made a lease August 1, 1941, of the property and rights to Loup River Public Power District, The Central Nebraska Pub-

lic Power and Irrigation District, and the Platte Valley Public Power and Irrigation District. A description of the property and rights in very general terms was made in the lease, supplemented by this language: "* * * and including but without limitation of the generality of the foregoing, all lands, buildings, storerooms, turbines, diesel engines, generators, boilers, boiler room auxiliaries, electrical connections and switches, instruments and meters, switchboard, * * * and all appurtenances used or useful for proper and efficient operation of the plant at either part or full capacity, together with all rights, easements and privileges incidental thereto, being the same properties heretofore owned by the Central Power Company and conveyed by it to Consumers Public Power District." The property described in the lease was taken possession of and has been operated, maintained, and improved by the lessees by the use of the name Nebraska Public Power System. Appellee has been more active in reference thereto because the property is located within the area comprising that district. The lessees for convenience have and do use the name Nebraska Public Power System primarily in the conduct of their power business. The transactions had are those of the district but they are done in the name above noted. It is an operating arrangement for convenience adopted by the districts.

Blue Hole, used frequently in the record, signifies the original canal from where water was taken from the Platte River by the use of a siphon a considerable distance west of Section 4 and continuing from there generally eastward, with variations to the northeast, to and through Section 4 including Lots 6, 7, and 8 thereof, and into Section 3 where it joined the Kearney Canal proper. Later, in 1941, a new connection was made between the river and Blue Hole. Headgates were installed and by this means water was taken from the river, through the headgates, into Blue Hole, and transported by it to the Kearney Canal which originated in Section 3. A change

was thereafter made at the west end of the Kearney Canal. The water from Blue Hole was discharged in the river near but above the headgates and when desired it and other water were taken from the Platte River through the headgates into the Kearney Canal. Blue Hole has at all times been and is beneficially used. It is now largely a stand-by facility but the water therefrom is used at times in carrying out the purposes of the project of which it is a part. The land south of Blue Hole is necessary to protect the canal, the operations conducted by the lessees, and for access to and maintenance and improvement of the works. There has been no abandonment of Blue Hole. Appellee has an interest in the subject of this litigation. It is a lessee of the owner and it has capacity to contest and defend this cause. A lessee may maintain an action to quiet title to his leasehold. A tenant is entitled to the exclusive possession and use of the demised property in the absence of reservation or restriction in his lease. Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, on rehearing 160 Neb. 708, 71 N. W. 2d 186, 51 A. L. R. 2d 1221; Annotation, 51 A. L. R. 2d 1227. The converse is obviously true that a lessee may defend an action to quiet title which seeks to establish a claim of title adverse to the tenant and to deprive him permanently of the property involved.

Appellants must, to succeed in this case on their plea of adverse possession, rely on the strength of their title and not upon any possible weakness in the interest or title of appellee. Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117; McDermott v. Boman, 165 Neb. 429, 86 N. W. 2d 62; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

The record does not show any claim of possession or relationship of appellants with the real estate of which they seek to establish ownership by prescription until February or March of 1950. This litigation was instituted December 22, 1955. They could not have matured

title thereto by adverse possession by their independent acts. Ohm v. Clear Creek Drainage Dist., *supra,* declares: "A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years." See, also, Worm v. Crowell, *supra.*

Orval V. Beavers agreed to buy from Grace Berdine Lots 7 and 8 of said Section 4 in 1948. The consideration was to be paid within 5 years and the buyer was to have a deed when he performed the contract. He lived on the property until the spring of 1950 when he moved from it. He did not get a deed and he made no conveyance thereof, although he testified he sold his interest to Edwin Maas. A conveyance of these lots was made by Grace H. Berdine to appellants in February 1950. Orval V. Beavers testified he did not know how many acres of land he bought; that he knew only the east and west boundaries of it; that he did not know he was to have any land south of the canal across the land; that "We just had a verbal understanding"; that he thought there was some accretion land north of the canal; that whatever the actual deeds called for previously or whatever the record was, that was what he expected to get; that he never did locate any accretion land that was talked about; that he secured the permission of the superintendent of the Nebraska Public Power System to erect and he did build a fence along the north side of Blue Hole or the canal to keep his animals from crossing it and getting out into the river; that there was no fence south of the canal and there was no land south of it that was fenced or enclosed; that he had or made no use of the area south of the canal; that other persons had hunting blinds south of the canal but he did not question their authority because they were there before he came; and that he did not claim he owned anything south of the canal.

There is absence of proof that Orval V. Beavers either

had or claimed adverse possession of the area south of the canal. Any possession he had thereof could not aid the claim of appellants of adverse possession of it because the possession of Orval V. Beavers originated not earlier than the year 1947, less than 10 years before the commencement of this case in 1955.

The evidence establishes that Lots 6, 7, and 8 of Section 4 were deeded to Grace H. Berdine on October 23, 1933. She and her husband conveyed Lot 6 of Section 4 to Albert J. Schurr and Martha A. Schurr March 2, 1946. Grace H. Berdine deeded Lots 7 and 8 to appellants February 4, 1950. Grace H. Berdine and her husband or either of them never intended to nor did they claim any part of the 3 lots except the parts thereof deeded to them. They never used or had possession of the area south of the canal. The evidence is conclusively inconsistent with any claim that they or either of them had adverse possession or claimed ownership of any land south of the canal that crossed the lots from west to east. There is no evidence that Albert J. Schurr and Martha A. Schurr, the grantees of Grace H. Berdine of Lot 6 of Section 4, made any claim of adverse possession to the area south of the canal.

The only persons between whom there was privity of estate or connection of title mentioned in the record involving the premises in question were Grace H. Berdine, her husband, Orval V. Beavers, Albert J. Schurr and Martha A. Schurr, his wife, and appellants. Appellants cannot tack or link their possession of the premises involved with that of other persons just named to support the claim of adverse possession because of the lack of proof of adverse holding and occupancy by any of the predecessors in title. The possession of the premises involved by any other persons mentioned in the record is not significant because appellants did not derive their title or possession through such persons. It is essential that each occupant must show derivative title from his predecessor in order to link his possession with that

taken under a previous or original entry. The circumstance of successive occupancies does not establish the necessary privity but only shows a succession of independent trespasses, no one necessarily supporting the other. Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341, states: "Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription." See, also, Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597; Montague v. Marunda, 71 Neb. 805, 99 N. W. 653; Rice v. Kelly, 81 Neb. 92, 115 N. W. 625; Kramper v. St. John's Church, 131 Neb. 840, 270 N. W. 478.

The record does not establish title to the land involved in this case in appellants by prescription. The judgment should be and it is affirmed.

AFFIRMED.

CLEO WYNIA, APPELLEE, V. CLARENCE HOESING, DOING BUSINESS AS HOESING CONSTRUCTION COMPANY, APPELLANT.

91 N. W. 2d 404

Filed July 18, 1958. No. 34434.

1. **Workmen's Compensation.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
2. ———. A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
4. ———. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of

the act and does not apply to evidence produced to establish a claim for compensation.

5. ———. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Reversed and remanded with directions.*

Frederick M. Deutsch and *Gordon L. Gay,* for appellant.

Philip H. Robinson, for appellee.

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

MESSMORE, J.

This is a workmen's compensation case from the district court for Cedar County. Cleo Wynia, the widow of Benjamin R. Wynia, originally filed a petition in the Nebraska Workmen's Compensation Court. The case was tried to a judge of the compensation court who found for the claimant and awarded her compensation for the accidental injuries and death suffered by the claimant's husband, Benjamin R. Wynia, and reasonable and necessary expenses incurred and resulting from the accident and death as provided by section 48-122, R. S. Supp., 1955. The defendant thereupon waived rehearing before the compensation court and appealed directly to the district court for Cedar County. Trial was had in the district court, and the trial judge thereof found for the claimant and rendered a judgment in conformity with the judgment rendered by the single judge of the Nebraska Workmen's Compensation Court and, in addition, allowed attorney's fees for claimant's attorney. The defendant filed a motion for a new trial and, from the overruling thereof, perfected this appeal.

There is some contention made with reference to the pleadings of the plaintiff filed in the Nebraska

Workmen's Compensation Court and in the district court as being at a variance, and whether or not certain admissions made in the plaintiff's pleadings constituted a judicial admission or an admission against interest, which need not be determined as will appear later in the opinion.

The defendant assigns as error that the decision of the trial court is not supported by the evidence; that the plaintiff failed to prove that the accident arose out of and in the course of the employment of the deceased; and that the decision of the trial court is contrary to law.

The question for decision in this case is whether the plaintiff has proved by a preponderance of the evidence that the deceased was fatally injured in an accident arising out of and in the course of his employment.

There are certain well-established rules of law relating to the Workmen's Compensation Act applicable to the facts in the instant case.

On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record. 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. See McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373.

A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for

compensation. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence. See Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598.

For convenience we will refer to Benjamin R. Wynia as Wynia or the deceased, to Clarence Hoesing as the defendant, and to Cleo Wynia as the plaintiff.

The record shows that the defendant was engaged in the contracting and construction business and was the sole owner of such business; and that at the time of the accident which resulted in the death of Wynia, the defendant was engaged in the construction of an elementary school at Parker, South Dakota. The defendant's headquarters were in Hartington, Nebraska. Wynia had been employed by the defendant for 3 or 4 years as a job foreman. Wynia and the plaintiff, his wife, resided at Hartington, Nebraska. They had two daughters, one married, and one formerly a college student 19 years of age.

The defendant rented a building which was formerly a filling station in Parker, South Dakota, about a block east of where the school building was being constructed. This building had a large living room and bedroom, a small kitchen, and a half bath on the ground floor. In the kitchen was a gas stove which was rarely, if ever, used. In the basement, which was not a full basement being 16 x 16 or 16 x 12 feet, and having a cement floor, there was a hot water tank and a "side arm" heater which was fed by "L. P." gas. The side arm heater and tank were in the southeast part of the building, almost directly at the foot of the stairs leading to the basement. There was an oil-burning furnace in the basement, which was not used. A tank containing bottle gas was at the side of the building. There was a copper pipe which regulated the pressure from the tank, and the tank could be shut off at the outside of the building. This building was rented for the purpose of furnishing the workmen who lived away from Parker,

South Dakota, a place to sleep. Cots were placed in the building and bedding was furnished by the employer. Bottle gas was also furnished to heat water so the employees who desired to do so could take a shower. The shower was located in the basement. The employees were not required to use the facilities furnished by the defendant. They could lodge elsewhere if they so desired, and had their meals wherever they chose to eat. It was customary for the defendant to furnish these facilities for the men in his employ when they were employed on out-of-town projects, as part of their pay.

A part of the first floor of the building was used for an office. It was equipped with a telephone, and blueprints, specifications, and other records were kept on the first floor. Valuable hand tools were also kept there. No tools and no equipment necessary or incident to the work were kept in the basement. Most of the men who worked on the construction job left about a week prior to the date of the accident, leaving Wynia in charge as foreman, with two employees who lived in Parker, South Dakota. Wynia was the only one who occupied the building, referred to as the "shack," at the time of the accident. Wynia was authorized to and did go to the building as occasion required and when necessary to order material, look over the work sheets, or to obtain tools necessary for use on the job.

There were showers in the school building which were generally used by the men because they were close, and during that time of the year the men had no objection to taking cold showers. Prior to the time the men left Parker, South Dakota, to go to another job, the defendant's brother, a foreman, would light the heater at noon, and on occasions Wynia would light the heater, so that the men could have hot water after working hours in the event they desired to take a shower or wash their face and hands.

On August 3, 1956, between 4 and 4:15 p.m., Wynia left the job. At that time Roy Merrill, an employee, and Wynia had been working on risers in the band room. It was necessary to do some grading and leveling to set the forms for the next riser. In order to be certain that the form was at the right level, a transit was ordinarily used. The transit was kept in the shack unless it was being used on the job. It was always returned to the shack, and was found in the shack after the explosion.

Merrill testified that Wynia left the job to go to the shack for some tools or something. He did not say what he was going for, he just said: "I'm going after something." Merrill further testified that Wynia probably went to the shack for the transit or something like that. If anything in the way of tools was needed from the shack, Wynia went after them. He further testified that he really could not say what Wynia went after as Wynia did not tell him why he was going to the shack, and this witness did not know what he went to the shack for. He further testified that Wynia was coming back to the job, as they were not through working. The working hours were from 7 a.m., to 6 p.m., with an hour off for lunch. He could not think of any tools, supplies, or equipment that were needed on the job at that time. He further testified that he heard an explosion and immediately proceeded to the scene. When he arrived at the shack he saw Wynia standing up, and he and some other men laid him down. He was about 10 feet from the building, on the north side, and was badly burned. This witness went into the building. It did not catch on fire on the inside, but the explosion caused considerable damage to it. He picked up Wynia's belongings and packed them, and left the building. Wynia had been sleeping in the building during the nighttime. The general talk was that Wynia was lighting the side arm heater in the basement when it exploded. The testimony of this witness as to the reason

Wynia went to the shack is purely speculative and conjectural.

Arthur Peterson testified that prior to the explosion he was next door to the shack in a building where his wife operated an ice cream store. The back of this building was probably 8 or 10 feet from the shack and the front of the building about 12 or 14 feet from the shack. The front of the shack had one door on the southwest. He heard the explosion and immediately ran out of the back door of the building, which would put him about 8 feet east of the shack, to see what had happened. He started over to the shack. When he got to the basement window, he noticed a blaze in the basement. He could hear someone calling for help, saying "get help," or some such remark. He called down the basement several times because he thought the party was down there. He thought of going into the building, but was a "bit leery" for fear of another explosion. He probably called three or four times, and then Wynia called, "I'm out here," and he was out of the building, to the north. When Wynia called "I'm out here," this witness looked over and saw Wynia's condition and endeavored from that time on to help him as much as he could. Wynia told this witness to shut off the gas, which he did immediately. The tank was located on the southeast corner of the building. The flame in the basement was in the southeast part, about where the heater was located. He further testified that he did not see Wynia in the basement, and did not see him at all until he was in front of the building when he heard Wynia call "Get some help." He was unable to tell where the sound came from.

Wynia died on August 13, 1956, as a result of being badly burned by the explosion.

The evidence discloses that the deceased went to the shack during working hours. It does not disclose for what purpose he went there. The evidence does not disclose where he was in the shack, what he did in the

shack, or what caused the explosion. He was the only person who slept in the shack who would in any event use the water heater on the date the explosion occurred. It is true that it was within the scope of Wynia's employment to go to the shack during working hours for the purpose of obtaining tools, ordering materials, or to look over specifications and work sheets. However, there is no evidence that such was his purpose when he went to the shack at the time the explosion occurred. The record is as consistent with the theory advanced by the defendant that Wynia went to the shack for the purpose of lighting the heater so that he could take a shower after working hours, as with the theory that he went for tools or purposes connected with his employment.

From an analysis of the evidence, the plaintiff has failed to prove by a preponderance of the evidence that the accident resulting in the injuries and death of Wynia arose out of and in the course of his employment. In addition, in applying the rule established by many cases in this jurisdiction that an award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence, we are driven to the conclusion that the judgment rendered by the trial court constituted reversible error.

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

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. JOHN PAUL MENARD, APPELLEE, v. ROBERT E. NICHOLS, SUPERINTENDENT OF THE NEBRASKA STATE REFORMATORY, APPELLANT. (HAROLD D. SMITH, SUPERINTENDENT OF THE NEBRASKA STATE REFORMATORY, SUBSTITUTED AS APPELLANT.)

91 N. W. 2d 308

Filed July 18, 1958. No. 34441.

1. **Statutes.** All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention.
2. ———. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
3. **Pardons.** Sections 83-440 and 83-450, R. R. S. 1943, are in pari materia, and the limitation of 2 months for each year contained in section 83-450, R. R. S. 1943, is the maximum credit that can be allowed under either or both of these sections of the statutes.
4. **Pardons: Habeas Corpus.** A certificate of good time by the Board of Control, based on an erroneous computation under earned-good-time statutes, is subject to correction and will not afford a prisoner a basis for release in a habeas corpus proceeding.

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

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for appellant.

Wagener, Marx & Galter, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ., and NEWKIRK, District Judge.

CARTER, J.

This is a habeas corpus proceeding brought by the relator, an inmate of the Nebraska State Reformatory, against the respondent, the superintendent of the reformatory, claiming that he was illegally held in and was

entitled to an immediate release from such institution. A return to the writ was filed by the respondent which put in issue the allegations contained in the writ. The trial court found for the relator and directed his immediate release. The respondent has appealed.

The evidence shows that relator was sentenced by the district court for Lancaster County to serve a term of 3 years in the Nebraska State Reformatory for robbery. He entered the reformatory on April 3, 1956, and in the absence of any allowance for good time would be subject to release on April 2, 1959. Under section 29-2632, R. R. S. 1943, relator was entitled to an allowance of 7 months good-time credit at the time he entered the reformatory. The diminution of his 3-year sentence by this 7 months could be taken from him only for disciplinary reasons. Relator gave no cause for the deprivation of this good time authorized by the statute, and the parties are in agreement that it was properly deducted from his sentence.

The issue raised by the proceeding is the proper computation of credits for good time authorized by sections 83-440 and 83-450, R. R. S. 1943. A construction of these two statutes is necessary.

"The Board of Control may grant to prisoners, who occupy a position classified by the Board of Control as being entitled to that privilege, a diminution of time from their sentences, in addition to that provided for in section 29-2632, according to general rules to be prescribed by the board. The grants shall be conditioned on good behavior, a cheerful compliance with rules, diligence in work, and fidelity to trust. A diminution of time granted under this section shall not exceed the rate of two months for each year." § 83-450, R. R. S. 1943. This statute was enacted in 1915 and was the first statute authorizing good-time credit in addition to the statutory good time granted by section 29-2632, R. R. S. 1943. It being the only earned-good-time statute in existence at the time of its enactment, the limitation

on the diminution of time contained therein applied only to that section at that time.

In 1921 the Legislature enacted section 83-440, R. R. S. 1943, which provides: "The amount of good time allowed to prisoners in road camps or other places outside of the state penitentiary or reformatory while engaged in public work, shall be equal to the time the prisoners shall have served in the road camps or other places. The usual parole privilege of prisoners serving in road camps or other places shall not be affected by such service." This section of the statute does not appear to have been amended, although unimportant changes in language resulted from the 1943 revision. Previous statutes had provided for the working of inmates, but it is the first statute authorizing and fixing the rate of allowance of good time for work performed in road camps and other places outside the prison enclosure.

The history of section 83-450, R. R. S. 1943, appears important in determining if it should be construed in pari materia with section 83-440, R. R. S. 1943, as contended by the respondent. The original act of 1915 provided:

"The Board of Commissioners of State Institutions is hereby authorized to grant to prisoners employed outside of the prison enclosure and to prisoners making satisfactory progress in the prison school, a diminution of time from their sentences, in addition to that provided for in Section 657 of the Criminal Code of Nebraska (now § 29-2632, R. R. S. 1943), such grants to be conditioned on good behavior, a cheerful compliance with rules, diligence in work and fidelity to trust; but such additional diminution shall not exceed the rate of one month for each year of the sentence." Laws 1915, c. 240, § 1, p. 558.

In 1937 the act was amended as to the amount of diminution of sentence to be allowed as follows: "* * *; but such additional diminiution shall not exceed the

rate of one month for each year of the sentence for satisfactory progress and attendance in the prison school and an additional diminution not to exceed the rate of two months for each year to prisoners employed outside the prison enclosure." Laws 1937, c. 206, § 1, p. 831.

In 1949 the statute was amended to read in its present form and as we have hereinbefore quoted it. Laws 1949, c. 303, § 1, p. 1016. In proposing the amendment of the statute in 1949 the legislative committee recommending its passage included the following in the committee statement on the bill: "The purpose of the bill is to give prisoners who are engaged inside the penitentiary the same opportunity to gain a diminution of time from their sentences by good behavior, a cheerful compliance with rules, diligence in work and fidelity to trust as is now granted to prisoners employed outside the prison enclosure."

We think the two sections of the statute dealing with earned good time must be construed in pari materia. The Legislature has so treated them. Section 83-450, R. R. S. 1943, the first of the two enacted by the Legislature, provides for a diminution of time for those in classified positions in addition to the statutory good time provided for in section 29-2632, R. R. S. 1943, and fixes the maximum at 2 months for each year. The 1949 amendment to section 83-450, R. R. S. 1943, eliminated the allowance of 1 month's good time for satisfactory progress and attendance in the prison school, leaving such credit for good time within the scope of rules to be promulgated by the Board of Control and within the 2 months' limitation retained in the act. The legislative committee statement accompanying the 1949 amendatory act clearly shows an intent to give credit for work in the penitentiary the same status as that performed outside the prison enclosure. The two sections of the statute appear in the same chapter and it clearly shows that the Legislature considered them together throughout their legislative history. The result

is that work inside and outside the prison enclosure is treated the same and both are subject to the limitation of 2 months' credit per year contained in section 83-450, R. R. S. 1943.

An inmate may therefore earn 2 months' extra credit for each year that he has served. It may be earned at any time throughout the year on a day for day basis, but his credit cannot exceed 2 months in any year. Some contention is made that an inmate is entitled to this credit of 2 months on each year of his sentence. Prior to 1949 there would have been merit to this contention. In 1949, however, the Legislature deleted from the statute the words "shall not exceed the rate of one month for each year of the sentence" and left remaining the words not to "exceed the rate of two months for each year." The elimination of the words "of the sentence" indicates that a change of meaning was intended. It is clear that the Legislature intended that good-time credit, other than that provided in section 29-2632, R. R. S. 1943, should not exceed 2 months for each year served. We so construe the applicable statutes.

Our statutes deal with two types of credits to be applied to inmates of our penal institutions. The first deals with statutory good time under which the inmate enters upon his confinement with the statutory assurance that his term is automatically reduced by law, unless by his own breach of prison discipline he forfeits this statutory credit. This credit is provided for in section 29-2632, R. R. S. 1943. The second type of credits are those which inmates may earn as a reward for good conduct. Such credits are provided for in sections 83-440 and 83-450, R. R. S. 1943. These statutes do not provide for automatic credits, but require that the reward be earned before credit is given. These two statutes deal with extra-earned good time. They are in pari materia and must be construed and considered together. The general rule is: All statutes relating to

the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. State Farm Mutual Auto Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542. All statutes in pari materia must be considered together and construed as if they were one law and effect given to each provision. In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418. The sections in question relate to the same subject and have a common purpose. They are parts of the same plan for the allowance of extra-earned credits for good conduct and are in pari materia, although enacted at different times. It was clearly the intent of the Legislature to fix the rate of credit to be allowed for work performed outside the prison enclosure, and to equalize that performed within the prison enclosure with that performed outside, the limitation of the amount of credit to be allowed being applicable to both.

The respondent contends that the extra-earned good time allowed by the Board of Control is excessive. The relator urges that the certificate of the Board of Control may not be questioned. We think it can. Where a certificate of good time shows on its face that extra-earned good time was erroneously computed, it is illegal and void. The error contained in it is subject to correction and the prisoner may not be properly released on the basis of a certificate that shows on its face that it is not in accord with applicable statutes on the subject. We adopt the reasoning contained in Fredericks v. Gladden, 211 Or. 312, 315 P. 2d 1010, on this question.

The relator was sentenced to serve 3 years in the reformatory. He was received at the reformatory on April 3, 1956. It is admitted that relator had worked 95 days outside the prison enclosure. It is conceded also that relator earned 5 days per month for classified work within the prison enclosure and for attendance and satisfactory work in the prison school, in accordance

with properly established prison rules. Relator was certified for release as of March 2, 1958. He was released by order of the trial court on March 25, 1958.

The relator is entitled to a diminution of his sentence in the amount of 7 months as of April 3, 1956, leaving 29 months to be served, as provided by section 29-2632, R. R. S. 1943. Relator is entitled to a credit for extra-earned good time on the maximum rate of 2 months per year on the time he has actually served. On March 25, 1958, relator had served 1 year, 11 months, and 23 days. He had therefore earned the maximum of 118 days extra good time under sections 83-440 and 83-450, R. R. S. 1943; 3 days good time earned being credited for the 23 days. On March 25, 1958, relator was entitled to 7 months diminution of sentence under section 29-2632, R. R. S. 1943, and 118 days or 3 months and 28 days under sections 83-440 and 83-450, R. R. S. 1943. Relator's proper release date on March 25, 1958, in the absence of subsequently extra-earned good time was May 4, 1958.

Since relator was not entitled to be released on March 25, 1958, as ordered by the trial court, the trial court was in error in granting the writ of habeas corpus. The judgment of the trial court is reversed and the cause remanded with instructions to dismiss relator's petition for a writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS.

HAZEL EXSTRUM, APPELLEE, V. UNION CASUALTY AND LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT.

91 N. W. 2d 632

Filed July 25, 1958. No. 34243.

1. **Contracts.** A contract will ordinarily be construed according to the law of the place where the contract is made.
2. **Evidence.** It is the general rule that a foreign law or rights thereunder must be proved like any other fact, in the absence of which the law of the forum is ordinarily applied.

3. **Insurance.** Under applicable Illinois law a certificate of insurance which was issued to an employee by insurer under master policy of group life insurance, and which differed from master policy in several respects, constituted a part of the insurance contract.
4. **Courts.** In the absence of any conflicting decision by any other intermediate court of appeal or by the Supreme Court of a state, a decision of an intermediate court of appeal of such state must be accepted by the parties and by the courts of a sister state as stating the law of the state where the decision was made.
5. **Insurance.** Where the provisions of a contract of insurance are in conflict, or subject to more than one interpretation, the provision or interpretation most favorable to the insured will ordinarily be adopted.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. On rehearing. For former opinion, see 165 Neb. 554, 86 N. W. 2d 568. *Former opinion withdrawn. Affirmed.*

Stiner & Boslaugh, for appellant.

Dryden & Jensen and *Ginsburg, Rosenberg & Ginsburg,* for appellee.

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

CARTER, J.

This is an action at law brought by Hazel Exstrum as plaintiff against the Union Casualty and Life Insurance Company, defendant, in the district court for Buffalo County, to recover on a group life insurance policy under which it is alleged that Clayton D. Exstrum became insured with the plaintiff as the named beneficiary. Proof of the death of her husband was made by the plaintiff, and the defendant company refused payment on the ground that as deceased was not in active employment on January 1, 1955, and did not return to active employment prior to his death, he was not eligible for insurance coverage. A jury was waived and a trial had to the court. After the trial, judgment

was rendered for the plaintiff. The defendant has appealed.

On December 6, 1957, an opinion affirming the judgment of the district court was filed. Exstrum v. Union Casualty & Life Ins. Co., 165 Neb. 554, 86 N. W. 2d 568. A motion for a rehearing was granted and a reargument had. We withdraw the former opinion and reconsider the case on the merits.

There is no substantial dispute in the material facts. Prior to 1954 a trust agreement had been entered into between the Central States Area Employers Association, and ten others, as first party, and Central States Drivers Council, Southern Conference of Teamsters, and their affiliated local unions, acting on behalf of their members then or thereafter employed as drivers, helpers, or in such other capacities as would be mutually agreed upon, as the second party. The first party will be hereafter referred to as employer, and the second party as the union.

The trust was denominated Central States, Southeast and Southwest Areas Health and Welfare Fund. Its purpose was to receive the contributions of employers as provided in the agreement between the employers and the unions in order to provide and pay for life insurance for drivers and helpers represented by the unions. The trust fund thus created was under the joint control of representatives of the employers and the unions. Brown Transfer Company was an employer within the agreement. Clayton D. Exstrum was employed by Brown Transfer Company on March 5, 1954, and on September 13, 1954, became a member of the union.

The trustees purchased a 1-year renewable term nonparticipating life insurance policy for the term beginning April 1, 1952, and ending March 31, 1953. The policy was amended as of April 1, 1953. The policy as amended was renewed from year to year and was in full force and effect during the period involved in this

action. Employees in Exstrum's classification were eligible for life insurance upon compliance with conditions precedent in the policy. The trustees were the sole procurers of the insurance and they were the insured under the terms of the policy. Premiums were paid by the trustees to the insurance company. Employees were under no contractual obligation to pay insurance premiums, such premiums being paid by the trustees from the fund maintained by the contributions of the employers pursuant to their agreement with the unions.

Four amended provisions of the policy are cited by the insurance company in support of its claim of nonliability. They are as follows:

"1. The effective date of this policy as to an employer becoming a Contributing Employer after April 1, 1952 shall be the first (1st) day of the calendar month following two (2) full calendar months from the date such employer becomes obligated to make his contributions to the Policyholder. The effective date as to such Contributing Employer may be a date earlier than that set forth by agreement between the Contributing Employer, the Policyholder, and the Company.

"2. Each employee employed on the effective date of his employer's insurance, for whom contributions have been made for two (2) full calendar months on his behalf prior thereto, is insured on such effective date.

"3. Each employee not insured on the effective date of his employer's insurance is insured on the first (1st) day of the calendar month following two (2) full calendar months of contributions made by his employer on his behalf.

"4. Each employee not in active employment on the effective date of his insurance after the effective date of this policy shall be insured on the first (1st) day of his employment."

Placing the most favorable construction on quoted paragraph 3, the first day of the calendar month fol-

lowing 2 full calendar months of contributions by his employer would be December 1, 1954. The evidence shows, however, that Exstrum became ill on November 20, 1954, and never returned to active employment thereafter prior to his death on January 19, 1955. It would appear therefore that Exstrum had never qualified for insurance under the terms of the group policy. The evidence discloses, also, that the trustees, nor anyone else with authority to do so, had not certified to the insurance company that Exstrum had qualified for the insurance, nor had the trustees, or anyone else, paid any premium to the insurance company for insurance on the deceased, Exstrum. It would appear, as contended by the insurance company, that Exstrum had neither qualified nor become insured under the terms of the group policy.

The evidence shows that the insurance company issued a certificate of insurance to the deceased, Exstrum, prior to his death, an act required by the policy and the applicable Illinois statute. The certificate was found among the papers of the deceased after his death. The insurance company admits the certificate was issued and asserts that it was issued through mistake, although there is no evidence to sustain this contention. The pertinent part of the certificate is: "Union Casualty & Life Insurance Company * * * Certifies that it has insured certain employees of Contributing Employers to the Trustees * * * for Group Life Insurance under Group Life Policy Number L.I.T.-90, and that Clayton D. Exstrum an employee, is insured for the sum of $2,500.00 payable in event of death of such employee to Hazel Exstrum—wife beneficiary designated by the employee to receive such benefits as are payable in the event of the death of the employee. Effective Date Oct 1 1954 * * * (Provided Employee is then regularly performing the duties of his occupation)." The evidence is uncontradicted that Exstrum regularly performed the duties of his occupation after October 1, 1954, and until

November 20, 1954. It is not disputed that Exstrum became ill on November 20, 1954, and that he died on January 19, 1955, within the 6-months termination period provided in the policy when the termination of his employment is due to illness. The question to be determined is the effect of the issuance of the certificate of insurance on the liability of the insurance company under the facts recited.

The contract of insurance is an Illinois contract. As such it is governed by the laws of that state. The applicable Illinois statute provides that no policy of group insurance shall be issued or delivered in that state unless it contains the following: "(b) A provision that the policy, the application of the employer or trustee of any association of employees and the individual applications, if any, of the employees insured shall constitute the entire contract between the parties, * * *." Smith-Hurd Ill. Ann. St. Ch. 73, § 843(b), p. 325. The foregoing statute was pleaded by the insurance company in support of its allegations that the certificate was not a part of the contract of insurance.

The insurance company contends that under the foregoing statute the certificate of insurance is not a part of the contract and that the provisions of the master policy control the result in this case under the law of Illinois. It is the general rule that a foreign law or rights thereunder must be proved like any other fact, in the absence of which the law of the forum is ordinarily applied.

We have been cited to no decision of the Supreme Court of Illinois interpreting the pleaded statute of that state; nor has our research revealed the existence of any such decision. We conclude that the question has not been before the Supreme Court of that state. We are cited to the case of Thieme v. Union Labor Life Ins. Co., 12 Ill. App. 2d 110, 138 N. E. 2d 857, in which the court held: "The Illinois Appellate Courts for three different districts, while not having the precise issue

before them, have determined the rights of an insured under a policy of group insurance by treating both the master policy and the certificate as integral parts of the contract. (Citing cases.) As we have heretofore stated, in the absence of a provision to the contrary in the master policy, we should apply the law of Illinois and under that law we are of the opinion that the certificate is a part of the contract." We point out that this case was released for publication on January 8, 1957, a date subsequent to the enactment of the statutes of Illinois herein cited. We necessarily conclude that the certificate of insurance is a part of the insurance contract under the law of Illinois for the reasons stated in Thieme v. Union Labor Life Ins. Co., *supra.*

The insurance company contends that plaintiff failed to plead the law of Illinois and hence she should not be heard to assert for the first time on reargument that there are decisions of the appellate courts of Illinois holding that the certificate of insurance is a part of the insurance contract. We do not think this contention is meritorious. We point out that the statutes of Nebraska dealing with group life insurance contain no such provision as Smith-Hurd Ill. Ann. St., Ch. 73, § 843(b), p. 325. Under the law of Nebraska the certificate of insurance is a part of the insurance contract. Hemmer v. Metropolitan Life Ins. Co., 131 Neb. 14, 267 N. W. 153; Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220. To avoid the effect of these decisions the insurance company pleaded the quoted Illinois statute. The determination of the law of Illinois is a question of fact upon which both parties may submit evidence. The plaintiff, assuming that the group policy was an Illinois contract, produced the appellate court decision of Illinois to establish that the certificate of insurance was a part of the insurance contract under the law of that state. This, plaintiff has a right to do to establish that under the statute pleaded

by the insurance company the plaintiff had a right to recover.

The quesion immediately arises as to the sufficiency of the proof of the law of Illinois. Is the decision of an intermediate appellate court sufficient to establish the law of a sister state? This question does not appear to have been previously before this court. The rule appears to be that such a decision is not only sufficient but should be followed in the absence of a conflicting decision by any other intermediate court of appeal, or by the Supreme Court of the state. The rule is well stated in Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570, 123 P. 2d 622, wherein the court said: "As the contract was issued in Missouri, its interpretation is governed by the laws of that state, and so we turn to the decisions of that state for support of what we have said. The only decision from that jurisdiction, on the point here involved, which has come to our attention is that of an intermediate court of appeal. In the absence of any conflicting decision by any other intermediate court of appeal or by the Supreme Court of that state, and we know of none, the decision must be accepted by the parties as well as by this court as stating the law of Missouri. (Six Companies of California v. Joint Highway etc. of California, 311 U. S. 180 [61 Sup. Ct. 186, 85 L. Ed. 114]; Stoner v. New York Life Ins. Co., 311 U. S. 464 [61 Sup. Ct. 336, 85 L. Ed. 284]; Fidelity Union Trust Co. v. Field, 311 U. S. 169 [61 Sup. Ct. 176, 85 L. Ed. 109]; West v. American Telephone & Telegraph Co., 311 U. S. 223 [61 Sup. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956].) This is a universal rule. The Supreme Court of the United States has made it plain in the above cited cases that it regards a decision of an intermediate court of appeal of a state as stating the law of the state, unless it is in conflict with the decision of another co-ordinate court, even though such decision is not binding on the highest court of appeal of the state, so long as that court has not pro-

nounced otherwise. In view of that holding the full faith and credit clause would require us to follow it, even if we were of a different view, which we are not."

In Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109, the Supreme Court of the United States in dealing with this question stated: "While, of course, the decisions of the Court of Chancery are not binding on the Court of Errors and Appeals, a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court 'except for cogent and important reasons.' Ramsey v. Hutchinson, 117 N. J. L. 222, 223; 187 A. 650. It appears that ordinarily the decisions of the Court of Chancery, if they have not been disapproved, are treated as binding in later cases in chancery (Philadelphia & Camden Ferry Co. v. Johnson, 94 N. J. Eq., 296, 297; 121 A. 900), but there is always, as respondent urges, the possibility that a particular decision of the Court of Chancery will not be followed by the Supreme Court (see Flagg v. Johansen, 124 N. J. L. 456, 461; 12 A. 2d 374) or even by the Court of Chancery itself. See Kicey v. Kicey, 112 N. J. Eq. 459, 461; 164 A. 684. It is the function of the court of last resort to resolve such conflicts as may be created by decisions of the lower courts, and except in rare instances that function is performed and the law is settled accordingly. Here, however, there is no conflict of decision. Whether there ever will be, or the Court of Errors and Appeals will disapprove the rulings in the Thatcher and Travers cases, is merely a matter of conjecture. See West v. American Telephone & Telegraph Co., supra. At the present time the Thatcher and Travers cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."

The Supreme Court of Illinois dealt with this question in Moscov v. Mutual Life Ins. Co., 387 Ill. 378, 56 N. E. 2d 399, wherein it said: "Plaintiffs also urge that the Farmers Trust Co. case is of but little authority because rendered by an intermediate court of review of the commonwealth. Royal League v. Kavanagh, 233 Ill. 175, invoked by plaintiffs, held that, in advance of its announcement by the Supreme Court of another State, this court cannot assume the common law in the sister State will be declared to be different from the common law as construed in Illinois. The reason for the existence of this rule has been abolished by the Uniform Judicial Notice of Foreign Law Act. (Ill. Rev. Stat. 1943, chap. 51, pars. 48g-48n.) When the reason for a rule disappears the rule should likewise disappear. In West v. American Telephone and Telegraph Co., 311 U. S. 223, the Supreme Court of the United States said, 'Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' If Courson v. New York Life Ins. Co., 295 Pa. 518, be deemed not decisive of the issue made with respect to the question of Theodore Moscov's alleged mental incapacity, we must accept the decision of the intermediate court of review as stating the law of Pennsylvania, in the absence of any conflicting decision by another appellate court of co-ordinate jurisdiction in that commonwealth or by its highest court of review."

It seems clear that the decision in Thieme v. Union Labor Life Ins. Co., *supra,* although a decison of the intermediate appellate court of Illinois should be accepted as stating the law of Illinois and, as such, is applicable to the situation before us. We are required to hold, under the law of Illinois, the certificate of insurance is a part of the insurance contract in the case presently before us.

It is readily apparent that differences exist in the provisions of the master policy and the certificate. The most important difference is that under the master policy, giving it the construction most favorable to the insured, the effective date as to Exstrum was December 1, 1954, while under the certificate of insurance the effective date was October 1, 1954. If the effective date was December 1, 1954, Exstrum had not qualified for insurance and the insurance company has no liability. If the effective date was October 1, 1954, Exstrum had been thereafter actively employed and was qualified for the insurance, and the basis of the rejection of the claim was without merit. The law is that 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., 162 Neb. 284, 75 N. W. 2d 739.

Under the law of Illinois the certificate of insurance is a part of the insurance contract. The provisions in the two instruments are in conflict, particularly with reference to the effective date of the policy. It is a universal rule that where provisions of a contract of insurance are in conflict, or subject to more than one interpretation, the provision or interpretation most favorable to the insured will ordinarily be adopted. In Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874, this court stated the rule as follows: "If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted."

We hold therefore that the group policy of insurance here involved is an Illinois contract, that under the law of Illinois the certificate of insurance is a part of the insurance contract, and the effective date of the

policy is controlled by the provisions of the certificate of insurance under the rule of construction herein cited. The defense that the deceased Exstrum had never qualified for insurance under the terms of the policy contract is without merit under the law of Illinois. The judgment of the district court finding for the plaintiff for $2,500, with interest and costs, is therefore correct. An attorney's fee of $500 is allowed the plaintiff for the services of attorneys in this court to be taxed as costs against the defendant.

AFFIRMED.

YEAGER, J., dissenting.

I find no difficulty in concurring in the result arrived at by the majority opinion. I cannot however agree with much of the reasoning employed in arriving at that result.

I do not disagree with the conclusion that the group insurance policy which is the basis of the controversy in this action is subject to interpretation and application of the Illinois insurance code and the pertinent decisions of the courts of Illinois, provided reference thereto becomes necessary. If however the terms of the policy and other documents, which must in the very nature of things be looked to for the ascertainment of the true meaning of the policy, are clear and unambiguous and reflect the intention of the parties, which intention is not violative of law, no valid purpose can be served by reference to the Illinois code or the decisions of the courts of that state.

I agree that a certificate issued by an insurer to a person eligible for insurance under a group insurance policy may properly be construed to be a part of the insurance contract and may even in case of conflict be controlling. It may not however be employed to destroy the clear, meaningful, and unambiguous terms of the engagements between the contracting parties. What I have said will become clear from a reading of the majority opinion and the following which I think is

the true attitude which should be adopted in the determination of this case.

This is an action at law brought by Hazel Exstrum as plaintiff against the Union Casualty and Life Insurance Company, a corporation, defendant, in the district court for Buffalo County, the purpose of the action being to recover on a group life insurance policy whereunder Clayton D. Exstrum became insured with the plaintiff as the named beneficiary. Proof of the death of her husband was made by the plaintiff, and the defendant company refused to allow her claim. By stipulation of the parties, a jury was waived and trial was had to the court. After trial judgment was rendered for the plaintiff. The defendant filed a motion for new trial which was overruled. From the order overruling the motion for new trial and the judgment the defendant appealed.

Following a hearing in this court an opinion was adopted affirming the judgment of the district court. That opinion is reported as Exstrum v. Union Casualty & Life Ins. Co., 165 Neb. 554, 86 N. W. 2d 568. Thereafter the case was before the court on motion for rehearing the consequences of which are that the former opinion was withdrawn.

The case was tried on an amended petition of the plaintiff and an answer thereto by the defendant. A reply was filed after the conclusion of the presentation of the evidence.

The material facts, about which there is no substantial dispute, which are the basis of the action, are that prior to the year 1954 and during that year a trust and trusteeship was in existence. The trust and trusteeship had been created by agreement between Central States Area Employers Association and 10 others, as first party, and Central States Drivers Council, Southern Conference of Teamsters, and their affiliated local unions, acting on behalf of their members now or hereafter employed as drivers, helpers, or in such other capaci-

ties as may be mutually agreed upon, second party. The first party will be hereinafter referred to as employers and the second party will be referred to as the union.

The trust was denominated Central States, Southeast and Southwest Areas Health and Welfare Fund, and its purpose, to the extent necessary to refer to it herein, was to receive contributions from employers who were members of the first party in order to provide and pay for life insurance for drivers and helpers represented by the second party. The trust will be hereinafter referred to as the fund. The fund was under the joint control of representatives of the employers and the union who are denominated trustees. The union and the employers had no direct control over the trust functions or funds of concern in this action.

Brown Transfer Company, which will be referred to as Brown, was an employer within the meaning of the agreement. From and after September 13, 1954, Exstrum was an employee of Brown and was represented by the union.

By the agreement provision was made, among other provisions, for the acquisition of life insurance for employees in the classification of Exstrum. The trustees were the sole procurers of the insurance and the policy or policies of insurance were taken in their name. Funds for the payment of the premiums were paid and payable into the fund in the hands of the trustees and were payable by the trustees to the insurance company. There was no contractual obligation for payment of premiums for insurance by either the union or the employers on life insurance. Life insurance was available only to members of the union.

The defendant issued to the trustees a 1-year renewable term nonparticipating life insurance policy for the term beginning April 1, 1952, and ending March 31, 1953. The policy was amended as of April 1, 1953. The policy with these amendments was thereafter in full

force and effect and is the entire contract of insurance which is of concern in this case. Two of the amendments are of concern here. The first of these is as follows:

"3. Each employee not insured on the effective date of his employer's insurance is insured on the first (1st) day of the calendar month following two (2) full calendar months of contributions made by his employer on his behalf."

This provision was applicable to Exstrum since it is made clear by the record that he was not employed on the effective date of Brown's insurance. Exstrum was not entitled to insurance until contributions for premiums were made for 2 calendar months after he became eligible for insurance. He became a member of the union September 13, 1954, and was thereafter eligible for insurance. Thus the 2-month period for Exstrum began October 1, 1954, and ended November 30, 1954, unless it was interrupted by operation of the second amendment, which is the following:

"4. Each employee not in active employment on the effective date of his insurance after the effective date of this policy shall be insured on the first (1st) day of his employment."

Under the terms of the second of these quoted provisions, if Exstrum was not in active employment on December 1, 1954, he could not become entitled to insurance thereafter until he again became actively employed.

Exstrum performed no service for Brown after November 20, 1954. He died January 19, 1955. There is evidence that Exstrum was an employee of Brown who did not work regularly but performed service only on call; that he was not called after November 20, 1954; that actually he was not available for work after November 20, 1954, because of sickness; but that he was never discharged as an employee by Brown.

In the light of this evidence the plaintiff insists that

Exstrum remained in active employment until after December 1, 1954. On the other hand the defendant urges that active employment as used in the policy means active and actual engagement in the performance of service for Brown.

Under the definitive and declaratory provisions of the policy of insurance issued by the defendant to the trustees and other facts disclosed by the record, I think it must be said that the contention of the plaintiff in this respect is correct and Exstrum was not, within the meaning of the policy, out of active employment as contended by the defendant.

While it is true that Exstrum was not actually engaged in employment after November 20, 1954, the policy by its terms accords to his status thereafter active employment. The status was removed from the category of inactivity by the declaration that eligible employees shall not be regarded as out of active employment if this is caused by sickness.

The policy defines those employees who were or became eligible for insurance as follows: " 'Eligible employee' as used in this policy means an employee actively at work with a Contributing Employer whose employment is covered under the collective bargaining agreement establishing the Central States, Southeast and Southwest Areas Health and Welfare Fund."

The collective bargaining was on behalf of certain named organizations "* * * acting on behalf of their members now or hereafter employed as drivers, helpers, or in such other capacities as may be mutually agreed upon, * * *." Exstrum came within the categories named on September 13, 1954.

The policy contains provisions as to when termination of the insurance of an employee takes place. It first provides that it shall take place: "Thirty (30) days after termination of employment."

Next it provides: "Termination shall be deemed to occur upon cessation of active employment."

Next is a provision and declaration that an eligible employee may not be regarded as being out of active employment if he is absent on account of sickness. It is to be observed that this definition has reference to those who are covered by the collective bargaining agreement and not necessarily to those who may at the time have or be entitled to insurance protection. It purports to say, when the statement is read with reference to the policy, the trust agreement which by its declarations reflects the collective bargaining agreement, and the purposes to be served, that those who were out of employment on account of sickness may not be regarded as out of active employment. It is as follows: "Cessation of active employment in the classes of employees eligible for insurance shall be deemed termination of employment except that while an employee is absent on account of sickness * * * the insurance shall be deemed to continue until premium payments for such employee's insurance are discontinued."

Any insistence that these provisions of the policy apply only to employees who have been employed a sufficient length of time to have acquired insurance fails to give full effect to the policy as by its own terms it must properly be interpreted. Further any contention that they refer only to the termination provisions of the policy and therefore have application only to those employees who have by lapse of time become insured is without merit.

The placement of the reservation or exception with regard to inactivity on account of sickness does not cause them to become foreign to the situation of Exstrum after November 20, 1954. In reason instead, in the light of the declarations of the policy construed as they must be with the trust agreement and its references to the collective bargaining agreement, they may well be said to have been appropriately placed to receive the application which has been given to them herein.

It is to be observed that one who has been in active

employment for 2 months has passed beyond the point of mere eligibility for insurance. He is ab initio insured. It would have been simple and understandable for the defendant to have said "insured" or "insured employee" instead of, as it did, "eligible employee" if that had been the purpose and intention. If it had done so there could be no doubt of the meaning. This it failed to do. The reasonable conclusion is that by the use of the word "employee" the intention was to extend the reservation or exception relating to inactivity on account of sickness beyond those who had already become insured.

It becomes necessary only to refer to the provisions of the policy as they have already been pointed out herein to find this intended extension of the reservation or exception. It was clearly intended and so declared to extend the reservation or exception to all "employees eligible for insurance." All of the members of the class which included Exstrum were eligible employees. Employee within the specific definition of the policy means eligible employee. Thus Exstrum was an employee out of work on account of sickness and accordingly had insurance on December 1, 1954.

If it should be said that the policy is capable of some other interpretation as well as the one given to it herein, then the following rule must be applied:

"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., 162 Neb. 284, 75 N. W. 2d 739. See, also, Woodring v. Commercial Casualty Ins. Co., 122 Neb. 734, 241 N. W. 285; Machurek v. Ohio Nat. Life Ins. Co., 125 Neb. 35, 249 N. W. 81; Jensen v. Lincoln Hail Ins. Co., 125 Neb. 87, 249 N. W. 94; Peony Park v. Security Ins. Co., 137 Neb. 504, 289 N. W. 848; Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

The policy of insurance provides for the continuance of payment of premiums as a condition of insurance re-

maining in force and effect. The failure to pay premiums was pleaded as a defense. It however is not available as a defense since liability on the policy was denied before action was commenced on the sole ground that Exstrum was not in active employment a sufficient length of time to have insurance under the policy. Under these circumstances the following rule is applicable, which rule removes from consideration any question of whether or not premiums were paid: "A party who gives one reason for his conduct and decision as to a matter involved in controversy cannot after litigation has begun defend upon another and different ground." Serven v. Metropolitan Life Ins. Co., 132 Neb. 637, 272 N. W. 922. See, also, Moore v. Washington Nat. Ins. Co., 135 Neb. 29, 280 N. W. 221; O'Neil v. Union Nat. Life Ins. Co., *supra*.

As pointed out this is an action at law wherein a jury was waived. It calls for the application of the rule that the findings of the court have the effect of a verdict of a jury, and judgment thereon will not be disturbed unless it is clearly wrong. See Scottsbluff Nat. Bank v. First State Bank, 162 Neb. 475, 76 N. W. 2d 445. The findings and judgment of the district court in this case may not be said to be clearly wrong.

For the reasons set out herein the judgment of the district court should be affirmed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1958

GENE RAYMON HASWELL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
92 N. W. 2d 161

Filed October 3, 1958. No. 34369.

1. **Criminal Law: Evidence.** Information pertinent to an issue in a criminal case is admissible in evidence on the trial thereof notwithstanding it was obtained in an irregular or illegal manner.
2. **Criminal Law: Searches and Seizures.** A violation of the constitutional guarantee concerning search and seizure does not render information acquired thereby inadmissible on the trial of a criminal case against the person from or concerning whom the information was procured.
3. **Criminal Law: Trial.** The inclusion in an otherwise proper instruction defining reasonable doubt that it does not mean the possibility that the accused may be innocent does not make the instruction prejudicially erroneous.
4. ———: ———. It is a proper charge to the jury in a criminal case that the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, the burden of proof is on the State throughout the trial and that a conviction of the crime may only be had when the jury is satisfied, from a consideration of the whole evidence, of the guilt of the accused, beyond a reasonable doubt.
5. **Criminal Law.** If the punishment for an offense is committed to the discretion of the court, to be exercised within prescribed limits, a sentence within the limits of the statute will not be disturbed in the absence of an abuse of discretion by the trial court.
6. **Appeal and Error: Evidence.** This court, in the exercise of its appellate jurisdiction, may not receive evidence originally tendered therein to sustain or defeat a judgment of the trial court.

ERROR to the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Francis M. Casey, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error, hereafter called accused, was charged with and convicted of the offense of rape of Barbara Williams, referred to herein as prosecutrix. A motion for a new trial was denied and the accused was adjudged to be confined in the State Reformatory. He presents the record of his conviction for review by error proceedings.

The accused claims that the action of the trial court in admitting the testimony of the sheriff of Cass County as to what he saw and learned when he forcibly, without the authority or protection of legal process, entered the bedroom of a farmhouse then occupied by the accused and the prosecutrix the day of the alleged commission of the offense charged against the accused. He claims that the action of the sheriff in this respect constitutes an unlawful search and seizure. Art. I, § 7, Constitution of Nebraska. The accused argues that any information then obtained by the sheriff was illegally secured and that testimony concerning it was inadmissible. The gist of the testimony of the sheriff was that he entered the house without process of any kind, forced open the door to the bedroom, and entered it. He then saw the accused and the prosecutrix with their clothes wholly removed. The accused was near a bed and the prosecutrix was attempting to leave the room. The sheriff placed the accused under arrest and removed him and

the prosecutrix to his office in Plattsmouth some distance away.

The record does not show that the accused had ownership, right of possession, or lawful occupancy of the premises where this happening occurred. Kelley v. United States, 61 F. 2d 843, 86 A. L. R. 338. However, assuming that the sheriff forcibly entered the bedroom without the authority of legal process, his testimony as to the information he thereby acquired was not inadmissible and the action of the court concerning it was not error. It is a doctrine of this state that information pertinent to an issue is admissible in evidence notwithstanding it was obtained in an irregular or illegal manner. The fact that the constitutional guarantee concerning search and seizure has been violated does not render the information received thereby inadmissible against the person from or concerning whom the information was procured. Billings v. State, 109 Neb. 596, 191 N. W. 721; Bush v. State, 112 Neb. 384, 199 N. W. 792; Walker v. State, 113 Neb. 19, 201 N. W. 640; Kuxhaus v. State, 117 Neb. 514, 221 N. W. 439. The larger number of jurisdictions approve the view of this state in reference to this class of evidence. Annotation, 50 A. L. R. 2d 533.

Insufficiency of evidence to establish the crime charged is an assignment made and argued by accused. The evidence is that accused was 26 years of age and the prosecutrix was 15 years of age. The sheriff found and saw them in the bedroom in the farm home where the accused was taken into custody in a very compromising condition and situation. The accused voluntarily made a written confession of the crime charged. He testified, while a witness on the trial, to facts constituting the crime with which he was charged. The prosecutrix, while a witness on the trial, likewise testified to facts constituting the offense alleged against the accused. There is no conflict in the proof of the unlawful relationship and indulgence of the prosecutrix and the ac-

cused as charged in the information and that the prosecutrix was 15 years of age. There was a conflict of evidence on the issue of whetner or not she was previously unchaste. Larson v. State, 125 Neb. 789, 252 N. W. 195. This issue was resolved on conflicting proof by the jury favorably to the State. The contention that the evidence did not sufficiently support the verdict is wholly without foundation.

The instruction defining reasonable doubt is assailed by accused as prejudicially erroneous. The instruction contains this language: "A reasonable doubt, within the meaning of the law, is such a doubt as would cause a prudent and considerate person, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matters charged. It does not mean the possibility that the accused may be innocent, nor does it mean an imaginary doubt or one based upon groundless conjecture, but it does mean an actual and substantial doubt, having some reason for its basis." The specific objection is because of the words therein "It does not mean the possibility that the accused may be innocent." In Whitney v. State, 53 Neb. 287, 73 N. W. 696, the court considered instructions which used the language "You are instructed that a reasonable doubt is an actual, substantial doubt arising from the evidence or want of evidence in the case. * * * That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis." This court said concerning these instructions: "The foregoing states the law correctly. Instructions, either in the identical language, or in substance the same, have been approved by this court in the following cases: Polin v. State, 14 Neb. 540; Langford v. State, 32 Neb. 782; Lawhead v. State, 46 Neb. 607." See, also, Carter v. State, 98 Neb. 742, 154 N. W. 252; Johnson v. State, 111 Neb. 545, 196 N. W. 898; Daugherty v. State, 154 Neb. 376, 48 N. W. 2d 76.

A complaint of this instruction by accused is that there is nothing in the instruction given which precedes the phrase quoted above which advised the jury "that the State must produce sufficient proof." The instruction which preceded the one defining reasonable doubt contained this information: "The plea of not guilty by the defendant casts upon the State the burden of establishing by the evidence, beyond a reasonable doubt, every material allegation charged in the information. The defendant is presumed innocent until he has been proved guilty by the evidence, beyond a reasonable doubt * * *." The instructions must be considered as a whole and when this is done there is no basis for the complaint of the accused noted above.

The charge of the trial court to the jury was in part as follows: "In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the State throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt, beyond a reasonable doubt." The challenge of the accused is to the words therein "* * * the burden of proof never shifts, but, as to all defenses, rests upon the State throughout." He says that even though he had established by evidence a complete defense, his evidence could not be considered because it was not produced by the State and that the instruction deprived the accused of his right to prove his innocence as a matter of his own defense. His interpretation of the language of the instruction is not a valid or a reasonable one. In Gravely v. State, 38 Neb. 871, 57 N. W. 751, this language appears: "In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt."

Yeoman v. State, 81 Neb. 244, 115 N. W. 784, states as follows: "One of the instructions given by the court upon its own motion was as follows: 'The court instructs the jury that in criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence, a conviction can be had only when the jury are satisfied from a consideration of all the evidence of the defendant's guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged.' It is contended that this instruction shifted the burden of proof from the state to the defendant as to any distinct, substantive defense which might be interposed by the accused to justify or excuse the act charged. A casual reading of the instruction might leave the impression that it was to be so construed; but a more critical study shows that it is not susceptible of that construction." The case last cited was modified in one respect by an opinion on rehearing, 81 Neb. 252, 117 N. W. 997, but the quotations therefrom set out above were not disturbed. See, also, Torske v. State, 123 Neb. 161, 242 N. W. 408.

An assignment of accused is that the sentence imposed by the trial court is excessive. It is sufficient to say concerning this that if punishment for an offense is left to the discretion of the court to be exercised within prescribed limits as it is in reference to the crime of which the accused was convicted (§ 28-408, R. R. S. 1943), a sentence within the limits of the statute will not be disturbed unless an abuse of discretion is made to appear. Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. Abuse of discretion in this respect does not appear from a consideration of the record.

A motion by the accused requests that this court by order make an original affidavit attached to the motion a part of the record in the case. The motion was filed

September 13, 1958, and was submitted to the court at the time of the argument and submission of the case on its merits. The motion must be denied. Evidence not contained in a bill of exceptions will not be considered in this court although it is physically attached thereto or otherwise exhibited.

Lee v. State, 124 Neb. 165, 245 N. W. 445, declares: "This court is given no jurisdiction to correct any errors save those only 'appearing in the record.' So far as the action of this court of review in a criminal case can be called a trial, it is a trial of the correctness of the lower court's decision, and the evidence of those acts of that court, whose correctness is on trial, can be furnished only by the record, as by its records alone can that court speak. Barlass v. Braash, 27 Neb. 212, 219. The cause here must be considered on the record as it is, not what it possibly might be."

Clark v. State, 150 Neb. 494, 34 N. W. 2d 877, states: "Original evidence cannot be received in the appellate court to support or defeat the judgment of the trial court."

An indeterminate sentence was given the accused by the trial court. This was unauthorized. Such a sentence may not be imposed on one convicted of a crime of violence against the person of another. Rape is a crime of that class. § 29-2620, R. R. S. 1943; Larson v. State, *supra*. A person sentenced for the crime of rape may be adjudged to serve the sentence in the State Reformatory if the conditions prescribed by the statutes exist. § 83-455, R. S. Supp., 1957; § 29-2620, R. R. S. 1943.

The pending motion should be and is denied. The verdict and judgment of conviction of the accused of the crime of rape should be and it is affirmed. The indeterminate sentence given him should be and it is reversed and set aside and the cause is remanded to the district court for Cass County with directions to impose on the accused a proper sentence as provided by law.

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

HAROLD E. HEIN, APPELLANT, V. THE W. T. RAWLEIGH COMPANY, A FOREIGN CORPORATION, ET AL., APPELLEES.

92 N. W. 2d 185

Filed October 3, 1958. No. 34425.

1. **Trial: Evidence.** Proof by preponderance of the evidence is all that is required in any civil action; but when a litigant seeks to overcome by parol evidence the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, the quality of the evidence must be clear, satisfactory, and convincing.
2. **Husband and Wife: Gifts.** The law indulges a presumption of a gift of the property when one spouse places the title thereto in the name of the other spouse and this is true without regard as to which one of them furnished the consideration expended in acquiring the property.
3. **Judgments: Executions.** The issuance and return of an execution without a levy of it is sufficient, as against the judgment debtor, to prevent the judgment from becoming dormant; but to preserve the priority of the judgment lien as against good faith creditors and purchasers, it is necessary that an actual levy of the execution be made.
4. ———: ———. If an execution is issued on a judgment and delivered to the sheriff of the county as provided by law and it is by him returned unsatisfied, the law presumes that the officer did his duty in reference thereto and the execution in such case is duly "sued out." It is immaterial in such a case that the creditor requested the return of the execution.
5. **Vendor and Purchaser.** A good faith purchaser of real estate is one who buys it for a valuable consideration without notice of suspicious circumstances which would put a prudent person on inquiry.
6. **Joint Tenancy.** The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all who have an interest in such estate.
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. **Quieting Title.** A decree quieting title to real estate, encumbered by a lien, may be obtained on a proper ground, such as the bar of the statute of limitations, without alleging or proving payment of the lien.
9. **Joint Tenancy.** The meaning of the phrase by the moiety or

half and by the whole is that joint tenants are seised of the entire estate for the purposes of tenure and survivorship but of only a particular part or interest for the purpose of immediate alienation.

10. **Judgments.** Real estate acquired by a judgment debtor subsequent to the rendition of judgment against him is subject to the lien of the judgment at the time the title thereto vests in the debtor.

11. ———. A grantee of the judgment debtor, who has actual or constructive notice of the judgment, takes the real estate subject to and charged with the lien of the judgment.

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

Addison & Stirtz, for appellant.

John L. Cutright, for appellees.

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

BOSLAUGH, J.

The W. T. Rawleigh Company recovered a judgment against Edward H. Hein September 23, 1932, in the district court for Dodge County. The judgment was revived November 18, 1937, and an execution was issued and returned unsatisfied within each successive 5-year period thereafter to and including May 13, 1957. It is not shown that a levy was made of any of the executions and it is a permissible inference from the records that a levy of any one of the executions was not made by the sheriff of Dodge County.

Edward H. Hein and Hilda Hein were at the times of the transactions involved in this case husband and wife. Hilda Hein agreed to buy the real estate involved in this case and described as the southerly 80 feet of Lot 5 and the westerly 16 feet of the southerly 80 feet of Lot 6 in Block 66 of the original town, now city, of Fremont, Nebraska, and she paid $200 of the purchase price on the evening of February 20, 1946, when the agreement of sale and purchase was made. The transac-

tion was completed the following day, February 21, 1946, by Hilda Hein paying the balance of the purchase price and the seller and her husband executing and delivering a deed of the property to Hilda Hein which was filed for record on that day and recorded in the office of the register of deeds of that county. The deed was prepared by the attorney for the seller of the property and the transaction was consummated in his office. The deed named "Edward Hein and Hilda Hein, husband and wife, as joint tenants with right of survivorship and not as tenants in common" as grantees therein. The purchase price of the property was produced and paid by Hilda Hein to the seller February 21, 1946, the day the transaction was completed, except the $200 which was paid the previous day. The amount paid on February 21, 1946, was evidenced by a cashier's check of Stephens National Bank of Fremont for $5,768.57 issued February 21, 1946, to Hilda Hein. This amount was transferred to the bank by her from her savings account therein and in consideration thereof the cashier's check was issued and delivered to her. A cashier's check for $3,152.47 was issued February 21, 1946, to Hilda Hein by The Fremont National Bank of Fremont and charged to her deposit account in the bank. The cashier's checks were endorsed and delivered to the seller and she gave Hilda Hein her check for the difference, $154.94, between the balance Hilda Hein owed the seller and the total of the cashier's checks. Edward Hein for a recited consideration executed and delivered a general warranty deed of this property to Hilda Hein February 13, 1947, and it was that day filed and recorded in the public records of Dodge County.

The source of the funds used by Hilda Hein in the purchase of the property involved herein was as follows: The net proceeds of the sale by her of a residence property in which she and her husband lived as their home for many years. It was transferred to her July 16, 1932. It had a value of $4,600 and was encumbered

by a mortgage for $3,200. It was the homestead of Edward H. Hein and his wife. The exemption of $2,000 was greater than the equity in the property. Hilda Hein was engaged in conducting a cafe and beer tavern business in the Fremont Country Club for many years. She and her husband lived there and he assisted in any way he could. He had no business or other gainful occupation. She paid the mortgage indebtedness and thereafter sold the property in February of 1945. The deed to the purchaser was recorded March 3, 1945, and on that date she deposited in The Fremont National Bank $4,249.97. The father of Hilda Hein conveyed to her May 23, 1945, real estate in Fremont. She sold and conveyed it by deed dated January 5, 1946, to Emil E. Peterson and Zilla A. Peterson. She received the net consideration of the sale and conveyance, $5,157.07, from her real estate broker and she deposited it in her account in the Stephens National Bank January 28, 1946. The deposit accounts in the banks referred to were always in the name of Hilda Hein.

She entered into the actual physical possession of the property when she purchased it and made her home there until the time of her death. She had all the benefits and the burdens of ownership of the property. Hilda Hein died April 16, 1954, testate, a resident of Dodge County. Her will was admitted to probate and her estate was administered by the county court of that county. The will of the deceased devised the use of the real estate involved in this case to Edward H. Hein during his life and subject thereto she devised it in fee to her son, Harold E. Hein, the appellant herein. Edward H. Hein died on February 26, 1957.

Harold E. Hein commenced this litigation April 10, 1957. Alfred F. Christensen and May Griffin are named in the caption as defendants but jurisdiction of either of them was not acquired by service of process or appearance by either of them in the case. The contending parties are Harold E. Hein, appellant, and The W. T.

Rawleigh Company, appellee, and they will be referred to hereafter in that manner.

The relief sought by appellant was an adjudication quieting title to the real estate involved herein in him in fee and especially as against the alleged lien of the judgment of appellee against Edward H. Hein above described. The basis of the relief sought as asserted by appellant was that the judgment of appellee was obtained September 23, 1932; that no valid or effective execution was sued out thereon after November 8, 1947; that the judgment has been dormant since 5 years after that date; that the attempt of appellee to have an execution issued on the judgment July 17, 1951, was legally ineffective to prevent the judgment becoming dormant because nothing was done under it after it was made out conditionally and it was returned by the sheriff not in the exercise of his discretion but by direction of appellee; that the judgment is dormant and is not a lien on any part of the real estate concerned in this case; that the real estate was purchased and paid for by Hilda Hein with her personal and separate funds and estate and it was intended to be transferred to her only, but by mistake, inadvertence, and accident and without her knowledge until long after the deed was delivered and recorded, the deed by its terms conveyed the real estate to her and her husband as joint tenants; that no execution has been issued on the judgment and levied on the real estate or any part of it and because of this failure the judgment was not and is not a lien on the real estate to the preference of Hilda Hein, a bona fide purchaser thereof, or of appellant, her successor in interest and her devisee; that more than 5 years have elapsed since February 13, 1947, (the date of the deed from Edward H. Hein to Hilda Hein, his wife, for the real estate involved herein) and by lapse of time, operation of law, and the statute of limitations appellee is barred from asserting any judgment lien against the real estate or prosecuting any action to es-

tablish that its judgment against Edward H. Hein is a lien on the real estate; and that appellee has been guilty of laches because it deliberately and wrongfully delayed any attempt to enforce its judgment against the real estate until after the time Edward H. Hein, Hilda Hein, and others concerned in the transactions and matters affecting or apparently affecting the real estate who had knowledge of facts could have been witneses for appellant if appellee had acted promptly and timely in the premises and that its laches are sufficient in equity to defeat any recovery of appellee against appellant or his real estate.

Appellee denied the claims and assertions of appellant and by cross-petition alleged the judgment of appellee recovered against Edward H. Hein, the additional accruals thereon, and the payments made on the judgment; that the judgment was revived November 18, 1937, and since then appellee has sued out executions thereon within each successive period of 5 years and the judgment was a valid, subsisting lien against the real estate owned by the judgment debtor during and since his lifetime; that the deed to the real estate involved herein was deliberately and intentionally made and taken in joint tenancy and without mistake, accident, or inadvertence and Edward H. Hein thereby acquired an undivided one-half interest in the real estate; that he, on the death of his wife, acquired by virtue of the deed the other undivided one-half thereof belonging to his wife; that the lien of the judgment upon the conveyance and death of his wife attached and has remained a lien as to the whole of the real estate; and that the deed of February 13, 1947, from Edward H. Hein to his wife, Hilda Hein, was made to hinder, delay, and defraud appellee in the collection of its judgment against the grantor therein and the deed is void as to appellee. It asked the court to find that appellant had no cause of action and that appellee go hence without day and recover its costs.

The district court found generally in favor of appellant and against appellee; that appellant was the owner in fee simple of the real estate involved herein and was entitled to a decree quieting title thereto except that his title to an undivided one-half of the real estate was subject to the judgment lien of appellee because of the judgment recovered by it against Edward H. Hein; that the lien of said judgment was valid and subsisting upon and against an undivided one-half of said real estate; that the fee simple title of appellant in an undivided one-half interest in the real estate should be and it was quieted and confirmed in him; and that appellee should be enjoined from claiming or asserting any right, interest, or title in or lien upon said undivided one-half interest in said real estate. A judgment was rendered in harmony with the findings. The motion of appellant for a new trial was denied.

Appellant alleged and now contends that the real estate involved was purchased by Hilda Hein and that the purchase price of it was paid by her with her individual and separate funds; that Edward H. Hein did not at any time own or have any interest therein; and that it was through mistake, inadvertence, or accident that the deed conveyed the real estate to Hilda Hein and Edward Hein jointly when it was intended that Hilda Hein should be the sole grantee named in the deed.

The record yields no proof that there was any mistake, inadvertence, or accident in the preparation or the terms of the deed. There was no evidence produced by appellant tending to show that the language of the deed and the persons named as grantees therein were not precisely as Hilda Hein directed and intended. The record does not establish that she did not freely and advisedly have her husband and herself named jointly as the grantees in the deed. Appellant had the burden of proving mistake, inadvertence, or accident in the respect claimed by clear, satisfactory, and convincing

evidence. The burden of proof as to mistake rests on the party who has the affirmative of the issue and to maintain it the proof must be clear and convincing.

Doane v. Dunham, 64 Neb. 135, 89 N. W. 640, declares: "While proof by a preponderance of the evidence is all that is required of the plaintiff in any civil action, when a plaintiff seeks to overcome the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, by parol evidence, much more certainty and conclusiveness are required than in ordinary cases." In the opinion the court said: "It is undoubtedly true that proof of an issue by a preponderance of the evidence is all that is required of a plaintiff in any civil action. * * * But this is not a fixed or unvarying standard. What would be sufficient to constitute a preponderance of the evidence and to sustain a judgment in an ordinary case might not suffice in another, where, in addition to the burden resting upon the plaintiff in any case, particular presumptions are to be overcome. This is especially true where a plaintiff seeks by parol evidence to overcome the presumptions arising from the express terms of a conveyance, or from the relations of the parties concerned therein. * * * The very terms of the conveyance are evidence, and must be overcome. Hence much more certainty and conclusiveness are requisite than in ordinary cases."

In Bingaman v. Bingaman, 85 Neb. 248, 122 N. W. 981, the court stated: "While it is the rule in this state that a preponderance of the testimony is all that is required to sustain a finding in a civil case, still what constitutes a preponderance may vary largely according to the circumstances of each case. Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, the presumptions of validity and regularity attaching to such a document require clear

and convincing evidence to preponderate against them." See, also, Madura v. McKillip, 112 Neb. 783, 201 N. W. 633.

The burden of appellant was increased by the presumption which arises in any case in which a spouse puts the title to property in the other spouse. The law indulges a presumption in such a situation that the property was a gift. Hoover v. Haller, 146 Neb. 697, 21 N. W. 2d 450, contains this language: "We have long followed the rule that where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. * * * This presumption has been applied not only to cases where the husband furnished the consideration but also to cases where the wife furnished all or the larger part of the consideration." See, also, Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919; McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543; Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. The deed in the circumstances of this case is the best evidence of the intent and purpose of the parties thereto as to the interest conveyed and received.

It is argued by appellant that the judgment of appellee is dormant and is not a charge on the real estate of appellant, the devisee of Hilda Hein who it is asserted was a bona fide purchaser, because of the failure of appellee to have an execution issued and levied upon the real estate concerned. The judgment was rendered September 23, 1932. It was revived November 18, 1937. There was issued and delivered to the sheriff an execution on the judgment within each successive 5-year period thereafter to May 13, 1957, and each of the executions was returned unsatisfied by the officer. This case was commenced April 10, 1957, before the last execution was sued out. The record does not show that a levy was made of any execution.

If execution is not sued out within 5 years from the time of the judgment rendered in a court of record in

this state or if 5 years intervene between the date of the last execution issued thereon and the time of the issuance of another execution thereon, the judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor. The issuance of an execution on a judgment, directed and delivered to the proper officer, and his return of it is sufficient without a levy of it to prevent the judgment from becoming dormant. § 25-1515, R. R. S. 1943, which was code section 482, R. S. p. 473. In order to preserve the priority of the judgment lien as against a bona fide creditor or purchaser, it is required that an actual levy of the execution be made. § 25-1542, R. R. S. 1943, which was code section 509, R. S. p. 480.

Glenn v. Glenn, 79 Neb. 68, 112 N. W. 321, states: "Unaided by any previous construction of sections 482 and 509, and giving to the language employed its ordinary meaning, it would seem that as against the judgment debtor, the issuance and return of an execution without levy is sufficient to prevent the judgment from becoming dormant, but, in order to preserve the priority of the judgment lien, it is necessary that an actual levy should be made." See, also, Glissmann v. Happy Hollow Club, 132 Neb. 223, 271 N. W. 431; Filley v. Mancuso, 146 Neb. 493, 20 N. W. 2d 318; Hilton v. First Trust Co., 151 Neb. 99, 36 N. W. 2d 571.

The claim is also made by appellant that the execution issued July 17, 1951, was not effective to prevent the dormancy of the judgment during the period from November 8, 1947, when the immediately preceding execution was sued out on the judgment, to July 5, 1956, when the immediately subsequent execution was issued thereon. The execution issued July 17, 1951, was regular in all respects. It was issued by the clerk of the district court for Dodge County, directed to the sheriff thereof, delivered to him the date it was issued, and it was by him returned unsatisfied and filed in the office of the clerk 1 week after the date it was issued. The

claimed defect is that the sheriff recited in the return that "said writ is returned at the request of the plaintiff's attorney." There were two executions on the judgment which preceded the one of July 17, 1951. Each was returned unsatisfied for failure to find any goods or land belonging to Edward H. Hein. The same was true as to the two executions after the one challenged as insufficient. The first one thereafter stated it was returned because no property of the debtor could be found. Edward H. Hein was admittedly insolvent in 1932 and afterwards. He was encumbered by a number of judgments in addition to the one owned by appellee. The Legislature used the words "sued out" and "issued" interchangeably and synonymously. § 25-1515, R. R. S. 1943. This execution was issued and delivered to the sheriff. He had it a week and returned it unsatisfied. There is nothing to show that the request for its return was unreasonable or prejudicial to the rights of anyone. The law presumes that the officer did his duty. In Godman v. Boggs, 12 Neb. 13, 10 N. W. 403, the court said: "An execution issued by the clerk of a district court upon a transcript of a judgment of a justice of the peace or county judge and delivered to the sheriff, and by him levied upon real estate, and afterwards, before the sale, returned unsatisfied by order of the creditor in execution, will prevent the judgment becoming dormant." It was contended in that case that when an execution was issued to an officer, the law required him to levy upon the goods and chattels of the judgment creditor, which were not exempt, and that it was only in cases where no goods or chattels could be found that the officer was authorized to levy upon real estate. The court considered that challenge in this wise: "The executions in the cases set up in the answer appear to have been properly issued and delivered to the proper officer, and the fact that they were levied upon the premises in controversy, is sufficient to justify the presumption that no goods and chattels of the judgment debtor could be

found whereon to levy, the presumption being that the officer performed his duty in the premises. The execution being thus levied upon real estate, so heavily encumbered that nothing would in all probability be realized in satisfaction of the judgment by offering the same for sale, the creditor may order the execution returned and save unnecessary expense. In such case the execution has been sued out within the meaning of section 482, and the lien of the judgment is continued." See, also, Glenn v. Glenn, *supra;* Hilton v. First Trust Co., *supra.*

The action in which appellee recovered the judgment against Edward H. Hein was commenced July 15, 1932. The liability, the subject of the action, resulted from a contract made January 2, 1931. Edward H. Hein conveyed the real estate owned by him to Hilda Hein for a recited nominal consideration July 16, 1932, the day after the case was filed in the district court. The judgment against Edward H. Hein has been of record in the court since September 23, 1932. The deed from Edward Hein to Hilda Hein, his wife, for the real estate involved in this case bears date of February 13, 1947. The record does not show that there was any substantial consideration for it. The recitation in this respect in the deed is $1 and other valuable consideration. Appellant pleads that the deed was to correct the alleged, but not proven, error of mistake, inadvertence, and accident. The transaction in which the deed was given, under the circumstances of this case, was presumed to be fraudulent. Hilda Hein was not a good faith purchaser of the interest of her husband in the real estate. Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546, states: "A good faith purchaser of real estate is one who buys it for a valuable consideration and without notice of a suspicious circumstance which would put a prudent man on inquiry."

Appellee contends that if the deed in joint tenancy conveyed an undivided half interest in the real estate to

Edward Hein with right of survivorship, the other half interest in Hilda Hein, his wife, reverted to Edward H. Hein on her prior death so as to subject the entire property to a lien of the judgment against him. Appellee concludes the judgment should be modified to the extent of adjudicating that the lien of the judgment attached to the whole of the real estate involved instead of to only an undivided half interest therein. This contention is not well founded. In Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252, it is said: "The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate. * * * 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." See, also, Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141; DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733; Campbell v. Drozdowicz, 243 Wis. 354, 10 N. W. 2d 158. The deed of Edward H. Hein of February 13, 1947, destroyed the unity of interest and the unity of title, and the joint tenancy and right of survivorship were then at an end.

Appellee argues that the pleading of appellant fails to state a cause of action to quiet title to real estate. The amended petition on which the case was tried described the property involved in this case; alleged plaintiff (appellant herein) was the owner thereof and he and his predecessors in title had been in the open, notorious, continuous, exclusive, and adverse possession thereof for more than 10 years before the commencement of the action; stated the facts concerning the judgment of appellee against Edward H. Hein; averred the judgment was dormant for failure to issue execution thereon as required by law; stated the judgment was not a lien on any part of the real estate because no execution

had been issued on the judgment and levied on the real estate since February 21, 1946; and set forth that more than 5 years had elapsed since that date and by reason thereof appellee was barred by the statute of limitations from prosecuting any act, asserting any judgment lien against the real estate, or prosecuting any action on the judgment against it. There were other allegations in the petition not necessary to be mentioned in this connection. The prayer was for an adjudication quieting title to the real estate in appellant. Section 25-21,115, R. R. S. 1943, declares that it is sufficient to state generally in a petition to quiet title that the defendant claims or appears to have some right or title to or lien upon the real estate but "No lien of record * * * shall be affected by such action unless it is particularly described, and payment or other legal reason for its cancellation, or that it is barred by limitation, is specifically alleged." The pleading of appellant complied with the statute. It alleged the judgment was dormant, was not a lien on the real estate by reason of the lapse of time and the statute of limitations, and that appellee was barred thereby from prosecuting any proceeding on the judgment against the property. A decree quieting title to real estate encumbered by a lien may be obtained on proper ground therefor such as the bar of the statute of limitations without alleging or proving payment thereof. The contention of appellee in this respect cannot be sustained.

The deed of February 21, 1946, conveyed the real estate involved herein to Edward Hein and Hilda Hein as joint tenants. Edward H. Hein became, contemporaneously with the delivery of the deed to the grantees, the owner of an interest therein as a joint tenant. In re McKelway, 221 N. Y. 15, 116 N. E. 348, L. R. A. 1917E 1143, declares: "Joint tenants, by reason of the combination of entirety of interest with the power of transferring in equal shares, are said to be seized per my et per tout, or by the half and the whole * * *."

In 48 C. J. S., Joint Tenancy, § 6, p. 930, it is said concerning the title of a joint tenant: "Each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share. Each tenant is said to hold per my et per tout, by the half and by the whole. The shares of interests of joint tenants are presumed to be equal * * *."

In 14 Am. Jur., Cotenancy, § 8, p. 81, appears this language: "In the ancient language of the common law, joint tenants were said to hold per my et per tout, or, as expressed in plain language, 'by the moiety or half and by the whole.' The true interpretation of this phrase seems to be that such tenants were seised of the entire estate for the purposes of tenure and survivorship, but of only a particular part or interest for the purpose of immediate alienation." See, also, Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506, 66 A. L. R. 870; Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 A. 624, 117 A. L. R. 904.

The judgment of appellee against Edward H. Hein became a lien on the interest of the judgment debtor in the real estate immediately upon the title thereto vesting in him. Lessert & Steele v. Sieberling & Co., 59 Neb. 309, 80 N. W. 900, says: "Real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor." See, also, Wollmer v. Wood, 119 Neb. 248, 228 N. W. 541.

The deed of Edward H. Hein to Hilda Hein dated February 13, 1947, did not affect or disturb the judgment lien of appellee on the interest of the judgment debtor in the real estate and the deed was necessarily subject and subordinate to the lien of the judgment. In Lessert & Steele v. Sieberling & Co., *supra,* it is said: "Purchasers from such judgment debtor, who have actual or constructive notice of the lien, take the

property charged with the lien." See, also, Wollmer v. Wood, *supra;* Glissmann v. McDonald, 128 Neb. 693, 260 N. W. 182.

The grantee in the deed from Edward H. Hein had constructive and probably actual notice of the judgment of appellee at the time of the execution and delivery of that deed. The judgment was properly exhibited by the records of the district court in which it was rendered commencing with September 23, 1932, and at all times thereafter. The judgment of appellee became a valid, subsisting lien on the joint tenancy interest of Edward H. Hein on February 21, 1946, and since February 13, 1947, when Edward H. Hein and Hilda Hein voluntarily destroyed the joint tenancy by their deed of that date of the interest of Edward H. Hein. Appellee, because of lapse of time, is not now in a position to question the validity and effect of that deed because of the statute of limitations. The appellant was entitled to have his title to the real estate herein quieted in fee simple subject to the lien of the judgment of appellee rendered against Edward H. Hein in the district court for Dodge County as above described on an undivided half of the real estate. This is the effect of the findings and judgment of the trial court and no cross-appeal was taken by appellee.

The judgment should be and it is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

The court holds that the judgment is a lien on an "undivided half of the real estate."

The chain of title of this property may be briefly stated. Edward Hein and Hilda Hein received title to this property as joint tenants with right of survivorship. According to the authority quoted by the court, with which I agree, each had "an undivided share of the whole estate" and not "the whole of an undivided share." The judgment attached to that "undivided share of the whole estate" as the court holds.

Mr. and Mrs. Hein conveyed to Mrs. Hein. The conveyance of necessity was subject to the judgment against the "undivided share of the whole estate."

The conveyance created an estate "in fee simple" in Mrs. Hein. The court so holds, for it quiets title in her devisee "in fee simple."

The court then carves out of that fee simple title the "whole of an undivided share" and holds that the lien attached to it. That creates the attribute of a tenancy in common.

Such an estate is not shown to have existed in this chain of title until this judgment appears. Edward H. Hein never had a tenancy in common interest. He never owned "an undivided half" of the real estate. His conveyance did not create such an interest. He was the owner first as a joint tenant and then after the deed held no interest in the title. There never was a whole of an undivided share to which the lien of the judgment could attach.

I would hold that the judgment attached to the estate and the only estate created by the deed of Mr. and Mrs. Hein. That estate is the fee simple estate which the court recognized and quiets in Mrs. Hein's devisee.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS W. STANOSHECK, RESPONDENT.

92 N. W. 2d 194

Filed October 3, 1958. No. 34488.

1. **Criminal Law.** The crime of issuing a no-fund check upon a bank with intent to defraud, knowing at the time that the maker or drawer had no account or deposit in such bank, as provided by section 28-1212, R. R. S. 1943, is a felony involving moral turpitude.
2. ———. A plea of nolo contendere admits the matters alleged in an information when the plea is entered by a defendant, and

places him in the same position in that particular case as though he had pleaded guilty; and as a matter of course, an appropriate judgment of conviction and sentence follows such plea as well as upon a plea of guilty.

3. ———. Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a statute or a rule of court provides that a lawyer convicted of such an offense may be disbarred.

Original action. On motion of relator for judgment on the pleadings. *Judgment of disbarment.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for relator.

Bartlett E. Boyles, for respondent.

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

CHAPPELL, J.

This is an original proceeding brought by the State on relation of the Nebraska State Bar Association, praying for fitting and proper disciplinary action against respondent, Thomas W. Stanosheck, who was a member of said association and licensed to practice law in this state.

The complaint filed by relator alleged in substance that on or about November 21, 1956, respondent entered a plea of nolo contendere to a charge of issuing a no-fund check, contained in an information filed in the district court for Gage County. Relator also alleged that on said date respondent was convicted of said charge and was sentenced to imprisonment in the State Reformatory for Men at Lincoln, Nebraska, during a period of not less than 15 nor more than 21 months, which judgment of conviction and sentence became final and had been carried into effect. Relator further alleged that by reason of the foregoing facts, respondent violated designated canons 29 and 32, Canons of Profes-

sional Ethics promulgated and adopted by the Nebraska State Bar Association for the regulation of ethical standards applicable to members of said association.

For answer, respondent admitted that on or about November 21, 1956, he entered a plea of nolo contendere to the charge alleged in the information aforesaid, and was convicted and sentenced as alleged, which judgment and sentence had been carried into effect, and that the sentence of imprisonment thereunder had long since been completed. However, defendant alleged that he had a substantial defense to the charge upon which he was sentenced, but for compelling personal reasons he determined that a public trial would be highly undesirable so he entered a plea of nolo contendere. He denied that the admitted facts constituted a violation of any canon of professional ethics or statutes, and in effect alleged that the offense for which he was convicted was done in a personal capacity and did not involve activities in any professional matter.

Thereupon, relator filed a motion for judgment on the pleadings, and same was argued and submitted. We sustain the motion and render a judgment of disbarment.

In State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583, a disciplinary proceeding, we reaffirmed that: "A motion for judgment on the pleadings admits facts well pleaded or admitted in an answer but does not admit conclusions of law contained therein.

"Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment should be so rendered by the court." See, also, Part III, § 6, Disciplinary Proceedings, Revised Rules of the Supreme Court. Further, section 10 thereof provides: "The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate."

As recently as State ex rel. Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N. W. 2d 323, we said:

"In the Rules Creating, Controlling and Regulating Nebraska State Bar Association it is provided by Article X thereof, as to professional conduct, that: 'The ethical standards relating to the practice of law in this state shall be the canons of Profesional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court.'

"Canon 29 thereof provides in part that: 'He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.'

"And canon 32 provides in part that: '*He must also observe* and advise his client to observe *the statute law,* though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.' (Emphasis ours.)"

In the foregoing opinion, after citing and quoting with approval from numerous authorities of this and other jurisdictions, we held: "In granting a license to practice law it is on the implied understanding that a party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.

"The purpose of a disciplinary proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice.

"Misconduct of an attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment.

"The oath required by section 7-104, R. R. S. 1943, obligates lawyers taking the same to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe establisned standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar.

"In general it may be stated that a conviction of a felony or misdemeanor involving moral turpitude, as such term is defined by the statutes, is conclusive evidence warranting disbarment."

Section 28-1212, R. R. S. 1943, provides in part: "Any person who, *with intent to defraud,* shall make or draw, utter or deliver any check * * * upon any bank, * * * knowing, at the time of such making, drawing, uttering, or delivering, that the maker or drawer has no account or deposit in such bank * * * upon conviction thereof, shall be imprisoned in the penitentiary for not less than one year nor more than ten years, or imprisoned in the county jail not less than thirty days nor more than six months, or be fined not less than fifty dollars nor more than five hundred dollars." (Italics supplied.)

Also, as provided in part by section 29-102, R. R. S. 1943: "The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary."

In that connection, as stated in Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119, citing and relying upon Rains v. State, 142 Neb. 284, 5 N. W. 2d 887: "Under the provisions of section 29-102, R. S. 1943, if the maximum penalty is one year or more in the penitentiary, the crime is a felony."

As a general rule, all crimes of which intent to defraud is a necessary element are looked upon as involving moral turpitude. See, 58 C. J. S., Moral, p. 1206; Neibling v. Terry, 352 Mo. 396, 177 S. W. 2d 502, 152 A. L. R. 249; In re Hallinan, 43 Cal. 2d 243, 272 P.

2d 768; State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269.

Without discussing the issue at length, we conclude that the crime of issuing a no-fund check upon a bank with intent to defraud, knowing at the time that the maker or drawer had no account or deposit in such bank, as provided by section 28-1212, R. R. S. 1943, is a felony involving moral turpitude.

In that connection, we are not concerned here with the history or general effect of a plea of nolo contendere provided for by section 29-1819, R. R. S. 1943. It is sufficient to say that a plea of nolo contendere admits the matters alleged in an information when the plea is entered by a defendant, and places him in the same position in that particular case as though he had pleaded guilty; and as a matter of course, an appropriate judgment of conviction and sentence follows upon such plea as well as upon a plea of guilty. See, Annotation, 152 A. L. R 273, which cites and discusses authorities too numerous to set forth herein.

Respondent herein admitted in his answer that such a judgment of conviction was rendered upon his plea of nolo contendere, whereupon sentence was imposed as provided by section 28-1212, R. R. S. 1943, which judgment and sentence became final, and respondent served his sentence.

In comparable situations, it is generally held that a judgment of conviction of a felony or misdemeanor involving moral turpitude, rendered upon a plea of nolo contendere, is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a statute or rule of court, as heretofore recited, provides that a lawyer convicted of such an offense may be disbarred. See, State ex rel. Nebraska State Bar Assn. v. Fitzgerald, *supra,* and Neibling v. Terry, *supra,* together with authorities cited and discussed in Annotation, 152 A. L. R. 287. That rule is controlling here.

For reasons heretofore set forth, relator's motion for judgment on the pleadings should be and hereby is sustained. It is therefore found and adjudged that respondent should be and hereby is disbarred; his order of admission to the bar of this state is annulled; his license to practice law is cancelled; his name is stricken from the roll of lawyers in this state; and he is enjoined from practicing law either directly or indirectly in this state.

JUDGMENT OF DISBARMENT.

MESSMORE, J., not participating.

RUDOLPH K. OLSEN, ALSO KNOWN AS R. K. OLSEN, APPELLANT, V. WARREN BEST, ADMINISTRATOR OF THE ESTATE OF MARIE E. OLSEN, DECEASED, ET AL., APPELLEES.

92 N. W. 2d 531

Filed October 17, 1958. No. 34390.

1. **Witnesses.** A person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is not competent to testify to any transaction or conversation had between the deceased person and the witness, under the provisions of section 25-1202, R. R. S. 1943, in the absence of waiver as provided in the statute.
2. **Trusts.** No resulting trust arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another where the parties are sufficiently close so as to give rise to the presumption that a gift was intended.
3. ———. Ordinarily a trust will not be impressed where the transaction is as consistent with another relationship as with that of a trust.
4. ———. To establish a resulting trust the evidence must be clear, satisfactory, and convincing that a gift or advancement was not intended.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Henry F. Pedersen and *Wilbur C. Smith,* for appellant.

Finlayson, McKie & Kuhns, for appellees.

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

CARTER, J.

This is a suit in equity to establish a resulting trust as to certain real estate in favor of a surviving husband as against the heirs of a deceased wife in whose name the title was vested at the time of her death.

The pertinent facts which are supported by competent evidence are as follows: Plaintiff and Marie E. Gilson were married on July 3, 1945. Plaintiff was then 55 years of age and his wife was 52. Plaintiff had two sons by a previous marriage. His wife had two daughters by a previous marriage, they being Esther Donahoo and Ethel Nickelson, who were made parties defendant in the instant suit. In January 1947, plaintiff purchased a home for the sum of $15,500. The title to the home was placed in the name of the wife because she was younger and apparently in better health, and to keep the house from becoming involved in any of plaintiff's possible business misfortunes.

In 1948 the wife became ill and, after an illness of more than 2 years, passed away on September 20, 1951. At the time of his wife's death plaintiff had fully paid for the house. Plaintiff contends that he was the true owner of the property and that he had paid for it from his own funds. He brought this action, praying that he be decreed to be the true owner and that a resulting trust be established in his favor, that title be decreed to be vested in him, and that such title be quieted in him against the defendants.

It is the contention of the defendants that the deceased wife was the owner of the property at the time of her death and that they are entitled to the property as her heirs at law subject to the homestead interest of the plaintiff.

The trial court found that no resulting trust had been

established, and dismissed the action. Plaintiff has brought the case here on appeal.

The plaintiff testified over objection to many matters which had some tendency to support the theory of a resulting trust. This evidence was clearly inadmissible under section 25-1202, R. R. S. 1943, commonly referred to as the dead man's statute. The defendants were the representatives of a deceased person and the plaintiff had a direct legal interest in the result of the suit. The placing of the title in the name of the wife and the subsequent recording of the deed constituted a transaction between the husband and wife within the meaning of the statute. Any evidence by the plaintiff relative to and tending to destroy the effect of that transaction is incompetent under the dead man's statute. Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350. The incompetent evidence was received subject to the proper objection. The trial court refused to consider the incompetent evidence in the record. We do likewise, under the rule that upon appeals in suits in equity this court will not consider incompetent evidence received by the trial court. Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731; Owens v. Reed, 141 Neb. 796, 4 N. W. 2d 914.

We think the controlling rule of law in the instant case was announced in Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919, wherein it is said: "Even in cases of insolvency involving the advancement of money as part of the purchase price, we have long been committed to the view that no resulting trust arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift." See, also, Van Etten v. Passumpsic Savings Bank, 79 Neb. 632, 113 N.

W. 163; Klamp v. Klamp, 51 Neb. 17, 70 N. W. 525; Bogert on Trusts, Vol. 2A, § 459, p. 473.

There is no competent evidence in this record, clear and satisfactory in nature, to establish a resulting trust. Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; Veeder v. McKinley-Lanning Loan & Trust Co., 61 Neb. 892, 86 N. W. 982. Where the evidence is as consistent with another relationship as with that of a trust, a trust will not ordinarily be found to exist. O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N. W. 2d 507. The material and relevant evidence in the instant case is as consistent with the theory of gift as with the theory of a resulting trust. Under such a situation the evidence will not sustain a finding that a resulting trust was created.

A review of all the facts and circumstances disclosed by competent evidence clearly establishes that there was no resulting trust in the present case and that the trial court was correct in so holding.

AFFIRMED.

YEAGER, J., not participating.

IN RE APPLICATION OF TORONTO PIPE LINE COMPANY. TORONTO PIPE LINE COMPANY, APPELLEE, V. CAMERLAND PIPELINES COMPANY, INC., ET AL., APPELLANTS, IMPLEADED WITH OHIO PIPELINE COMPANY, INTERVENER-APPELLEE.

92 N. W. 2d 554

Filed October 17, 1958. No. 34408.

1. **Statutes.** Where the attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind.
2. ———. A careful and intelligent reading of two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new.
3. **Carriers.** The requirements of the Motor Carrier Act found in sections 75-222 to 75-250, R. R. S. 1943, do not apply to com-

mon carriers of petroleum products by pipe line under the provisions of Chapter 75, article 6, R. R. S. 1943.

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

Viren, Emmert, Hilmes & Gunderson and *Morsman, Maxwell, Fike & Sawtell,* for appellants.

Bert L. Overcash and *Woods, Aitken & Aitken,* for appellee.

Frank J. Mattoon, for intervener-appellee.

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

SIMMONS, C. J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity to Toronto Pipe Line Company to construct, operate, and maintain a pipe line gathering system in Cheyenne, Morrill, and Banner Counties.

Northwest Pipe Line Company and Camerland Pipelines Company, Inc., protested the issuance of the certificate and appeared and participated in the hearing before the commission.

Camerland Pipelines Company, Inc., is the sole appellant appearing here.

As occasion requires we will refer to the Nebraska State Railway Commission as the commission, to Toronto Pipe Line Company as Toronto, to Northwest Pipe Line Company as Northwest, and to Camerland Pipelines Company, Inc., as Camerland.

Toronto is a wholly-owned subsidiary of the British American Oil Producing Company hereinafter referred to as British American.

The record shows this situation: Some 3 miles south of the Redington Station of the Platte pipe line is an oil field served by Camerland as a common carrier under a

certificate of public convenience and necessity issued by the commission. South and east of that is the Lindberg field. Farther south and east of the Lindberg field is the Dogleg-Gaylord field. West of that is the Willson Ranch field.

British American has no production in the Lindberg field. British American produces approximately one-half of the oil coming from the Dogleg-Gaylord field. British American produces all the oil coming from the Willson Ranch field.

The oil from Lindberg, Dogleg-Gaylord, and Willson Ranch fields at the time of the hearing before the commission was being delivered to the Platte pipe line by motor truck. All parties agreed that it was not a satisfactory method of delivery and that pipe line service was required.

It appears that the initial production in the Lindberg and Dogleg-Gaylord fields did not assure economical operation of a pipe line. New wells in the Dogleg-Gaylord field gave assurance of additional oil production there.

Camerland began conversations with British American looking toward the service of those fields by Camerland pipe lines. It is clear that Camerland was unwilling at that time to construct pipe lines to serve the field unless financial commitments, not clearly defined in the record, were made by the producers.

While that was in the conversation stage, Willson Ranch field was developed so that there was reason to believe that the three fields would produce ample oils to justify the building of a pipe line. Camerland then desired to enter that field with pipe lines and was willing to do so provided it had the assurance of British American that it (Camerland) would receive British American production for carriage. British American refused to give that assurance and through its subsidiary, Toronto, proposed to build a gathering pipe line to serve those three fields. This application resulted.

It appears to be assumed that other producers in the three fields would use whatever pipe line service was provided.

It is Camerland's position that it is a common carrier already in the field and has a prior and necessarily exclusive right to extend its existing pipe line south and east to serve the three fields.

Camerland on appeal here assigns error in that Toronto has not met the requirements as to certificates of public convenience and necessity set out in the provisions of the Motor Carrier Act, which is sections 75-222 to 75-250, R. R. S. 1943. Toronto's position is that it is not subject to those provisions.

The statute with reference to pipe lines was originally enacted in 1903 in an act to provide for acquiring the right-of-way for pipe lines in the state for the transportation, transmission, and flow of petroleum and other like oils. Laws 1903, c. 67, p. 364. As amended it is now found in Chapter 75, article 6, R. R. S. 1943. In 1917 the first section of the act was amended so as to provide that those transporting "for a consideration" were "Common Carriers," and specifically providing that "Such company, corporation, or association is hereby placed under the control and subject to regulation by the State Railway Commission of the state of Nebraska, and subject to Article X of Chapter 67 of the Revised Statutes of Nebraska for the year 1913 so far as the provisions thereof are applicable to pipe lines as common carriers." Laws 1917, c. 112, § 1, p. 284. As amended this provision is now found in section 75-601, R. S. Supp., 1957. At that time Article X of Chapter 67, contained the provision that: "The commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads, express companies, car companies, sleeping car companies, freight and freight line companies, and all other common carriers engaged in the transportation of freight or passengers within the state." § 6107, Rev. St. 1913.

In 1937 the Legislature passed an act to regulate transportation of passengers and property by motor carriers in intrastate commerce upon the public highways of the state and conferred powers of administration upon the commission with reference thereto. Laws 1937, c. 142, p. 526. This act as amended is found in sections 75-222 to 75-250, R. R. S. 1943.

In the 1943 revision, legislation concerning the commission was placed in Chapter 75. This included among other acts the above Motor Carrier Act and the Pipe Line Act. The report of the 1943 Statute Commission to the Legislature recommended that the phrase in the statute referring to "Article X of chapter 67 of the revised statutes of Nebraska for the year 1913," above quoted, be changed to "subject to Chapter 75." As so changed the provision was approved and adopted as a part of the 1943 Revised Statutes.

Camerland and Northwest assumed at the hearing before the commission, and Camerland assumes here, that the above language used in the 1943 revision makes the motor carrier provisions of the statute as to certificates of public convenience and necessity applicable to pipe line common carriers.

Toronto contended at the hearing before the commission, as it does here, that it is under the control and subject to the regulation of the commission as to rates, service, and general control as provided in section 75-201, R. S. Supp., 1957, which is: "The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general control over, all railroads, express companies, car companies, sleeping car companies, freight and freight-line companies, * * * and any other carrier engaged in the transportation of freight, passengers, * * *."

It calls attention to the provisions of Article IV, section 20, of the Constitution regarding the power of the commission which provides in part: "The powers and duties of such commission shall include the regulation

of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

It offered evidence that the commission had not exercised the powers conferred as to pipe line common carriers in the absence of specific legislation.

Toronto's position is that recognizing the above powers of the commission over it as a common carrier by pipe line, it used the application for a certificate as a means upon which to base a request to the commission to exercise the powers which it concedes are vested in the commission.

The commission recognized that the question of the extent of its powers and jurisdiction was presented but did not decide those issues.

The Motor Carrier Act, by its title and repeatedly throughout, refers to motor carriers in intrastate commerce upon the public highways. By section 75-224, R. S. Supp., 1957, its provisions "shall apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce," with exceptions not important here. Section 75-228, R. R. S. 1943, relating to certificates of public convenience and necessity directly relates itself to common carriers by motor vehicle in intrastate commerce on any public highway; and so it goes throughout the entire Motor Carrier Act.

The question then comes: Did the 1943 Legislature, when it made common carriers by pipe line subject to Chapter 75 of the Revised Statutes "so far as the provisions thereof are applicable to pipe lines as common carriers," intend thereby to make the Motor Carrier Act provision as to certificates of public convenience and necessity applicable to pipe lines?

The Legislature has given this court no guide by which to determine the legislative intent. We see no

rational reason for so holding and none has been suggested to us.

Chapter 75, article 6, R. R. S. 1943, relates to the narrow and not involved field of transportation of petroleum products by pipe line common carriers for hire. It is clearly a specialized kind of transportation. It does not involve carriage by motor vehicles using the public highways. The problems of motor vehicles as common carriers using the public highways are not presented. Except insofar as a pipe line may be in or across a public highway, its existence presents no use of a highway problem. It presents no problem of regular or irregular routes or deviation of routes. Its patrons are few and known. Its problems, insofar as they relate to shippers and the public, are relatively simple in comparison with the problems presented by common carriers by motor vehicles on the public highways.

Every reason that occurs to us points against the conclusion that the Legislature intended to make the requirements of the Motor Carrier Act applicable to common carriers of petroleum by pipe line. As pointed out, the provisions of the Motor Carrier Act are made applicable to common carriers by motor vehicle in intrastate commerce on the public highways. Those provisions negative any conclusion that it is applicable to common carriers of petroleum by pipe line.

In State ex rel. Bancroft v. Frear, 144 Wis. 79, 128 N. W. 1068, 140 Am. S. R. 992, the Supreme Court had for determination a question of inclusion of an existing statute by reference. It said: "We should have as little confusion as possible in our statute law. Where the attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new.

People are obliged to obey the laws, and in order that they may do so they should be put in a position where they can ascertain what they are." This was followed and approved in State ex rel. Kunz v. Wendt, 225 Wis. 10, 273 N. W. 72.

Obviously it cannot be found here "with a reasonable degree of certainty" that the Legislature intended to make the motor carrier provisions here discussed applicable to pipe line common carriers. To do so would be to go to the center of the field of speculation and conjecture.

Accordingly, we find no legislative intent to make the requirements of the Motor Carrier Act relating to the issuance of certificates of public convenience and necessity to common carriers by motor vehicles on the public highways "applicable" to common carriers of petroleum products by pipe line.

This conclusion makes it unnecessary to discuss the assignments of error made by Camerland here, as they are predicated on the applicability of those requirements.

For the reasons given herein the order of the commission is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

VERNON WAYNE TENNYSON, DOING BUSINESS AS RAPID CITY COLOR LABORATORIES, APPELLANT, V. AL J. WERTHMAN, APPELLEE.

92 N. W. 2d 559

Filed October 17, 1958. No. 34413.

1. **Libel and Slander: Limitations of Actions.** An action for libel must be commenced within 1 year of the publication of the defamatory matter, the basis of the action.
2. **Limitations of Actions.** The statute of limitations is not tolled as to an amended petition which alleges a new and different cause of action but the statute of limitations against the cause of

action pleaded in the amended petition runs until the filing of that pleading.

3. **Pleading.** An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action.

4. ———. In deciding the correctness of a ruling on a demurrer to a pleading, only allegations of fact in the pleading to which it is directed may be considered.

5. **Libel and Slander: Pleading.** A petition, to be sufficient to charge a cause of action for libel, which does not contain an allegation of special damage, must aver a publication which is libelous per se.

6. ———: ———. A demurrer to a petition charging a libel admits the allegations of the petition and the implications following naturally from the publication.

7. **Libel and Slander.** The language of an alleged libel should be interpreted in its ordinary and popular meaning according to the sense in which it would be understood by the readers to whom it was addressed.

8. ———. Any language, the nature and meaning of which are to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace, is libelous per se.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Reversed and remanded with directions.*

Reeker, Tews & McFadden and *Daniel D. Jewell,* for appellant.

Philip H. Robinson, for appellee.

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

BOSLAUGH, J.

The substance of the petition of appellant is that the appellee published and distributed through the United States mail on or about May 12, 1955, libelous matter concerning appellant, to wit: "P.S. ONE OF THESE KIDNAPPERS (TRAVELING PHOTOGRAPHERS) IS SETTING UP SHOP ONE DAY DURING THE WEEK OF MAY 22 IN THE HARTINGTON HOTEL BUILD-

ING IN HARTINGTON. THERE WILL BE OTHERS. REMEMBER—YOU HAVE BEEN WARNED." Appellant and appellee were business rivals and the object of appellee in publishing the libelous matter concerning appellant was to injure his business and build up the business of appellee. The libelous matter was extensively circulated and caused appellant large damage, injuring his business and reputation in the sum of $30,000 for which he prayed judgment against appellee.

The amended petition of appellant states: He was at the times mentioned a traveling photographer engaged in that business using the name Rapid City Color Laboratories. In 1955 and for several years prior thereto he had operated his business in Hartington, Nebraska, during several weeks each year. Appellee was at the time stated in the pleading engaged in the photography business in the designated city. Appellee published and distributed through the United States mail on or about May 12, 1955, libelous handbills which stated: "P.S. One of these kidnappers (Traveling Photographers) is setting up shop one day during the week of May 22 in the Hartington Hotel Building in Hartington. There will be others. Remember—YOU HAVE BEEN WARNED:" A copy of one of the handbills was attached to and made a part of the pleading. Appellant and appellee were business rivals and the libelous matter was published and circulated concernng appellant for the purpose of injuring his business and increasing the business of appellee. The libelous matter was extensively circulated and has caused appellant large damage by injuring his business and reputation in the sum of $30,000 for which he prayed judgment against appellee.

A motion of appellee to strike the amended petition of appelllant because it stated a new cause of action, was a departure from the one pleaded in the original petition, and was barred by the statute of limitations when the amended petition was filed was sustained by the trial court and the amended petition stricken from

the record of the case. A general demurrer of appellee to the original petition of appellant was then sustained. Appellant elected not to plead further and a judgment of dismissal of the case was rendered. The present appeal was occasioned by that action of the trial court.

The amended petition was stricken from the record because the hypothesis of appellee was accepted by the trial court that it stated a new and different cause of action than that claimed to be stated in the original petition; that the petition did not state a cause of action and therefore it was not effective to toll the statute of limitations; and that more than 1 year had elapsed between the publication of the alleged libel, May 12, 1955, and the filing of the amended petition, November 8, 1956. If this hypothesis was true, the ruling of the court was correct when it eliminated the amended petition from the case. An action for libel must be commenced within 1 year of the publication of the defamatory matter, the basis of the action. § 25-208, R. R. S. 1943; Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. The statute of limitations is not tolled as to an amendment to a petition which alleges a new and different cause of action. If the facts incorporated into a petition by amendment constitute a cause of action independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition. Buerstetta v. Tecumseh Nat. Bank, 57 Neb. 504, 77 N. W. 1094.

The petition in the first paragraph alleges the publication by appellee of the libelous matter relied upon by the pleader, and the time of the publication. The second paragraph states the libelous matter quoted in the first paragraph was published of and concerning appellant, who was a rival in business of appellee, to injure appellant in his business and to benefit appellee in his business. The concluding paragraph of the pleading asserts wide publication and distribution of the alleged libelous

matter with resulting injury to the reputation of appellant and damages in a specified amount.

The first two paragraphs of the amended petition state the nature, character, and location of the business of each of the parties in detail and more fully than the statement of the original petition that they were business rivals. There was an inference or implication from the allegation that they were business rivals and the identification of appellant as a traveling photographer in the libelous matter that each was engaged in the photography business, as is alleged in the amended petition. The identical alleged libelous matter quoted in the petition is repeated in paragraph 3 of the amended petition, and the entire handbill containing the quoted matter was made by proper statement a part of the amended petition. The identical libel and publication alleged in the petition are repeated in the amended petition. The matter alleged in paragraph 4 of it is the same as paragraph 2 of the petition except the first sentence thereof which was omitted as surplusage because it was properly a matter of defense. Paragraph 5 of the amended petition is in substance and legal effect identical with paragraph 3 of the original petition.

An amended petition which only amplifies, clarifies, or gives greater fullness of detail than is alleged in the original pleading does not state a new cause of action. The amended petition is of this character. It preserves in all respects the identity and characteristics of the identical cause of action alleged in the petition. There was but one libel and one cause of action alleged in the two petitions.

Zitnik v. Union P. R. R. Co., 95 Neb. 152, 145 N. W. 344, states: "The amended petition merely amplified and set out more specifically the various acts of omission and commission of the defendant which it is claimed were included in the general allegations of negligence in the original petition. We think this is permissible, and that the amplification of the charge did not consti-

tute the bringing of a new action for a different cause." In a headnote to that case it is said: "In an action for the negligent killing of plaintiff's decedent, plaintiff may amend her petition by alleging other and additional grounds of negligence. Such amendment does not amount to a departure, and does not render the petition vulnerable to a plea of the statute of limitations * * *." See, also, Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 116 N. W. 517; Buerstetta v. Tecumseh Nat. Bank, *supra;* Kennedy v. Potts, 128 Neb. 213, 258 N. W. 471; Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571; Annotation, 171 A. L. R. 1087.

The record yields no support to the claim of appellee that the theory of the original petition was that appellee had charged appellant with being a kidnapper; that the amended petition embraced the theory that the entire publication, the handbill, charged appellant with bad business practices to his detriment; and that such a shift of theory constituted and substituted a new and independent cause of action in the litigation. The action of the trial court in striking the amended petition from the record was incorrect unless the original petition wholly failed to state a cause of action.

The trial court sustained a general demurrer to the original petition. The determination of the sufficiency of the petition in this regard must be made exclusively from what is presented therein. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether the pleading states a cause of action. The court may not look beyond the pleading against which the demurrer was directed. Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W. 2d 706; Hester v. Young, 154 Neb. 227, 47 N. W. 2d 515. The petition does not allege special damage. A petition, to be sufficient to charge a cause of action for a libel, which does not contain an allegation of special damage, must aver a publication which is libelous per se. Callfas v. World Publish-

ing Co., 93 Neb. 108, 139 N. W. 830; Hudson v. Schmid, 132 Neb. 583, 272 N. W. 406; Barry v. Kirkland, 149 Neb. 839, 32 N. W. 2d 757.

The libelous publication alleged to have been made by appellee of and concerning appellant, according to the petition, is as follows: "P.S. ONE OF THESE KIDNAPPERS (TRAVELING PHOTOGRAPHERS) IS SETTING UP SHOP ONE DAY DURING THE WEEK OF MAY 22 IN THE HARTINGTON HOTEL BUILDING IN HARTINGTON. THERE WILL BE OTHERS. REMEMBER—YOU HAVE BEEN WARNED." This must be, as a matter of law, libelous per se or the petition fails to state a cause of action and the general demurrer thereto was correctly sustained by the trial court. The petition charges, and appellee admits, that the quoted matter was published on or about May 12, 1955, by appellee of and concerning appellant; that the parties were business rivals; that the purpose appellee had in publishing the quoted matter was to injure appellant's business and to benefit appellee in his business; and that the defamatory matter was extensively circulated and resulted in injury and great damage to the business and reputation of appellant alleged to be the sum of $30,000. The general demurrer of appellee to the petition admitted the truth of the facts alleged therein and any implication naturally following from the publication. Heckes v. Fremont Newspapers, Inc., 144 Neb. 267, 13 N. W. 2d 110. Such an implication is that the parties were each engaged in the photography business because of the allegation that they were rivals in business and the identification by the publication that appellant was a traveling photographer.

The language of the publication asserted to be libelous may not be considered in a technical manner but must be interpreted in its ordinary and popular sense. In World Publishing Co. v. Mullen, 43 Neb. 126, 61 N. W. 108, 47 Am. S. R. 737, it is stated: "The courts no longer strain to find an innocent meaning for words prima facie

defamatory, neither will they put a forced construction on words which may fairly be deemed harmless. * * * In determining whether the words of a publication are libelous the courts will not resort to any technical construction of the language used, but read the language in court as they would read it elsewhere. * * * Language alleged to be libelous is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, conveys, or is calculated to convey, to persons reading it the charge of a crime." See, also, Pokrok Zapadu Publishing Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358; Bigley v. National Fidelity & Casualty Co., 94 Neb. 813, 144 N. W. 810, 50 L. R. A. N. S. 1040; Morearty v. Strunk, 118 Neb. 718, 226 N. W. 329.

Appellee asserts the only construction which can be placed upon the words "(Traveling Photographers)" in the publication is that they are an explanation of the term "kidnappers" therein. This argument expresses more confidence than it induces conviction. It is not probable the reading public to whom the defamatory material was distributed would or did understand the author intended to say that traveling photographers were, because of the business in which they were engaged, kidnappers. It is much more logical to conclude the reading public understood the author of the publication was informing them that the traveling photographer who was coming to Hartington at the time designated was not only a traveling photographer but he was also a kidnapper. It is significant that the defamatory material set forth in the petition was labeled a postscript. A permissible inference is that the author intended it to be of such a nature that all who read it would understand that appellant was a most despicable character and should be certainly and entirely avoided. The crime of kidnapping is a serious, deliberate, and heinous one which frequently causes the perpetrator to commit other crimes to the injury of the victim and in some instances even to cause his death. The Legislature so considered

it. § 28-417, R. R. S. 1943. It is so regarded and condemned by all right-thinking people. This publication, considered in an ordinary and popular sense, charged that appellant was a kidnapper. It was libelous per se and the original petition alleged a cause of action. Heckes v. Fremont Newspapers, Inc., *supra,* declares: "A publication is libelous per se if the nature and obvious meaning of the language is such as to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him." See, also, Barry v. Kirkland, *supra;* Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N. W. 2d 806.

The judgment should be and is reversed and the cause is remanded to the district court for Cedar County with directions to overrule the demurrer of appellee to the original petition, to deny the motion of appellee to strike the amended petition from the record of the case, and for further proceedings in accordance with law.

REVERSED AND REMANDED WITH DIRECTIONS.

LAWRENCE HECKMAN, APPELLANT, V. DONALD WALKER ET AL., APPELLEES.

92 N. W. 2d 548

Filed October 17, 1958. No. 34429.

1. **Landlord and Tenant.** Where a landlord notifies his tenant for a fixed term that in case he holds over beyond the term he must pay a specified increased rental, the tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to the notice, or fails to express his nonassent to the terms thereof.
2. **Frauds, Statute of.** The implied contract thus created does not arise until the new year begins and is not therefore violative of the statute of frauds with reference to agreements not to be performed within 1 year.

3. **Trial.** Where, in an action for a money judgment, the undisputed evidence entitles the plaintiff to a judgment for a definite sum, it is the duty of the court to instruct the jury as to such fact and, in effect, to direct the jury to return a minimum verdict for such amount.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Reversed and remanded.*

Frederick M. Deutsch and *Gordon L. Gay,* for appellant.

B. B. Bornhoft and *Hutton & Hutton,* for appellees.

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

CARTER, J.

This is an action to recover the rent due under an oral lease of certain farmlands. The jury returned a verdict for the defendant Walker, hereinafter called defendant, and the plaintiff appealed.

The evidence shows that defendant leased certain lands belonging to the plaintiff for the 1955-crop year. Plaintiff testified that defendant rented certain described farm buildings and yards, a 25-acre pasture, and 8 acres of alfalfa for a cash rental of $550. In addition thereto defendant rented a 55-acre field of alfalfa for which he was to give one-half of the alfalfa crop in the stack as rent. Defendant contended that the cash rent was to be $450, although there is evidence the defendant's brother-in-law agreed to pay the additional $100, which he stated had been paid. Defendant testified that his brother-in-law agreed to pay one-half of the cash rent. The cash rent for 1955 appears to have been paid and all disputes adjusted, except that plaintiff took 1½ tons of hay in excess of one-half of the crop in dividing the hay in the stack. The undisputed evidence sustains a finding that defendant was short this ¾ of a ton of alfalfa hay worth $18.75.

Prior to the termination of the 1-year oral lease,

plaintiff caused a written lease for 1 year, covering the 1956-crop season, to be prepared, and delivered to the defendant. Defendant did not sign or return the lease, or make objection to its terms, and remained in possession for the 1956-crop year. The unsigned written lease described the same property that defendant had leased the year before upon the same terms, the lease expressly stating that the cash rent was to be $550. The defendant admitted having notice of the amount of cash rent demanded by the plaintiff before the termination of the 1955 lease.

It is the general rule that if a landlord notifies his tenant for a fixed term that in case he holds over beyond the term he must pay a specified increased rental, the tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to the notice, or fails to express his nonassent to the terms thereof. This result follows despite the provision of the statute of frauds with reference to agreements not to be performed within 1 year; the implied contract does not arise until the new year begins. See, 32 Am. Jur., Landlord and Tenant, § 950, p. 800; Annotation, 109 A. L. R. 201. See, also, M. Samuels & Co. v. Zorbas, 182 Minn. 345, 234 N. W. 468; Buesch v. McCullough, 245 Ill. App. 68; Williams v. Foss-Armstrong Hardware Co., 135 Wis. 280, 115 N. W. 803. The defendant was clearly liable for cash rent for the year 1956 in the amount of $550.

The plaintiff claims that defendant failed and neglected to harvest the alfalfa-hay crop and that it was necessary for plaintiff to do so to protect his interest therein. He claims $338.41 as the cost of putting the hay in the stack. Included in this amount is an item of $98.41 for baling the hay. The lease agreement did not provide that defendant should bale the hay. He is not liable for this item. The balance of $240 is a proper item to submit to the jury under proper instructions.

Plaintiff claims that defendant, in dividing the 1956

hay crop, took 78 bales belonging to plaintiff. Defendant admits taking 50 bales of plaintiff's hay by mistake. The amount taken, if any, over and above the 50 bales admittedly taken, constitutes a jury question. The value of the 50 bales was $53.13.

It appears that defendant admittedly owed the plaintiff $550 cash rent and $53.13 for the 50 bales mistakenly taken. Plaintiff owes defendant $18.75 for excess hay taken from the 1955 crop. The jury should have been instructed that plaintiff was entitled to $584.38 under the undisputed evidence. Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182. Other items claimed should have been submitted to the jury under proper instructions.

The verdict of the jury is contrary to the undisputed evidence in the record. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. EUGENE F. FITZGERALD, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. LEO KUBIK ET AL., APPELLANTS.

92 N. W. 2d 533

Filed October 24, 1958. No. 34384.

1. **Intoxicating Liquors.** Liquor cannot be lawfully sold by the drink outside the corporate limits of cities and villages. In other words, insofar as selling and dispensing liquor by the drink is concerned, the country outside the boundaries of incorporated cities and villages is dry territory.
2. **Intoxicating Liquors: Nuisances.** The maintaining of a place where liquor is habitually brought by others to be there consumed, with the encouragement of the owner who profits from the sale of "set-ups," constitutes a public nuisance when such place is operated in territory in which sales by the drink are prohibited.

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

Schrempp & Lathrop, for appellants.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellee.

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

WENKE, J.

This is an action brought to enjoin the operation of an establishment known as the Carter Lake Country Club on the grounds that it was being operated as a common nuisance. The action was brought in the district court for Douglas County on October 14, 1957, in the name of the State of Nebraska on the relation of Eugene F. Fitzgerald, County Attorney for Douglas County. The trial court found that the Carter Lake Country Club was being operated by the defendant Leo Kubik as a commercial enterprise and in such a manner as to be in violation of the provisions of the Nebraska Liquor Control Act and, therefore, a common nuisance within the meaning thereof. It ordered that the operation of the club be permanently enjoined. The named defendants Carter Lake Country Club, Leo Kubik, and Regina Kubik thereupon filed a motion for new trial, which was overruled. This appeal was taken therefrom by the defendants Leo Kubik and Regina Kubik, who are husband and wife. In view of the nature of the action it will be reviewed in this court de novo. § 25-1925, R. R. S. 1943.

The evidence establishes that on October 14, 1957, when this action was instituted, Leo Kubik and Regina Kubik were the record title owners of that part of Lot Four (4), East Omaha Land Company's Land, lying south of Locust Street and northwest of Abbott Drive, Douglas County, Nebraska, which property appellant Leo Kubik, whom we shall herein refer to as Kubik,

had owned for more than 10 years prior thereto; that the property is commonly described as 1515 East Locust Street, East Omaha, Douglas County, Nebraska, but is entirely outside of any incorporated city or village; that Kubik caused substantial improvements to be built on this land; and that in either May or June of 1957 Kubik began to use these improvements by operating a business therein under the name of the Carter Lake Country Club. Although Kubik testified he went through certain procedures to organize Carter Lake Country Club as a private club, apparently to bring it within the meaning of subdivision (19) of section 53-103, R. R. S. 1943, the evidence establishes that he actually operated the Carter Lake Country Club as a private business.

Although the club would be opened somewhat earlier, most of its business was conducted after 1 o'clock a.m. It would remain open thereafter as long as any customers remained, which had been as late as 6 o'clock a.m. prior to October 15, 1957, on which date it was closed by the law enforcement officers of Douglas County. The principal business of the club consisted of furnishing and serving set-ups for intoxicating liquors, although incident thereto it did serve some food to some of its patrons. The evidence shows the principal business of the club was operated in the following manner: If an adult person, who appeared to be respectable, came to the club with a bottle of intoxicating liquor (apparently a fifth) he could gain admission thereto but before entering the bar, or main room of the club through the second set of doors, he had to exchange his bottle of liquor for a card; this card, on which his name and the kind or brand of liquor which he had furnished was written, had numbers from 1 through 25 printed along the outer edges thereof and entitled the person whose name was written thereon to buy 25 drinks in the bar room of the club at 50 cents each of the kind and brand of liquor he had furnished, one number

being punched for each drink served; and while the name of the person who furnished the liquor would be written on the bottle he had furnished to the management of the club, however, in serving that person and his guest no attempt was made to supply liquor solely from his bottle, but it was served from any bottle of liquor of the same kind and brand, the management furnishing the mix and ice, or either, for that purpose. It thus becomes evident that through the medium of furnishing a bottle of intoxicating liquor and the payment of $12.50 (50 cents for each drink when served) any person patronizing the club could buy 25 drinks of intoxicating liquor of the kind and brand he had furnished.

There is no evidence of the club having been run in a disorderly or improper manner and therefore a possible nuisance at common law. See State ex rel. Johnson v. Hash, 144 Neb. 495, 13 N. W. 2d 716. So the question arises as to whether or not it is a common nuisance within the meaning of the Nebraska Liquor Control Act. Section 53-198, R. R. S. 1943 (formerly § 53-376, C. S. Supp., 1941), which is a part of that act, provides, insofar as here material, as follows: "Any * * * building * * * structure or place of any kind where alcoholic liquors are sold, * * * bartered or given away, in violation of this act, or where persons are permitted to resort for the purpose of drinking same, in violation of this act, or any place where such liquors are kept for sale, barter or gift, in violation of this act, and all such liquors, and all property kept in and used in maintaining such a place, are each and all of them hereby declared to be a common nuisance; and any person who maintains or assists in maintaining such common nuisance shall be guilty of a violation of this act." Section 53-199, R. R. S. 1943 (formerly § 53-377, C. S. Supp., 1941), sets out the authority of the courts to deal therewith if such nuisance exists and provides, insofar as here material, as follows: "* * * county attorney in the

county where such nuisance exists, or is kept or maintained, may maintain an action by injunction, in the name of the State of Nebraska, to abate and temporarily or permanently to enjoin such nuisance. The court shall have the right to make temporary and final orders as in other injunction proceedings. The plaintiff shall not be required to give bond in such action, and, upon final judgment against the defendant, such court shall also order that such room, house, building, structure, boat or place of any kind shall be closed and padlocked for a period of not less than three months nor more than two years * * *."

It is true, as appellants point out, that nothing in the Nebraska Liquor Control Act "shall prevent the possession and transportation of alcoholic liquor for the personal use of possessor, his family and guests; * * *." § 53-102, R. R. S. 1943. However, as we said in State ex rel. Johnson v. Hash, *supra:* "Liquor cannot be lawfully sold by the drink outside the corporate limits of cities and villages under any circumstances. In other words, insofar as selling and dispensing liquor by the drink is concerned, the country outside the boundaries of incorporated cities and villages is dry territory. This does not mean that persons may not congregate in such territory for the purpose of imbibing intoxicating liquors. It merely means that business places engaged in selling and dispensing liquors by the drink are not permitted in such areas under the terms of the act."

The opinion further states: "The act clearly indicates a legislative policy that places which permit sales by the drink and its consequent group drinking in the territory outside the corporate limits of cities and villages are contrary to the public health, morals and welfare of the people of this state."

We think the following from State ex rel. Johnson v. Hash, *supra,* has direct application to the factual situation here presented and controlling thereof: "It is clear that defendants were operating a place of business for

profit, which brought upon the community all the evils of public group drinking in rural areas, contrary to the provisions of the Nebraska Liquor Control Act. Defendants cannot escape responsibility for their contribution to the evils decried by the legislature by merely showing that liquor was not sold by them. By the simple expedient of having their patrons bring their own liquor, the defendants furnishing every other facility for the promulgation of the evils proscribed by the legislature, the defendants must be deemed to have created and maintained a public nuisance in direct contravention to the declared purposes of the act.

"We think the maintaining of a place where liquor is habitually brought by others to be there consumed, with the encouragement of the owner who profits from the sale of 'set-ups,' with all the evil results of public group drinking present, constitutes a public nuisance when such place is operated in territory in which sales by the drink are prohibited * * *."

As we said in State ex rel. Johnson v. Hash, *supra:* "But where, as here, the main business of the defendants contravenes the law of the state and the legitimate business of the place is either a sham or a minor part of the whole, the only adequate remedy consists of an abatement of the nuisance by closing the place by injunctive process in the manner prescribed by the legislature."

Having come to the conclusion, based on the facts as we have determined them to be, that the trial court was correct in what it did, we affirm its action taken herein.

AFFIRMED.

JOHN L. WALLA ET AL., APPELLANTS, V. OAK CREEK TOWNSHIP, A MUNICIPAL CORPORATION IN SAUNDERS COUNTY, ET AL., APPELLEES.

92 N. W. 2d 542

Filed October 24, 1958. No. 34391.

1. **Waters.** Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.
2. ———. The upper owner of land has the right, without interference, to have the flow of surface water follow along a well-defined watercourse from his land.
3. ———. 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.
4. **Waters: Drains.** 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.
5. **Waters.** Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

Phillip A. Tomek, John G. Tomek, and *William E. Tomek,* for appellants.

George W. Haessler, for appellees.

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

WENKE, J.

This is an appeal from the district court for Saunders

County. It involves an action brought therein by John L. Walla and Adeline Walla, husband and wife, to enjoin the officers of Oak Creek Township in Saunders County, their agents and employees, from constructing a culvert across a public highway just south of and immediately adjacent to the Wallas' farm. After trial was had the district court dismissed the plaintiffs' petition and also dissolved a temporary restraining order that had been granted plaintiffs at the commencement of the action. Plaintiffs filed a motion for a new trial. This motion the trial court overruled and plaintiffs took this appeal therefrom, giving a supersedeas bond in the amount fixed by the trial court.

If appellants are entitled to the relief they herein seek, injunction would be the proper action for that purpose. Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467; McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912. Such action being one in equity is triable de novo in this court and every case of this character must necessarily stand or fall upon the factual situation disclosed by the record. Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334.

There is a good deal of evidence relating to material matters that is in irreconcilable conflict. We have often stated that: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. See, also, Town of Everett v. Teigeler, *supra;* Mader v. Mettenbrink, *supra;* Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

At the conclusion of the trial appellants' counsel requested the trial court to view the premises, which request the trial court granted. In view thereof the

following has application: "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." Mader v. Mettenbrink, *supra*. See, also, Town of Everett v. Teigeler, *supra*.

Oak Creek Township in Saunders County consists of Township 13 North, Range 5 East of the 6th P. M. The appellants purchased the southeast quarter of Section 13 in this township sometime in 1950 and moved thereon in January 1951. They have lived on this farm ever since, making it their home.

There is an east-west township road along the south side of this farm. The improvements on the farm, which are substantial and in good condition, are located just north of this road in an area that is about 300 feet wide, east and west, and east of a point some 650 feet east of the southwest corner thereof. We shall refer to the area on which these improvements are located as the farmyard.

Across the section line to the south of this farmyard is an area in the northeast quarter of Section 24 of some 15 to 19 acres that drains to the north and forms a small swale just south of the section line. The collected surface water coming into this swale did, when the area was in its natural state, flow therein north and across the section line. After doing so this water would then flow northeast across the area where the improvements are now located on appellants' farm, entering it somewhere near the southwest corner thereof. This drainage to the north was caused by a slight rise in the lay of the land just to the east of the swale and south of where the house has now been placed on appellants' land, which is near the southeast corner of their farmyard. Water coming from the west in the ditch on the

north side of the road also flows northeasterly across appellants' farmyard as there is no ditch on the north side of the road in front of it wherein this water can flow on to the east.

When the township road obstructing this natural flow was first built the record does not disclose. However, when it was built a culvert was placed therein at about the point where the swale is located, thus permitting the water coming to the road in the swale to flow to the north as it had always done in its natural state. This culvert was inspected by those in charge of the road as late as January 3, 1951, and found to be open and in good condition. It consisted of a tube 30 inches in diameter and 36 feet long. It is evident this tube is no longer in the road. Just when it disappeared is not shown by the record, although its disappearance was officially noted by those in charge of the road on January 6, 1956.

There is another culvert across the township road south of appellants' farm. It is located some 200 feet east of appellants' farmyard. Water flows through this culvert from south to north and then onto and across appellants' farm. In the fall of 1956 the Oak Creek township board decided to clean out this culvert, fill over it, and do some grading on this road from this culvert east. For this purpose one of the board members contacted Ermin Benes, a brother-in-law of the appellant John L. Walla, and contracted with him to do the work, which he did. However, while doing this work Benes used his dozer to cut a substantial ditch along the south side of the road through the rise, or saddle, to which we have already referred. This ditch was cut through this rise or saddle by Benes without authority as he had not been directed to do it by either the board or any of its members. It was solely the act of Benes. The cutting of this ditch damaged the farm to the south of this road and permitted all water approaching the road from the south in the swale, which we have already referred

to herein, to flow east to the culvert under the road located to the east of appellants' farmyard. Doing so will eventually cause erosion to the farmland to the south thereof.

When this situation came to the attention of the members of the board they immediately took action to restore the situation to its former condition by placing a culvert, consisting of a 24-inch tube, across the road at about the point where a culvert had formerly been. This action was then brought by appellants to prevent the board from doing so.

"Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129. See, also, Mader v. Mettenbrink, *supra.*

"The upper owner of land has the right, without interference, to have the flow of surface water follow along a well-defined watercourse from his land." McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

"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." McGill v. Card-Adams Co., *supra.* See, also, Town of Everett v. Teigeler, *supra;* Schomberg v. Kuther, *supra;* Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81.

"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." McGill v. Card-Adams Co., *supra.* See, also, Town of Everett v. Teigeler, *supra;* Mader v. Mettenbrink, *supra;* Clare v. County of Lancaster, 160 Neb. 622, 71 N. W. 2d 190; Purdy v. County of Madison, 156

Neb. 212, 55 N. W. 2d 617. As stated in Clare v. County of Lancaster, *supra:* "The counties had the right to reconstruct this highway in 1949. No one questions this right. This they did. In this it was their right and duty to provide for the flow of the water as it was wont to flow in the course of nature theretofore." The same is true here.

"Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain." Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831. See, also, Purdy v. County of Madison, *supra;* Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809.

Applying the foregoing principles to the factual situation here present we find the trial court came to the correct conclusion for, under the factual situation here present, it was the duty of the officers of Oak Creek Township to provide for the flow of the water coming down this swale as it was wont to flow in the course of nature. Nor did appellants obtain any rights by reason of the fact that the culvert was apparently not in the road for some years for, as stated in Roe v. Howard County, *supra:* "An easement by prescription can be acquired only by an adverse user for ten years, * * *." See, also, Mader v. Mettenbrink, *supra.*

Having come to the same conclusion as the trial court, we affirm the judgment it rendered.

AFFIRMED.

OMAHA PAXTON HOTEL CO., APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

92 N. W. 2d 537

Filed October 24, 1958. No. 34392.

1. **Taxation.** Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive.
2. ———. Where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation the valuation becomes one of fact to be determined from the evidence, unaided by presumption.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Gaines, Spittler & Moore, for appellant.

Eugene F. Fitzgerald and *John C. Burke,* for appellee.

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

CHAPPELL, J.

This is an appeal by plaintiff, Omaha Paxton Hotel Company, from a judgment rendered by the district court for Douglas County affirming the action of defendant Board of Equalization in fixing the basic value of plaintiff's land and improvements located at the southwest corner of Fourteenth and Farnam Streets in Omaha. The county assessor had fixed the basic value of plaintiff's land for 1956 at $140,000, and of plaintiff's improvements thereon at $1,054,000, or a total of $1,194,000. After hearing, defendant dismissed plaintiff's complaint that such valuations were excessive, and therefrom plaintiff appealed to the district court, which rendered a judgment affirming the action of defendant upon the grounds, among others, that plaintiff had failed to establish by a preponderance of evidence that such values were excessive when compared with values placed

on other similar property, or that the fixing thereof was the result of a failure of plain legal duty and was not a mere error of judgment. Thereafter, plaintiff's motion for new trial was overruled, and it appealed, assigning in effect that the trial court erred in so finding and adjudging the issues. We sustain the assignment.

Section 77-201, R. S. Supp., 1955, effective September 18, 1955, and applicable herein, provided that all tangible and real property in this state, not expressly exempt therefrom, should be valued at its *basic value* and assessed at 50 percent of such basic value, which should be taken and considered as the taxable value upon which the levy should be made.

Previously, section 77-201, R. S. Supp., 1953, effective March 6, 1953, was identical except it provided that all property in this state, not expressly exempt therefrom, should be subject to taxation and valued at its *actual value* and assessed at 50 percent of such actual value, which should be taken and considered as the taxable value upon which the levy should be made.

Section 77-112, R. S. Supp., 1955, effective September 18, 1955, and applicable herein, provided that *basic value* should mean the value of property for taxation that is ascertained by using the following formula where applicable: "(1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; and (5) comparison with other properties of known or recognized value."

Previously, section 77-112, R. R. S. 1943, provided that: "Actual value" should mean value in the market in the ordinary course of trade.

In that connection, it is conceded that defendant passed a resolution in 1956 which in effect made basic value 70 percent of actual value.

At the outset, it should be noted that the defendant, relying upon DeVore v. Board of Equalization, 144 Neb. 351, 13 N. W. 2d 451, argued that all evidence sought

to be introduced relating to a compromise and settlement by stipulated court decree fixing the 1955 values of plaintiff's property for assessment purposes was immaterial as evidence of the value of such property for 1956. The record shows that ruling upon objections of defendant to admission of the decree itself, and evidence directly relating thereto, was generally deferred and not specifically disposed of. In that connection, there was competent and relevant evidence adduced by both parties with regard to the actual value of plaintiff's property in 1955, and the actual and basic value of plaintiff's property in 1956, which was properly received. It appears that the decree itself, together with evidence directly relating thereto, was not admissible, but that alone would not require a reversal because we have consistently held that: "In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment." Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658.

In such a situation, this court on appeal also considers only such evidence as is competent and relevant, bearing in mind, as hereinafter observed, that in this case the actual and basic value of plaintiff's property in 1956 was one of fact to be determined from such evidence, unaided by any presumption.

The manager of plaintiff's hotel for the last 15 years, who was familiar with its operations, was called as a witness by plaintiff. He testified that no basic improvements, except ordinary maintenance, had been made on plaintiff's property for the last few years, and that it was fundamentally the same property in 1956 as in 1955; and that between 1955 and 1956 there had been an increase in room vacancies, which resulted in about 70 percent occupancy, but that the hotel had charged

the same rates at all times, and its income and profits had decreased. He did not have the exact gross and net income figures for 1956 because they were handled in plaintiff's home office, which without dispute was in Galveston, Texas.

A man who had been engaged in the real estate business in Omaha since 1919, and had no interest in the Paxton Hotel property, was called as a witness by plaintiff. His testimony revealed substantially the following: That he was a qualified expert in making appraisals of real property such as that involved, and that at plaintiff's request he had appraised it in March 1956 for the tax year 1955. He did have an interest in the Woodmen of the World Building directly east of the Paxton Hotel, and at one time previously had an interest in a parking lot across the street north of the Woodmen of the World Building. Thus he claimed to have some knowledge of property values in that vicinity, although he placed no specific value on any properties thereat except plaintiff's property.

In making the appraisal, he knew that in March 1956 the Paxton Hotel had 300 rooms with an occupancy of about 73 percent, and each room rented for an average of $7 a day. He had no knowledge of plaintiff's income for the lease of a drug store in the Paxton Hotel on the corner of Fourteenth and Farnam Streets, and he had no exact knowledge of plaintiff's income from its bar, restaurant, and other facilities. However, he figured same at 46 percent of gross income according to standards of measurement authorized by a national survey of hotels. He knew, and it was undisputed, that plaintiff's property was suitable only for a hotel. He knew that the Paxton Hotel was built in 1928, and from his figures adduced the number of cubic feet in the building. He claimed to be familiar with the Fontenelle Hotel, and testified that it was the only one in the downtown area comparable in size and quality with that of the Paxton Hotel. He admitted that they had

the same number of rooms, but testified that the Fontenelle Hotel rooms were larger and that such hotel had double special accommodations, and because thereof and because of its location, such hotel was in a higher psychological level; and that it was in a more desirable location because of close proximity to other high-class buildings and units, such as the Athletic Club, the Municipal Auditorium, and the biggest retail stores and banks, which would all be factors increasing its valuation. However, he placed no valuation on the Fontenelle Hotel property.

In that connection, it was his opinion that plaintiff's property had decreased in actual value between 1955 and 1956 because of general attrition of the east end of the heart of the downtown area by movement therefrom toward the west section of the city. It was his opinion that on March 1, 1956, all of plaintiff's property except the furniture, but including the land and improvements, had an actual value of $1,100,000, which would give it a total basic value of only $770,000, or $424,000 less than $1,194,000 as fixed by the county assessor.

Generally speaking, plaintiff's expert testified that in arriving at that valuation he took into consideration capitalization of the property on an income basis, relative location, functional use, cost less depreciation of the building, plus value of plaintiff's land fixed at $115,500, then compared values and compared as well as possible plaintiff's hotel with other hotels in their operations.

The county assessor was called as a witness by defendant. He testified that on March 1, 1956, he assessed plaintiff's land at a basic value of $140,000, and plaintiff's improvements at a basic value of $1,054,000, and, over objection, expressed the conclusion that such values were fairly equalized and uniform with similar property in Douglas County. On cross-examination, however, he admitted that such values had been made by someone else in his office, he did not know who, and that they

were so submitted to and accepted by him. In that respect, he admitted that he had no personal knowledge about the number of rooms in the Paxton Hotel, its potential income, or anything else about such hotel. His office did have a card record which had been prepared by an appraisal board no longer in existence, upon which appeared the cubic content of plaintiff's hotel building, when it was built, type of construction, cost of replacement, and depreciation factors. However, admittedly such card record contained no information with regard to income of plaintiff's property. He did not know how plaintiff's rates compared with those of the Fontenelle Hotel, and admited that they might be considerably lower. He finally admitted that in giving his testimony about the value of plaintiff's property he relied upon the card records aforesaid which he had with him at the trial, and what somebody in his office had told him, but he could not remember who it was, and no such person was called as a witness by defendant.

In other words, the county assessor never inspected plaintiff's property, failed to perform his plain legal duty and conform to the formula provided by section 77-112, R. S. Supp., 1955, in material respects, and without any proper foundation therefor arbitrarily made the values given by him.

As recently as K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381, this court held: "Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive." In that respect however: "Where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation the valuation becomes one of fact to be determined from the evidence, unaided by presumption." Those rules have application herein.

In that connection, a man who had been engaged in the real estate business in Omaha since 1898 was called

as a witness by defendant. His testimony revealed that he was a qualified expert in making appraisals of real property such as that here involved, and that at defendant's request he had appraised plaintiff's property in March 1956 for the tax year 1955. He had been a member of the Douglas County tax appraisal board from 1947 to 1955. His testimony revealed that in fixing the value of plaintiff's property he used a method and formula comparable in material respects with that used by plaintiff's expert, except that he used different percentages in determining capitalization on an income basis and cost less depreciation. His opinion was that in 1956 the actual value of plaintiff's land was $200,000, with a basic value of $140,000, and that the actual value of plaintiff's improvements was $1,400,000, with a basic value of $980,000. That conclusion made the basic value of plaintiff's land and improvements $1,120,000 instead of $1,194,000, as fixed by the county assessor and affirmed by both the board of equalization and the district court. It will be borne in mind that, as shown by defendant's expert, the tax levy for 1956 upon plaintiff's land would, in the light of basic values fixed by such witness, be made upon 50 percent of $140,000, or $70,000, as it was made in 1955 on an assessed value of $140,000, and the levy on plaintiff's improvements was made in 1955 on 50 percent of an assessed value of $972,000, or $486,000, but would be made in 1956 on 50 percent of a basic value of $980,000, or $490,000.

In that respect, such witness testified that the assessed value used in 1955 as aforesaid was only 80 percent of the actual value of plaintiff's property under the tax procedure then used in Douglas County; that there had not been much change and no increase in actual value of plaintiff's property between March 1955 and March 1956; and that the values given by him on plaintiff's property for 1956 were fairly equalized with other values on comparable property. In that connection, he was familiar with the Fontenelle Hotel property, which, as

admitted by plaintiff's expert witness, was the only hotel comparable with plaintiff's property in the downtown district, but had a higher valuation, as heretofore pointed out. He testified that in 1956 the basic value of the Fontenelle Hotel land was properly fixed by the county assessor at $145,000, which would make its actual value $207,143, and the basic value of the Fontenelle improvements was so fixed at $1,120,000, which would make its actual value $1,600,000. Admittedly, as fixed by defendant's own expert, the total basic value of plaintiff's property by comparison should be $1,120,000 instead of $1,194,000, as fixed by the county assessor.

As we view the record, plaintiff established that the basic value fixed by the county assesssor and approved by defendant was excessive, but plaintiff failed to establish that in March 1956 the total actual value of plaintiff's property was only $1,100,000, which would give it a basic value of only $770,000. If, as plaintiff's expert testified, the actual value of plaintiff's land was $115,500, then its basic value would be only $80,850, and the actual value of plaintiff's improvements would be only $984,500, which would give it a basic value of only $689,150. We conclude that the evidence will not support such specific valuations.

On the other hand, the only competent evidence adduced by defendant upon values supports and sustains a conclusion that the basic value of plaintiff's land was $140,000, and frankly admits that the basic value of plaintiff's improvements was only $980,000, making a total basic value of $1,120,000. Under the circumstances as presented in this case, defendant is bound by such evidence and cannot well claim that the basic value was more than that amount.

Contrary to defendant's contentions, this case is distinguishable in material respects from LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455, and Lucas v. Board of Equalization, 165 Neb. 315, 85 N. W. 2d 638. Rather, K-K Appliance Co. v. Board of Equalization,

supra, is comparable in principle and controlling.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to fix the basic value of plaintiff's land at $140,000, and the basic value of plaintiff's improvements at $980,000, and thus make the total basic value of plaintiff's property $1,120,000. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

MAE OAK, APPELLANT, V. GENEVA GRIGGS ET AL., APPELLEES.
92 N. W. 2d 551

Filed October 24, 1958. No. 34422.

1. **Appeal and Error.** A district judge is without authority to allow and settle a bill of exceptions not prepared in the manner and within times fixed by the applicable statute.
2. ———. A bill of exceptions must be prepared, served, returned, settled, and allowed in accordance with the statute which is mandatory.
3. ———. In the absence of a bill of exceptions, no question may be considered on appeal, a determination of which requires an examination of evidence produced at the trial.
4. ———. If there is no bill of exceptions, it will be presumed in this court that any issues of fact presented by the pleadings necessary to justify the judgment were sustained by evidence and that they were correctly decided.
5. **Courts: Executors and Administrators.** The county court only has authority in the first instance to consider and adjudicate a claim against the estate of a decedent.
6. **Executors and Administrators.** A claim in this respect is every species of liability which the representative of an estate of a decedent may be required to pay from the general assets of the estate.
7. ———. Proceedings to administer the estate of a decedent are in rem and every person interested therein, either as heir, creditor, or otherwise, is a party thereto whether or not he is named or appears therein or is absent therefrom.
8. **Courts.** Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a dis-

trict court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.

APPEAL from the district court for Dixon County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Max Marshall, for appellant.

Kenneth M. Olds, for appellees.

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

BOSLAUGH, J.

The liability for the indebtedness represented by the judgment of appellant, which is the basis of this action, accrued and was owing by Harold Griggs in his lifetime to appellant and it existed at the time of the death of Harold Griggs. The judgment therefor was rendered in favor of appellant in accordance with the direction of this court made in the determination of prior litigation originated by Harold Griggs against appellant. Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410.

Appellant in the pending action seeks a judgment in the amount of the original judgment rendered in her favor in the prior litigation against Geneva Griggs as administratrix of the estate of Harold Griggs, deceased, because, as appellant alleges, Geneva Griggs as administratrix of the estate of Harold Griggs, deceased, collected indebtedness owing to and which was an asset of the estate of the deceased, retained it, and made no accounting therefor in the proceedings had for the administration of the estate of the deceased. The judgment sought by appellant against Fidelity and Deposit Company of Maryland is because it was the surety on the bond of Geneva Griggs as administratrix of the estate of Harold Griggs, deceased.

A motion for a summary judgment was made by each of the appellees. The basis therefor was, in substance, that the subject matter of the action was a probate

matter exclusively within the jurisdiction of the county court of Dixon County in which the estate of the deceased was administered; that the district court was without jurisdiction to hear the matters pleaded in the petition of appellant; that the matters in the action were within the exclusive, original jurisdiction of and they had been finally adjudicated in and by the county court of Dixon County in the proceedings had for the administration of the estate of Harold Griggs, deceased; that the determination made by the county court was res judicata of all matters pleaded by the petition of appellant in this case; that appellant did not file a claim against the estate of Harold Griggs, deceased, in reference to the indebtedness pleaded by the petition in the pending case within the time designated by the order of the county court of Dixon County for the filing of claims against the estate of the deceased; and that any claim appellant had was barred. The Fidelity and Deposit Company of Maryland also asserted by its motion that it was only bound secondarily on the bond furnished by it for the administratrix of the estate of the deceased for any liability of the administratrix and that there had been no determination by said county court that she was liable in any amount to the estate of the deceased.

The district court found that the claim made by appellant in this case was a probate matter of which the county court of Dixon County had original and exclusive jurisdiction; that the district court was without jurisdiction to consider the matters alleged in the petition of appellant; that appellant had not established any claim against the estate of Harold Griggs, deceased; and that appellant made no objection to the final report and account of the administratrix in the county court. The district court sustained each of the motions for a summary judgment and rendered a judgment of dismissal of the cause. This appeal challenges the correctness of the action of the trial court.

The document purporting to be a bill of exceptions furnished in this cause fails to show it was served on appellees, returned by them, or presented by appellant to the judge who tried the case for settlement and allowance, as the law requires. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854, declares: "The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced to 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." See, also, Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82; Sawyer v. Kunkel, 166 Neb. 303, 88 N. W. 2d 906. In the absence of a bill of exceptions, no question may be considered on this appeal, a determination of which requires an examination of evidence produced at the trial. It will be presumed that any issues of fact presented by the pleadings necessary to justify the judgment were sustained by the evidence and that they were correctly decided. Combes v. Anderson, 164 Neb. 131, 81 N. W. 2d 899.

The judgment of dismissal of the case was correct because the cause of action attempted to be alleged by appellant involved a subject matter of which the district court did not have and could not obtain original jurisdiction. The exclusive, original jurisdiction of the subject matter asserted in the petition of appellant was in the county court of Dixon County in which the estate of Harold Griggs, deceased, was administered. The petition on its face shows that if all the material allegations thereof are true, appellant only had a claim against the

estate of the deceased and the right to appear and object to and contest the legality of the acts of the administratrix, her reports, and her final accounting. Appellant filed no claim, made no objections, and offered no contest therein.

Appellant was a creditor of the estate of the deceased. The county court only has authority in the first instance to consider and adjudicate a claim against the estate of a decedent. A claim in this respect means every species of liability which the representative of an estate may be required to pay from the general assets of the estate. Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344. Appellant was a party to the administration proceedings of the estate of the deceased and was bound by the acts of the county court which had jurisdiction of the administration proceedings of the estate of Harold Griggs, deceased. The proceedings were in rem and every person interested therein, either as heir, creditor, or otherwise, was a party thereto without regard to whether or not he was named or appeared therein or was absent therefrom. Minahan v. Waldo, 161 Neb. 78, 71 N. W. 2d 723; Clutter v. Merrick, 162 Neb. 825, 77 N. W. 2d 572.

There is no issue concerning the regularity, scope, or effectiveness of the administration proceedings of the estate. Mueller v. Shacklett, *supra,* states: "Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises." See, also, Flessner v. Wenquist, 156 Neb. 378, 56 N. W. 2d 294.

Section 30-801, R. R. S. 1943, contains this limitation: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief

other than for the recovery of money only, and such actions as are permitted in sections 30-704, 30-705, 30-706 and 30-714 * * *." The sections cited in the quotation relate to contingent claims and have no application to this case. The district court had no jurisdiction of the subject matter of the pending case. This was obvious from the face of the petition. A summary disposition of the case was proper. Mueller v. Shacklett, *supra.*

The judgment should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. WESLEY D. BOUWENS, APPELLEE.

92 N. W. 2d 564

Filed October 24, 1958. No. 34449.

1. **Municipal Corporations.** In order to establish a case against a defendant for violation of a city ordinance it is necessary to show that the offense was committed within the area in which the ordinance is effective.
2. **Municipal Corporations: Evidence.** Courts will not take judicial notice that certain streets are located within the territorial limits of an unnamed city for the purpose of fixing venue.
3. ———: ———. Courts will take judicial notice of the streets, squares, and public grounds of a city, their location, relation to one another, and the direction they run as shown by an official map of a city. But judicial notice thereof will not be taken to establish venue.
4. **Criminal Law.** Venue may be proved the same as any other essential fact. It need not be established by direct evidence, nor in the words of the complaint or information, but if from the facts in evidence the only rational conclusion which can be drawn is that the offense was committed in the city or county alleged, the proof is sufficient.
5. **Municipal Corporations: Arrest.** The fact that defendant was arrested by policemen in the city of Lincoln is not proof that the offense was committed within the territorial limits of the city of Lincoln.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Ralph D. Nelson, Norma VerMaas, and *Thomas J. Gorham,* for appellant.

Bartlett E. Boyles, John E. Dean, and *Emory P. Burnett,* for appellee.

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

CARTER, J.

This is an appeal from a judgment dismissing a complaint against the defendant for disturbing the peace contrary to an ordinance of the city of Lincoln.

The complaint charged that defendant, on May 23, 1955, within the corporate limits of the city of Lincoln, did unlawfully disturb the peace and quiet of a neighborhood, contrary to the ordinances of the city of Lincoln and against the peace and dignity of the State of Nebraska. The defendant pleaded not guilty. Upon a hearing in the municipal court of the city of Lincoln, defendant was found guilty and fined $25 and costs. Defendant appealed to the district court where, after trial, the complaint was dismissed. The State appealed.

The case, although criminal in form, is a civil action for the collection of a penalty.

The evidence offered at the trial in the court below was wholly contained in a stipulation of facts which was offered and received in evidence. The evidence shows that on May 23, 1955, at about 11 o'clock p. m., defendant was operating a caterpillar tractor, which made a great amount of noise and disturbed the sleep and the peace and quiet of the neighborhood. The stipulation states that five named persons were unable to sleep because of the noise made in operating the tractor, and that upon refusal to desist, defendant was arrested by police officers of the police department of

the city of Lincoln for disturbing the peace and quiet of the neighborhood.

The defendant asserts that the complaint was properly dismissed because the evidence does not show that the alleged offense was committed within the territorial limits of the city of Lincoln. The evidence does not show the venue of the alleged criminal act. Proof of venue is essential to the establishment of the charge. The State contends that the court should take judicial notice that certain streets mentioned in the stipulation are within the territorial limits of the city of Lincoln.

We think the correct rule is stated in People v. Strook, 347 Ill. 460, 179 N. E. 821, wherein the court said: "This court has held that it cannot take judicial notice that certain streets are located in Chicago or anywhere else in Cook county, Illinois. * * * The reasons for the holdings in the foregoing cases are clearly based on the facts that streets of the same name as certain streets of any city of Illinois may be found to also exist in other cities of Illinois or in cities of other States of this country * * *." See, also, Thompson v. State, 89 Okl. Cr. 383, 208 P. 2d 584; City of Chicago v. Brent, 356 Ill. 40, 190 N. E. 97. It is fundamental that venue must be proven as any other essential fact.

The cases cited by the State do not sustain its contention that courts will under all circumstances take judicial notice that named streets or buildings are within the limits of a particular city. A court will take judicial notice of streets, squares, and public grounds thereof, their location, and relation one to another, and the direction in which they run as shown by an official map of a city. Cascio v. State, 213 Ark. 418, 210 S. W. 2d 897. But this does not mean that courts will take judicial notice of streets to prove venue within the city. There are cases holding, also, that where the description of streets or places is such that they could not reasonably apply to any other city or county, such description will be held sufficient to establish venue.

Gates v. State, 160 Neb. 722, 71 N. W. 2d 460; Commonwealth v. Lawrence, 282 Pa. 128, 127 A. 465. But ordinarily the mere reference to streets and addresses in the evidence, standing alone, will not be deemed sufficient to establish venue.

The only reference in the stipulation to the city of Lincoln is the following: "* * * that thereafter, at approximately eleven o'clock p. m., on the same evening, the defendant, Wesley D. Bouwen, was arrested by police officers of the Police Department of the City of Lincoln, for disturbing the peace and quiet of the neighborhood." It is well known that police may make arrests for the commission of crimes committed outside of the territorial limits of a city and its environs. The fact that defendant was arrested by policemen in the city of Lincoln is not proof that the offense was committed within the jurisdiction of the municipal court of the city of Lincoln. People v. Strook, *supra.*

The evidence fails to prove the venue of the offense charged. Such evidence is necessary to the establishment of the offense. The want of such evidence sustains the action of the trial court in dismissing the complaint.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BERTRAND V. TIBBELS, RESPONDENT.

92 N. W. 2d 546

Filed October 24, 1958. No. 34482.

1. **Attorney and Client.** Misconduct of an attorney indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, constitutes a ground for disbarment.
2. ———. As a general rule a conviction of a felony or misdemeanor involving moral turpitude is conclusive evidence warranting disbarment.

3. ———. Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a rule of court provides that a lawyer convicted of such an offense may be disbarred.
4. ———. It is the conviction of a crime involving moral turpitude, and not the plea to the charged offense, that warrants disciplinary action.

Original action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for relator.

Bertrand V. Tibbels, pro se.

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

CARTER, J.

This is an original proceeding brought by the State of Nebraska on the relation of the Nebraska State Bar Association praying for disciplinary action against the respondent, Bertrand V. Tibbels, an attorney duly licensed to practice law in this state.

The charge of misconduct against respondent is that he failed to file with the proper office of the federal government any return or report of his income for income tax purposes for the years 1952, 1953, and 1954, although he had an income which he was required by law to report. The complaint further alleges that on January 17, 1957, respondent was charged in two counts in the United States District Court for the District of Nebraska with willfully and knowingly failing to file the aforesaid income tax returns for the years 1953 and 1954. Respondent pleaded nolo contendere to Count 1 involving the year 1953, and not guilty to Count 2 involving the year 1954. Upon a hearing, respondent was found guilty as to Count 1 and sentenced to pay a fine of $500 and costs, and was placed on probation for 14 months conditioned that he pay into the proper govern-

mental agency the estimated amount of taxes and penalties due in the amount of $2,292.41. Count 2 was dismissed. Upon the foregoing charge the relator prays that respondent be disciplined for violating the standards of ethics governing Nebraska lawyers.

Respondent filed an answer to the complaint in which he admits the filing of charges and his conviction on Count 1 in the United States District Court. He further alleges that when he was arraigned on the charge he asked leave to plead nolo contendere to Count 1 and explained to the court that he was not guilty of any willful or intentional violation of the statute, but desired to waive trial and consent to the imposition of penalty. He admits that the court entered a judgment of guilty as to Count 1 and imposed the sentence alleged. He admits paying the fine and complying with the terms of the probationary order. Respondent further admits that he filed no income tax returns for the years 1952, 1953, and 1954; denies that such failure was willful, but resulted from inadequate bookkeeping methods, the press and urgency of professional engagement, and conflicting demands upon his time; and alleges that he reported his failure to file his return each year to the local internal revenue office and at all times intended to file the returns and pay any tax due. Respondent alleges that by offering to plead nolo contendere to Count 1 he did not intend to admit guilt, and that he in fact was not guilty of the charge.

Upon the filing of the foregoing answer the relator moved for a judgment on the pleadings. The issue before the court is whether or not the pleadings entitle the relator to a judgment as a matter of law.

It is the law of this state that a conviction of a crime involving moral turpitude, whether a felony or misdemeanor, is conclusive evidence warranting disciplinary action. State ex rel. Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N. W. 2d 323; State ex rel. Wright v. Sowards, 134 Neb. 159, 278 N. W. 148. It is

also the law of this state that a conviction following a plea of nolo contendere is a conviction within the foregoing rule. State ex rel. Nebraska State Bar Assn. v. Stanosheck, *ante* p. 192, 92 N. W. 2d 194; State ex rel. Nebraska State Bar Assn. v. Fitzgerald, *supra.* In the Stanosheck case this court said: "In comparable situations, it is generally held that a judgment of conviction of a felony or misdemeanor involving moral turpitude, rendered upon a plea of nolo contendere, is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a statute or a rule of court, as heretofore recited, provides that a lawyer convicted of such an offense may be disbarred. See, State ex rel. Nebraska State Bar Assn. v. Fitzgerald, supra, and Neibling v. Terry, supra, together with authorities cited and discussed in Annotation, 152 A. L. R. 287. That rule is controlling here." It is readily apparent, therefore, that it is the conviction and not the plea that affords the basis of disciplinary action.

In State ex rel. Nebraska State Bar Assn. v. Fitzgerald, *supra,* this court determined that to knowingly and willfully fail to make income tax reports, as required by federal statutes, involves moral turpitude even though the statute only classifies it as a misdemeanor. It is also determined by that case that a conviction for failure to file income tax reports under the criminal provisions of federal statutes is a violation of the standards of ethics of the Nebraska State Bar Association prescribed by this court. It is clear therefore that respondent's answer does not set forth a defense to the complaint and that relator's motion for a judgment on the pleadings should be sustained.

There is no evidence before us that respondent has ever breached any professional duties or been guilty of any other wrongdoing. Under these circumstances the ends of justice will be served by suspending respondent from further practice of law, same to be effective 30

days after our judgment rendered herein becomes effective. If at the end of 1 year respondent makes an affirmative showing that he has fully complied with the order of suspension and that he will not in the future engage in any practices offensive to the legal profession, he will be reinstated. If he fails to so comply, the suspension will become permanent. Judgment of suspension accordingly. All costs of the proceeding are taxed to respondent.

JUDGMENT OF SUSPENSION.

ALVINA WISCHMANN ET AL., APPELLEES, V. RALPH RAIKES, APPELLANT.

92 N. W. 2d 708

Filed October 31, 1958. No. 34368.

1. **Equity.** Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.
2. ———. "Final determination" as used in the foregoing refers and relates to all matters which became issuable under the pleadings or the presentation to the court.
3. **Judgments.** The defense of res judicata becomes available when a question of fact has been put directly in issue between the same parties or their privies and an adjudication is had thereon.
4. **Injunctions: Judgments.** Generally the granting of an injunction where an issue of damages has not been tendered is not a bar to an action at law for damages caused by the wrong enjoined.
5. **Crops: Damages.** In an action for damages to land or property thereon, or to growing crops, by floodwaters which it is alleged were thrown on a plaintiff's land by the negligent or improper construction of facilities by another, the burden of proof is on the plaintiff to show that the construction of the facilities complained of caused or increased the overflow or in some manner contributed thereto, together with the nature and extent thereof, and the amount of damages caused thereby.
6. **Trial.** In the absence of evidence to support the essentials of

proof of a cause of action pleaded, an alternative motion for directed verdict or for dismissal of the action should be sustained.

7. ———. 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 becomes the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion and to render judgment pursuant to the motion for directed verdict.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded with directions.*

Kennedy, Holland, DeLacy & Svoboda, William P. Mueller, Gross, Welch, Vinardi & Kauffman, Malcolm D. Young, and *Bryant, Christensen & Sullivan,* for appellant.

John J. Edstrom, Nelson & Harding, and *Duane W. Acklie,* for appellees.

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

YEAGER, J.

The action out of which the proceeding grows was by Willy Wischmann and Alvina Wischmann, husband and wife, plaintiffs, who were the owners of the northeast quarter and the north half of the southeast quarter of Section 21, Township 13, Range 9, Saunders County, Nebraska, against Ralph Raikes, defendant, who was the owner of the northeast quarter except the right-of-way of the Chicago, Burlington & Quincy Railroad Company and a small tract north and east of this right-of-way, the southeast quarter, the northeast quarter of the southwest quarter, and the northwest quarter of Section 18; and the southwest quarter, except the right-of-way of the Chicago, Burlington & Quincy Railroad Company and a small tract north of the said right-of-way, and that part of the northwest quarter south of

the right-of-way of the Chicago, Burlington & Quincy Railroad Company, in Section 17; all in Township 13, Range 9, in Saunders County, Nebraska. During the pendency of the action in the district court the plaintiff Willy Wischmann died, after which the action was revived as to him in the name of Alvina K. Wischmann, administratrix. The action was for damages to plaintiffs according to the allegations of the amended and supplemental petition on which it was tried on account of being prevented for a period of 12 years from the year 1945 from using and sowing cultivated crops on 40 acres of the lands of plaintiffs; on account of being prevented from using and sowing cultivated crops on 20 acres of the land; on account of the necessity to level 30 acres formerly used for cultivated crops; on account of inability to use hay land because of silt, rubbish, and debris for 12 years from 1945; on account of deprivation of 90 percent of the pasture land for 12 years; on account of the loss of cattle in the years 1950, 1951, 1952, and 1953; and on account of damage to and destruction of fences.

It is pointed out here that the action is in nowise to recover for damage to land. The action is to recover for alleged destruction of crops, for prevention of planting and harvesting crops, for cost of rehabilitating land, for loss of livestock, and for damage to fences.

The basis of the action for damages, briefly summarized, is a claim by plaintiffs that the defendant, whose land is to the north and west of that of plaintiffs but does not join it at any point, unlawfully and negligently created structures and drainage ways in such manner as to divert and cause water to flow upon the land of plaintiffs in a manner, quantity, and direction from that in which it was previously wont to flow in consequence of which the plaintiffs were damaged. This is but a brief sketch of that which has been described in great detail in the petition, but in view of the record of the evidence in the case it appears to be suffi-

cient for the purposes of the opinion and decision on this appeal.

The plaintiffs pleaded that in an earlier action wherein plaintiffs here were parties plaintiff and the defendant here was defendant, it was adjudicated with finality that the acts of defendant of which complaint is made herein, were damagingly injurious to the land of plaintiffs and discontinuance of them was decreed.

The answer of the defendant is of great length but for the purposes of this review it becomes necessary to point out only that the allegations of the petition containing the grounds of action by plaintiffs against the defendant are denied.

The case was tried to a jury and a verdict was returned in favor of plaintiffs and against the defendant for $10,000. A motion for new trial and one for judgment notwithstanding the verdict were duly filed and by the court overruled. Judgment was thereupon rendered on the verdict. From the order overruling the motions for new trial and judgment notwithstanding the verdict and the judgment, the defendant has appealed.

The assignments of error which the defendant asserts as grounds for reversal are numerous but only a few of them require consideration herein. Many of them amount only to legal abstractions when viewed in the light of the principles which must control in the face of the record which has been made.

The question which appears to require consideration first is that of whether or not the plaintiffs had the right in any event to maintain this action for damages.

As pointed out the original plaintiffs herein were plaintiffs in an action in equity to prohibit and to abate the acts and doings by the defendant which are the basis for this action for damages. In that action there were other plaintiffs who owned other land which it was claimed was damaged and on which it was claimed that other damage occurred. The decree in that case, which was affirmed by this court, ran in favor of all

plaintiffs and against the defendant. In that case no issue as to recovery of damages was pleaded or attempted to be proved. That case is Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507.

The defendant asserts that the issue of damages which the plaintiffs present in this case could have been presented in the earlier action mentioned in the statement herein and for failure so to do they may not now maintain this action for damages.

While it may be said that there is apparently some confusion in the opinions of this court in this area, when the opinions are carefully examined in the light of their entire context this confusion disappears.

The rule generally applicable is found in the following observations in Ledingham v. Farmers Irr. Dist., 135 Neb. 276, 281 N. W. 20: "Damages were not pleaded, presented, proved or determined in the former case. There is some diversity of judicial opinion on this subject in vast fields of litigation, but the better view seems to be that, in a situation like the present, the granting of an injunction is not necessarily a bar to an action at law for damages caused by the wrong enjoined."

Cases relied upon by the defendant to support his contention that this action for damages is barred by the injunctive decree in Bahm v. Raikes, *supra,* are Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575; Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333; and Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56.

In Brchan v. The Crete Mills, *supra,* and Armbruster v. Stanton-Pilger Drainage Dist., *supra,* the question of the effect of a decree in equity upon the right to maintain a later action in damages was not directly involved. The question actually presented and determined was that of whether or not damages were properly recoverable in an action basically equitable. In deciding that question it was said in both cases by quotation from

Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831: " 'It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.' "

In this, although not as clearly as might be desired, it appears that it was the purpose to say that "final determination" related to all matters which became issuable under the pleadings or the presentation to the court.

From a separated reading of syllabus points in Shepard v. City of Friend, *supra,* a conclusion opposite to this could be reached, but this is not possible when these are read in the light of the clear context of the opinion.

In the opinion it is made clear beyond peradventure that the right to maintain that action for damages was denied for the reason that the right to recover damages was denied in an earlier action in equity wherein the matter of damages was made an issue. The opinion points out in the first instance in the equity action there was no issue of damages. Later and after the equitable issues had been presented the plaintiffs asked leave to amend to include a claim for damages. This was denied on the ground that damages had not been proved. An appeal was taken from the adjudication of the court which included this ruling. The question of liability for damages was an issue specifically presented to this court and there was a decision thereon adverse to the plaintiffs. This is the over-all statement of what was before the court. Responding to this, it was said: "The defense of res adjudicata becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication is had thereon."

This case therefore is authority only for the proposition that in an equity action a decree therein is res

judicata of all issues adjudicated as well as all issues tendered which might have been determined therein. The opinion in Wightman v. City of Wayne, *supra,* is of like purport.

In this light the rule suggested in the quotation from Ledingham v. Farmers Irr. Dist., *supra,* is here announced as controlling in this case, as follows: Generally the granting of an injunction where an issue of damages has not been tendered is not a bar to an action at law for damages caused by the wrong enjoined.

The burden of proof to sustain their cause of action devolved on the plaintiffs. The rule generally stated is as follows: "In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of a railroad nearby and adjacent thereto, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby." Harris v. Lincoln & N. W. Ry. Co., 91 Neb. 755, 137 N. W. 865. See, also, Goodhart v. Chicago, B. & Q. R. R. Co., 146 Neb. 290, 19 N. W. 2d 549; Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899.

There are a number of questions incidental to this one presented by the briefs of appellant particularly with reference to evidence of plaintiffs admitted over objection which will require consideration only if it be found that the evidence as a whole including that which was admitted over objection amounts to proof of the cause of action pleaded within the requirement of the foregoing rule. If it does not, a discussion of these incidental questions could serve no useful purpose.

Before proceeding with a discussion of the question of whether or not the plaintiffs have sustained their bur-

den it appears well to point out here that while by the petition the plaintiffs seek a recovery of damages from 1945 forward to the date of the commencement of the action, a recovery, if any, could be had only for 4 years prior to and including June 10, 1954. See § 25-207, R. R. S. 1943. No party in the case contends otherwise.

As indicated by decisions already cited herein the burden was on plaintiffs to show that their damages, if any, were caused by failure of the defendant to comply with some mandatory or prohibitory exaction imposed by the adjudication in Bahm v. Raikes, *supra,* or some negligent act or failure to act from which the damages flowed.

In an effort to sustain the burden the plaintiffs offered and the court received in evidence the petition, the answer, the decree, and the motion for new trial filed in the district court, and the opinion of this court in Bahm v. Raikes, *supra.* Before completion of the trial the opinion of this court was withdrawn and the jury was instructed to disregard it. Testimony was adduced that land of plaintiffs had been flooded but none with any degree of particularity except one instance in 1951. A flood in that year was described as tremendous. This one was so great that it covered all land to a great depth over a very wide surrounding area. There was testimony of a small flood in 1952. There was testimony that at some time from 1944 to 1956, on account of water coming onto the land of plaintiffs, a channel was cut across it whereas there had been no channel but only a draw theretofor. There was testimony that at the south of plaintiffs' farm water from this channel backed up on meadow land causing damage. Testimony disclosed that some wheat was sowed in 1950 but on account of the 1951 flood no grain was harvested; that no other crop was planted in 1950 because the land was too wet; and that there was no flooding in 1950, 1952, 1953, and 1954, except a small flood in 1952 and inferentially one in 1954. There was testimony as to

damage to production of hay and pasturage on account of water during the period for which damages were recoverable, if proved. There was also evidence that rubbish and debris had been carried onto the land by water, and that livestock were lost on account of water in the soil.

Inexplicably, however, the plaintiffs failed to offer any testimony or other evidence that any of these things were caused or came about by reason of the matters charged against the defendant in Bahm v. Raikes, *supra,* which was prohibited or commanded by the adjudication in that case, or that they were caused by any other act of omission or commission on his part.

At the close of the plaintiffs' case-in-chief the defendant moved for a directed verdict in his favor. This motion was overruled. In the light of the absence of evidence to support the essentials of proof of the cause of action pleaded as noted, it should have been sustained. Goodhart v. Chicago, B. & Q. R. R. Co., *supra;* McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568. The appropriate rule is stated in Goodhart v. Chicago, B. & Q. R. R. Co., *supra,* as follows: "Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, it was the duty of the trial court to sustain a motion directing a verdict for defendant at the close of plaintiff's evidence."

Thereafter the defendant adduced his evidence. An examination of this evidence discloses that there is nothing therein to supply the failure of plaintiffs to adduce evidence establishing a causal connection between the damages which plaintiffs claim they have sustained and any act or failure by the defendant.

At the close of all the evidence, the defendant again moved for a directed verdict, which motion was overruled and the case was submitted to a jury with the result which has previously been pointed out. For

reasons already indicated, the motion should have been sustained.

After the verdict was returned the defendant filed his motion for judgment notwithstanding the verdict. This motion should have been sustained. "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. See, also, Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603; Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

The conclusion reached that proof of this basic element of plaintiffs' pleaded cause of action has not been sustained by evidence renders unnecessary a consideration of any of the other assignments of error or the responses thereto contained in the briefs.

The judgment of the district court is reversed and the cause remanded with directions to sustain the motion for judgment notwithstanding the verdict and to render judgment of dismissal of plaintiffs' action.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

FARMERS MUTUAL HAIL INSURANCE COMPANY, APPELLANT, v. CARL H. LEONARD, APPELLEE.

92 N. W. 2d 670

Filed October 31, 1958. No. 34396.

1. **Insurance.** When a time is fixed in a policy of hail insurance for the giving of notice of a loss for which indemnity is claimed which is reasonable in character, it will generally be

regarded as a condition precedent to be complied with before a recovery can be had.

2. ———. But when, because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter and the beneficiary will be excused for the failure if the act is done within a reasonable time or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist. The question of the sufficiency of the excuse offered and the reasonableness of the time in which the act is performed is to be determined according to the nature and circumstances of each individual case. The beneficiary in all cases is required to act with diligence and without laches on his part.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

B. B. Bornhoft and *Thomas J. Gorham,* for appellant.

Free & Free, for appellee.

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

SIMMONS, C. J.

This case originated as an action on a promissory note given by the defendant to the plaintiff as payment for a policy of hail insurance. As to that feature of the case there was a judgment for the plaintiff. That judgment is not involved in this appeal.

The defendant cross-petitioned seeking to recover for damages to insured crops. Issues were made and trial was had resulting in a verdict of damages for the defendant, and judgment was rendered thereon. That judgment is involved in this appeal.

At the close of all the evidence plaintiff moved for a dismissal of defendant's cross-petition or in the alternative for a directed verdict. The motion was overruled.

Plaintiff moved for a judgment notwithstanding the verdict or for a new trial. That motion was denied.

Plaintiff appeals, assigning error in several respects including error in failing to sustain the motion for a directed verdict or to dismiss the cross-petition.

We sustain the recited assignments and reverse the judgment and remand the cause with directions to dismiss the cross-petition.

The policy contained the following provision: "Whenever any member shall sustain a loss he shall within 10 days of the date of the loss notify the Secretary at its Home Office by registered letter. This Company shall not be liable for any loss not so reported. It is agreed that Notice of Loss to an Agent of this Company shall not constitute notice to the Company within the intent and meaning of this policy."

Crop damage occurred on June 26, 1954. Defendant and his sons had similar insurance. Within a day or so thereafter the defendant and his sons separately prepared notices of loss on post card forms. Defendant's notice contained the address in printing of the plaintiff and on the reverse side "NOTICE OF LOSS—PLEASE REGISTER." On the lower left-hand corner was a square above which was printed "Back Stamp" and below "Office of Mailing."

The card contained a stamped number of the policy and blanks to be filled in. The defendant caused to be filled in the hour, day, and month of the storm. The card was signed for defendant by his son and given to the son for mailing at a mail box about 600 feet from the farm home. The son mailed the other notices to the plaintiff. A few days later the son found the defendant's card notice of loss behind the car seat and testified that he promptly put it in the rural mail box. An attempt was made to show that this occurred on the 10th day after the loss. However, the record contains an admission by the defendant that it was not mailed within the 10-day period. It was postmarked July 7, 1954, at 4 p.m., which was the 11th day after the loss. It was received by the plaintiff at its home office on

July 8, 1954, which was the 12th day after the loss. Actual notice of the loss was given to an adjuster on July 8, 1954.

Defendant pleaded both the giving of the notice and actual notice, and argues here that he has shown substantial compliance.

In Woodmen Accident Assn. v. Pratt, 62 Neb. 673, 87 N. W. 546, 89 Am. S. R. 777, 55 L. R. A. 291, we had a case involving an accident policy which contained a provision requiring notice of injury within 10 days from the date of the injury. The rules there announced are applicable to the policy here involved. Applying those rules here we hold that when a time is fixed in a policy of hail insurance for the giving of notice of a loss for which indemnity is claimed which is reasonable in character, it will generally be regarded as a condition precedent to be complied with before a recovery can be had. The court there held: "But when because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter, and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist; the question of the sufficiency of the excuse offered, and the reasonableness of the time in which the act is performed, to be determined according to the nature and circumstances of each individual case; the beneficiary in all cases being required to act with diligence, and without laches on his part."

It is patent that the fault here was the lack of diligence and laches of the defendant and his agent. No circumstance, condition, or obstacle rendered impossible the performance of the act of mailing the notice within the proper time. The plaintiff is in nowise at fault.

The judgment of the trial court is reversed and the

cause is remanded with directions to dismiss defendant's cross-petition.

REVERSED AND REMANDED WITH DIRECTIONS.

TASTEE INN, INC., A CORPORATION, PLAINTIFF IN ERROR, V. BEATRICE FOODS CO., INC., A CORPORATION, DEFENDANT IN ERROR.

HAROLD L. JORGENSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA ET AL., DEFENDANTS IN ERROR.

92 N. W. 2d 664

Filed October 31, 1958. No. 34399.

1. **Contempt.** It is mandatory that the record of conviction for direct contempt must contain a statement of the facts upon which the court relied in adjudging the contemner guilty.
2. ———. The reason of the foregoing requirement is to enable a court reviewing the record of conviction for direct contempt to determine from the record of the conviction thus made if a contempt was committed and if the court which made the adjudication had authority to impose punishment therefor.
3. ———. A statement of conclusions of the court in the record of such a proceeding is unimportant and insufficient to sustain a conviction.
4. ———. A contempt proceeding is in its nature criminal and no presumption or intendment is indulged to sustain a conviction.
5. ———. In a proceeding for direct contempt, guilt must be established beyond a reasonable doubt to justify a conviction.

ERROR to the district court for Lancaster County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

William L. Walker and *Earl Ludlam,* for plaintiffs in error.

Cline, Williams, Wright & Johnson, for defendant in error Beatrice Foods Co., Inc.

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

BOSLAUGH, J.

This case concerns the conviction of Harold L. Jorgenson and Tastee Inn, Inc., plaintiffs in error, for a direct contempt of the district court for Lancaster County said to have been committed by Harold L. Jorgenson while he was being examined as a witness in the trial of a civil case in which Tastee Inn, Inc., was plaintiff and Beatrice Foods Co., Inc., was defendant, at a session of the court in the presence and hearing of the presiding judge. Plaintiffs in error contest the legality of the adjudication against them.

This case must be determined by the record made of the proceedings for contempt against them as evidenced by the journal of the court. It is, omitting formal parts, as follows: "This cause (Tastee Inn, Inc., v. Beatrice Foods Co., Inc.) came on for trial beginning October 14, 1957, which trial was adjourned from day to day to and including October 18, 1957; evidence was adduced by the plaintiff, and October 17, 1957, Harold L. Jorgenson was called as a witness and testified that he was president of the plaintiff corporation; on cross-examination he was asked to name the stockholders in said corporation and he refused to testify in said regard; no objections had been made to the questions of defendant's counsel in regard thereto; and the court finds that said questions asked by defendant's counsel with reference to the identity of the stockholders of the plaintiff company were relevant and material; by reason of the refusal of said witness produced by the plaintiff to answer said questions, the court finds said witness to be in contempt of court; by reason of the fact that said witness was the president and majority stockholder of plaintiff, the court also finds the plaintiff to be in contempt of court. The court therefore, on its own motion, finds that a mistrial should be declared in this proceeding and that all costs of trial incurred to this date, including jurors' fees, shall be taxed to the plaintiff, and that in addition an attorney fee to de-

fendant's counsel in the amount of $500 should be allowed and taxed against the plaintiff as costs in this proceeding. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Harold L. Jorgenson and the plaintiff are guilty of contempt of court in this proceeding and that the trial of this case be and the same hereby is declared to be a mistrial, and that the costs of this trial, including jurors' fees, be and the same are hereby taxed against the plaintiff. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the attorneys for the defendant be and they are hereby allowed the sum of $500 for services rendered by said attorneys during the trial of this cause, which amount is hereby taxed against the plaintiff as additional costs in this proceeding."

The record is challenged as insufficient to justify the action taken by the court as recited therein. Specifically it is said that the judgment is not supported by sufficient or any evidence and that the findings do not sustain the judgment.

In Crites v. State, 74 Neb. 687, 105 N. W. 469, the record of the court exhibited the following findings: " 'The said Albert W. Crites was examining the defendant Benjamin F. Pitman while the said Pitman was on the witness stand as a witness, and in open court, in the presence of the jury, the court advised the said Albert W. Crites not to examine the witness any further in relation to certain matters as shown by the record; that, after the court had advised the said Albert W. Crites not to examine the witness any further as to this particular matter referred to by the court, the said Albert W. Crites, immediately, in strict violation of the order of the court, again asked certain questions in relation to the same matter. Whereupon, the court advised counsel again not to examine any further as to the matter referred to by the court, and that if he did so he might consider himself in contempt of court; that counsel then advised the court in words, or in sub-

stance, that he was going to ask another question anyway; that the attorney did then immediately ask another question, which question was in strict violation of the order of the court; and the court, being fully advised in the premises, finds that said Albert W. Crites is guilty of contemptuous and insolent behavior toward the court and is in contempt of court, and that said contempt and the contemptuous and insolent behavior was committed in the presence of the court and while the court was in open session.' " The court adjudged Albert W. Crites guilty of direct contempt of court, imposed a fine upon him, and ordered that he stand committed until the fine was paid. This court in deciding that case said: "This was a summary proceeding to punish an alleged contempt committed in the presence of the court. No written charge or complaint was filed, which the accused could examine and attack, and no evidence was taken or submitted to establish the charge, which the accused could combat or explain. In such a case it is absolutely necessary for the preservation of the liberties of the citizen that, in recording the conviction, the court shall state the facts showing the contempt charged. It is not sufficient to state in a general way the conclusions of fact on which the conviction is based. The facts themselves must be stated, from which the reviewing court can see that the ultimate fact of guilt is properly and justly found. The findings of the court fail to meet this requirement. The record contains a bill of exceptions setting forth the proceedings in which the plaintiff was adjudged guilty of contempt. This does not aid the findings or supply such facts as should be contained therein."

In Ogden v. State, 3 Neb. (Unoff.) 886, 93 N. W. 203, the record of the conviction of Charles Ogden of a direct contempt of court was reviewed and the judgment was reversed. The findings from which the conviction resulted were as follows: " 'On this day again come the parties hereto attended by their counsel; also come the

jury heretofore duly impaneled and sworn and this cause proceeds. Whereupon the court finds that Charles Ogden, Esq., counsel for the said defendant, did on this day address to the court on the trial of this case insulting and menacing language; that he has threatened opposing counsel with an assault, and did willfully refuse to obey the order of the court to take his place at the counsel table and be seated.' " The judgment of conviction and the imposition of a fine were shown by the record. This court said: "In our opinion, the judgment can not stand. * * * It will be observed that the proceedings were conducted on the theory that the contempt was committed in the presence of the court. While it has been held that a formal accusation is not necessary under such circumstances, it is undoubtedly essential that it should affirmatively appear on the face of the record with all the certainty of an indictment or information, that an offense had been committed. In our judgment, such fact does not thus appear in this case. The language, which the trial court held to be insulting and menacing, is not set out. It will not be claimed that an indictment or information, thus charging an analogous offense, would be good. Hence, the record, in that behalf, is insufficient to sustain a judgment of conviction." This court noticed the specification that the attorney refused to obey the order of the district court to take his place at the counsel table and be seated and made this observation: "The circumstances, under which the order was made in this case, do not appear. It follows that the judgment of the district court can not be sustained * * *."

Wilcox v. State, 46 Neb. 402, 64 N. W. 1072, involved the refusal of Sherman Wilcox to be sworn and his refusal to testify in a proceeding for his examination in aid of execution. Jeremiah C. Wilcox appeared in court and was sworn but refused to give any testimony in the proceeding. The opinion states: "The record shows the following proceedings were had and taken:

'Whereupon the said Sherman Wilcox, now being before the court, refused to be sworn and refused to testify. Thereupon the said Sherman Wilcox was adjudged to be in contempt of court,' * * *." He was committed to the county jail until he signified his willingness to submit to an examination. The opinion then states: "The record further discloses that Jeremiah C. Wilcox appeared before Judge Blair, and upon being sworn, refused to give testimony. Thereupon he was adjudged guilty of contempt, and sentenced to pay a fine of $100, and to stand committed to the jail of the county until such fine is paid and he signify his willingness to answer such questions as might be put to him * * *." This court in the disposition of this case said: "It requires no argument to show that in this state a witness in court may be sworn by taking the statutory oath, or he may refuse to be sworn on the ground of conscientious scruples, in which case he may affirm. There can be no doubt that where a witness in a court of record, on being ordered to be sworn or affirmed, contumaciously refuses to do either, he is guilty of contempt; but it is not a contempt of court for a witness to decline merely to be sworn by taking the usual oath administered to witnesses, since the statute gives him the right to affirm. The finding of the district judge was insufficient and fatally defective, in that it failed to set forth that Sherman Wilcox refused to be affirmed, as well as declined to be sworn. Presumptions and intendments will not be indulged to support a conviction for contempt of court. * * * It remains to be determined whether the plaintiffs in error were rightfully adjudged guilty of contempt for refusing to testify. It cannot be doubted that the refusal of a witness to testify at all may be punished as a contempt of the court or officer of whom his testimony is required, in case the court or officer has jurisdiction of the controversy or proceeding in which the witness is called upon to give his evidence. The statute, section 360 of the Code of Civil Procedure

(now section 25-1232, R. R. S. 1943), provides: 'Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify particularly the cause of the arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order.' The language quoted is imperative, and requires, when a witness is committed for contempt for refusing to testify, or answer a question asked him, that such question asked and refused to be answered shall be stated in the order of commitment. This was not done in either of the orders under review. So far as this record discloses, no question of any kind was propounded to either of the plaintiffs in error, or that either refused to answer any legal or proper interrogatory. The findings, for this reason, are wholly insufficient upon which to base the convictions. The orders adjudging plaintiffs in error guilty of contempt must be set aside."

Gonzalez v. State, 119 Neb. 13, 226 N. W. 801, declares: "A judgment of contempt must state the facts constituting the contempt, and a judgment which merely states the conclusion of the court will not sustain a sentence of imprisonment for contempt."

In re Shull, 221 Mo. 623, 121 S. W. 10, 133 Am. S. R. 496, was a habeas corpus proceeding. Shull sought habeas corpus to release him from a judgment of conviction of direct contempt of court and his commitment to jail. The court found in the contempt proceedings that Shull had treated the court disrespectfully in refusing to answer proper and legal questions propounded to him while he was a witness in the trial of a certain civil case after he had been repeatedly admonished and ordered by the court to answer the questions. The Missouri court referred to and considered statutes substantially like the provisions of this state relative to contempt of court by refusal of a witness to answer questions

asked of him, and used this language: "The statutes require that when a citizen is committed to jail for a contempt the commitment itself must contain 'the particular circumstances of his offense,' and the contempt must be plainly and specifically charged in the commitment. * * * A recital in the order leading up to the adjudication of contempt that the witness was asked 'proper and legal questions,' that the court had ruled them to be such, and the witness was directed to answer them and refused, falls far short of specifically and plainly charging the contempt, as the statute requires. * * * It is not sufficient that the adjudication of contempt recite that the witness 'is hereby ordered and adjudged guilty of contempt of court in treating the court disrespectfully and he is hereby committed,' etc. That is a recital of a conclusion, not a finding and adjudication of the facts which constituted disrespectful conduct." In the opinion the court stated its conclusion in this language: "Without further discussion, we think the judgment of contempt and the commitment are fatally defective in not finding and adjudging the facts which would show petitioner had acted so disrespectfully towards the circuit court as to constitute a contempt within the statute. It is settled law in this State that one imprisoned for the violation of an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus. * * * The prisoner is discharged."

Wallace v. Weber, 134 Kan. 201, 5 P. 2d 855, states: "A written accusation on a contempt committed in the face of the court is not required, nor is evidence necessary, as the judge knows what transpired in his presence, but as a substitute for the written accusation, warrant or other statutory requirement for the protection of the accused, the statute provides that the judge shall enter of record the conduct constituting the contempt * * *. This, too, is jurisdictional in character and enables the accused to have a test or review in a superior court

of the validity of the judgment pronounced. The proceeding in a direct contempt is summary, of an arbitrary nature and might be subject to abuse and hence the legislature has required that the court or judge shall make these entries before the contemner shall be sent to jail or otherwise enforce the conviction and judgment. The making of the required entries is essential to the validity of the conviction, and the mere statement that the accused was guilty of contempt without specifying the acts constituting the contempt * * * is insufficient to a valid order of commitment."

State v. Dufek, 49 N. D. 851, 193 N. W. 928, contains this: "The defects above pointed out are fatal to the judgment in the instant case. It is not sufficient that the record upon appeal shall show that a contempt has, in fact, been committed, but it is essential that the record shall show that the defendant has been duly convicted of a specific contempt, and that if it be a direct contempt, that the order or judgment shall contain the requisite findings of fact * * * in order that it shall appear that no valuable right of the party accused may have been denied him."

People v. Rongetti, 344 Ill. 107, 176 N. E. 292, states: "In cases of direct contempt, committed in open court, the only record required to be made up is the order of the court finding the contempt to have been committed and fixing the punishment therefor, which order should set out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order."

People ex rel. Barnes v. Court of Sessions, 147 N. Y. 290, 41 N. E. 700, extensively discusses the history and reason of the rule now being considered. It contains the following: "Our difficulty is with the formal mandate or judgment. As will be seen, it convicts the appellants of a criminal contempt * * *. It does not specify the particular circumstances of the offense. In case of criminal contempt this is specifically required: 'When

a person is committed for such a contempt the particular circumstances of his offense must be set forth in the mandate of commitment.' (Code C. P. section 11.) This is but a re-enactment of the Revised Statutes, which provided that 'whenever any person shall be committed for any contempt specified in this article, the particular circumstances of his offense shall be set forth in the order or warrant of commitment.' (2 R. S. 377.) Under the Revised Statutes it is called the 'order or warrant;' under the Code it is called the 'mandate of commitment.' They doubtless mean the same and relate to the final order entered in the proceeding. This is no new doctrine. * * * In DeWitt v. Dennis (30 How. Prac. 131) Morgan, J., says: 'The order of conviction is not sufficiently definite and specific, and does not properly describe the particular misconduct for which he is convicted.' And for this reason the order convicting the person of contempt was set aside. The same rule prevails in England. * * * In the Pollard case (2 P. C. 120) it was said that 'No person should be punished for contempt of court (which was a criminal offense) unless the specific offense charged against him was distinctly stated.' * * * The reason for the statute is perfectly apparent. In the criminal contempts committed in the immediate view of the court it may punish summarily. The only record preserved is in the final order or mandate of the court entered in the minutes of the clerk. If the particular circumstances of the offense were not required to be set forth, there would be nothing that the accused could have reviewed, or that he could interpose as a defense to a subsequent conviction for the same act. If the court saw fit to call his act, no matter what it might be, a criminal contempt, that determination would of necessity be final * * *."

Annotation, 154 A. L. R. 1228, refers to very numerous decisions in support of the statement: "It has been held, in the overwhelming majority of jurisdictions, that an order or judgment of direct contempt must con-

tain a statement of the facts upon which the decision is based, the purpose of this requirement being to enable the appellate court to determine, by an inspection of the record, whether a contempt has in fact been committed and whether the court had jurisdiction to punish it." See, also, State ex rel. Aldrich v. District Court, 133 Iowa 450, 110 N. W. 592; Tweddle v. Judge of Superior Court, 134 Mich. 237, 96 N. W. 22; People ex rel. Bernstein v. La Fetra, 157 N. Y. S. 386; Ex parte Creasy, 243 Mo. 679, 148 S. W. 914, 41 L. R. A. N. S. 478; People v. Bain, 268 Ill. App. 192; Ex parte Redmond, 156 Miss. 582, 126 So. 485; In re Moxcey, 9 Kan. App. 262, 59 P. 672; In re Battelle, 207 Cal. 227, 277 P. 725, 65 A. L. R. 1497.

The record of conviction of plaintiffs in error of contempt may not be aided by presumption or intendment. The record alone must show facts to justify the conviction or it cannot be sustained. The statement therein of conclusions of the court, as appears in this case, does not satisfy or comply with this requirement. The facts by virtue of which a conviction for direct contempt results must establish the guilt of the contemner beyond a reasonable doubt. Such a prosecution is governed by the strict rules applicable to prosecution by indictment. This court said in Crites v. State, *supra:* "No intendments or presumptions can be indulged in to sustain the judgment of the trial court in a contempt proceeding. Such a proceeding is criminal in its nature, and the rules governing criminal proceedings are applicable thereto."

Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468, declares: "Contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction. * * * In a contempt proceeding before a conviction will lie, guilt must be established beyond a reasonable doubt." See, also, State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282; Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574; Furrer v. Nebraska Building & Inv. Co., 109 Neb. 1, 189 N. W. 295;

Bee Publishing Co. v. State, 107 Neb. 74, 185 N. W. 339. The record of the conviction as contained in the journal entry falls far short of complying with these requirements.

The record of the conviction of the plaintiffs in error does not exhibit any question said to have been propounded to Harold L. Jorgenson while he was a witness which he refused to answer. The statutory requirement that "such question must be stated in the order" was not observed. § 25-1232, R. R. S. 1943. In fact, there is in the record no evidence, of the character required, that any interrogatory was propounded to Harold L. Jorgenson. The record is silent as to any refusal by him to answer any question except the conclusion of the court that he refused "to testify in said regard." There is no proof that the court ordered or admonished Harold L. Jorgenson to answer any question or that such action of the court was requested by anyone. There was likewise no assertion that he contumaciously refused. The record contains no proof that any inquiry was made of him concerning any matter that was pertinent to any issue in the case on trial at the time of the alleged contempt. The findings are fatally defective and insufficient in not disclosing facts establishing that a proper and legal interrogatory was asked him and that answer thereof was contumaciously and unlawfully refused. It is not every refusal of a witness to answer a question asked him on a trial which amounts to direct contempt. The contempt the statute speaks of in this regard is the "contumacious and unlawful * * * refusal to answer any legal and proper interrogatory." § 25-2121, R. R. S. 1943. The record fails to sustain the conviction of either of the plaintiffs in error for contempt of the district court.

The cross-appeal of Beatrice Foods Co., Inc., a corporation, defendant in error, because of what has been said and concluded herein, should be and it is denied.

The judgment should be and is reversed and the cause

is remanded with directions to the district court for Lancaster County to enter an order discharging plaintiffs in error from the conviction of contempt of said court.

REVERSED AND REMANDED WITH DIRECTIONS.

VINCENT W. ROSE, APPELLEE, V. HENRY E. VONDERFECHT, APPELLANT.

92 N. W. 2d 691

Filed October 31, 1958. No. 34428.

1. **Contempt.** A conviction under contempt proceedings can only be reviewed in the Supreme Court by the filing of a petition in error as in a criminal case.
2. **Contempt: Appeal and Error.** Where, in a contempt proceeding, the trial court does not pass upon the guilt or innocence of the defendant, but enters a decree materially enlarging the extent of the relief granted by a previous decree which had become final, the procedure for review is by appeal.
3. **Judgments.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.
4. **Easements: Judgments.** In determining the nature and extent of an easement established by a final decree of a court, the court is bound by the language of such decree and the inferences that can reasonably be drawn therefrom.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Baskins & Baskins, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellee.

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

CARTER, J.

This is a proceeding arising out of a citation for contempt of court against the defendant for failure to com-

ply with the terms of an injunctive order. The defendant answered, setting forth facts indicating a full compliance with the injunction and praying for a dismissal of the contempt citation. The trial court did not pass upon the guilt or innocence of the defendant on the charge that he had violated the injunction. What the court did was to materially enlarge the scope of the relief it had granted plaintiff in its former decree bearing the date of January 31, 1955; and it authorized the plaintiff to put such enlarged decree into effect, and restrained the defendant from interfering with the plaintiff in so doing. A motion for a new trial was filed and overruled. Defendant has appealed.

Plaintiff contends that the appeal should be dismissed under the rule announced in Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574, wherein it is said: "A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case." In the instant case there was no conviction for contempt. There was no judgment of any kind or nature disposing of the issue raised by the citation for contempt and the answer filed thereto. We think the controlling rule is stated in Meier v. Nelsen, 156 Neb. 666, 57 N. W. 2d 273, where, in a very similar situation, this court said: "If the trial court had actually passed on defendant's guilt or innocence of the charge made against him this contention would have merit. But such is not the situation before us. What the court did was not to pass upon that question but to materially enlarge the extent of the relief which it had granted plaintiff by its decree of August 4, 1950. The question of whether or not the court had jurisdiction to do so defendant had a right to have reviewed by appeal. We find this contention of plaintiff to be without merit and the motion to dismiss the appeal is overruled." The motion to dismiss the appeal in the instant case is overruled.

The plaintiff has cross-appealed, contending that the

trial court erred in failing to adjudge the defendant guilty of contempt and in failing to punish him therefor, in failing to require defendant to pay damages to plaintiff, and in failing to require defendant to compensate plaintiff for restoring the premises in accordance with the injunction order entered January 31, 1955. The defendant has moved that the cross-appeal should be dismissed for the reason that this involves an issue which was not decided by the trial court and, if it had been decided, it could have been raised in this court only by petition in error. The motion to dismiss the cross-appeal is well taken. The issues raised by the citation for contempt and the answer filed thereto are not before this court, and could only be presented by an error proceeding. The cross-appeal is therefore directed to a matter not before the court. Under such circumstances the cross-appeal has no standing in this court and the motion to dismiss must be sustained.

The decree containing the injunctive order for the violation of which the defendant was cited for contempt was entered on January 31, 1955. The decree in the instant case was entered on January 21, 1958, and was made in a term subsequent to the one in which the decree of January 31, 1955, was entered. It is the rule in this state that, after the adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited by section 25-2001, R. R. S. 1943. Meier v. Nelsen, *supra.*

It is the contention of the defendant that the trial court in the present case extended the scope of the relief granted in the decree entered on January 31, 1955. This decree provided "that the plaintiff has an easement for a right of way across the South Half (S½) of Section 23 * * *, now owned by the defendant, Henry E. Vonderfecht, between the gates which formerly existed in the fence on the half-section line between the North

Half of said Section 23 and the South Half of said Section 23, designated in the record and the evidence herein as gates one and two, said right of way consisting of and to be limited to a strip of land eight feet wide beginning at said gate one and following said fence and the edge of the canyon between said gates one and two from gate one to gate two, by adverse possession and user and by prescription; * * *." No appeal was taken from the foregoing decree. The extent of the easement which the plaintiff has obtained across defendant's lands is determinable from the language of the decree of January 31, 1955, and the reasonable inferences to be drawn therefrom. The intendments of the trial court in entering the decree are unimportant except as they are expressed in the language of the decree. A failure to appeal from the granting of the decree makes it a final disposition of the litigation which cannot be modified at a subsequent term of court except as provided by section 25-2001, R. R. S. 1943.

The evidence shows that defendant constructed a fence more than 8 feet south of the half section line fence, leaving a lane of 8 feet between the fences for plaintiff's use in compliance with the decree of January 31, 1955. The fence was concededly on defendant's property and not on the granted easement. The defendant had a right to construct such fence, and its construction is not violative of the decree of January 31, 1955. The trial court in its decree of January 21, 1958, authorized the plaintiff to remove this fence, and restrained the defendant from interfering with his so doing. The court in directing the removal of the fence immediately south of the easement in effect extended the scope of the easement granted by the decree of January 31, 1955, and it was error for the court to so do, under the circumstances shown.

There is evidence that defendant failed to construct gate one in such a manner that plaintiff could make use of the 8-foot easement along the line fence. It is rea-

sonably inferable from the decree of January 31, 1955, that gate one was to be constructed in such a way that it would permit the use of the easement. It is contended also that the fence was erected so close to the canyon that plaintiff was deprived of the use of the easement. We think it is reasonably inferable from the language of the decree of January 31, 1955, that an exit from the easement was contemplated in order not to deprive the plaintiff of the benefit of the easement granted him. There is evidence in the record that two posts had been removed from the east end of the fence to permit the clearance required by the decree. Such evidence is competent in determining whether or not the decree has been complied with.

It is evident that the decree entered by the trial court was not responsive to the issues as fixed by the pleadings in the case. The issue was whether or not defendant was guilty of contempt. The trial court failed to enter an order disposing of this issue. The trial court was in error in directing the removal of the fence on defendant's property and restraining the defendant from interfering with such removal. In a contempt proceeding a trial court may properly examine the nature and extent of an easement described in a valid and final decree of court, together with the reasonable inferences to be drawn from the language used, in determining the guilt or innocence of one charged with contempt for violating the court's order. Further than this the court may not go. In such a proceeding the court may not properly change the nature and extent of the easement granted and restrain the defendant from interfering with the performance of acts by the plaintiff which are violative of the easement as fixed and determined by the original decree.

For the reasons stated, the judgment is reversed and the cause remanded for further proceedings in accordance herewith.

REVERSED AND REMANDED.

RICHARD E. FINNERN, APPELLEE, V. HARRY E. BRUNER, JR., ET AL., APPELLANTS, IMPLEADED WITH ARTHUR N. BRUNER ET AL., APPELLEES.

92 N. W. 2d 785

Filed November 7, 1958. No. 34378.

1. **Divorce.** A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments.
2. **Equity.** In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay.
3. ———. Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the parties.
4. ———. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action.
5. **Divorce.** Where a divorce decree provides for the payment of stipulated sums at designated intervals for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of a designated age or majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments by modification of the original decree or otherwise.
6. **Appeal and Error.** A judgment of an equity court, where the court is trier of the facts, unsupported by any competent evidence but based solely upon speculative or conjectural evidence, cannot stand and requires reversal by this court.

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

Frost, Meyers & Farnham, James E. Fellows, and *Viren, Emmert, Hilmes & Gunderson,* for appellants.

Frederick B. Laux and *Thede S. Backstrom,* for appellee Finnern.

Francis R. Pane, for appellees Bruner.

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

CHAPPELL, J.

Plaintiff, Richard E. Finnern, brought this action against defendants, Harry E. Bruner, Jr., and others, seeking to quiet title to Lot 25, Block 2, Ak-Sar-Ben Hill Addition, known as 5211 North Thirty-eighth Street in Omaha, Douglas County, Nebraska. Plaintiff was record title owner of the property as of December 28, 1956, and the primary purpose of his action was to have title thereto quieted with reference to the lien of a judgment for child support rendered in a divorce action in Douglas County on March 7, 1922, in favor of Bessie Mae Bruner and against Harry E. Bruner, Sr., a previous record title owner of said property. Generally speaking, the alleged grounds for relief sought by plaintiff were the statute of limitations, laches, equitable estoppel, and that the judgment had been fully satisfied and paid to Bessie Mae Bruner during her lifetime.

All children of the parties in said divorce action, and their respective spouses, were made defendants. With one exception, they filed answers and cross-petitions denying generally and alleging that a substantial amount of the support judgment and interest thereon was unpaid and a lien on the property involved since June 15, 1942. They prayed for enforcement of the lien, sale of the property, and application of the proceeds thereof in satisfaction of the lien. Plaintiff's reply and answer thereto were a general denial.

Also, with consent of plaintiff, a son, Harry E. Bruner, Jr., as the duly appointed administrator de bonis non of the estate of Bessie Mae Blake, formerly Bessie Mae Bruner, deceased, filed a petition in intervention. Therein he set forth the substance of an absolute divorce decree admittedly rendered in favor of Bessie Mae

Bruner and against Harry E. Bruner, Sr., on March 7, 1922, which required him to then and thereafter pay Bessie Mae Bruner $14 each week for the support of their minor children until their daughter, Catherine Bruner, now Catherine Bergman, attained the age of 16 years, which occurred September 15, 1935. He alleged that on June 6, 1942, the property here involved was conveyed to Harry E. Bruner, Sr., by deed duly recorded June 15, 1942; that Harry E. Bruner, Sr., had failed and refused to satisfy the child support judgment except the sum of $100, as shown by the records of the clerk of the district court; and that there was due and owing on the judgment a sum approximately in excess of $10,000. He also alleged that such unpaid judgment became a lien on the property involved when acquired by Harry E. Bruner, Sr., and prayed for dismissal of plaintiff's petition, enforcement of said lien, sale of the property, and application of the proceeds thereof in satisfaction of the lien. Plaintiff's answer thereto was a general denial.

After hearing upon the merits, the trial court rendered a decree finding and adjudging the issues generally in favor of plaintiff, and that the child support judgment in favor of Bessie Mae Bruner "was fully paid." The judgment dismissed the aforesaid cross-petitions and the petition in intervention, and quieted title to the property in plaintiff as prayed. Thereafter the motion of said defendants and intervener for new trial was overruled, and they appealed, assigning in effect that the judgment was not supported by the evidence but was contrary thereto and contrary to law. We sustain the assignment.

It is elementary that appeals in equity cases are tried de novo by this court, subject to established rules applicable thereto, and as decided in Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350, and reaffirmed in Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862, a judgment of an equity court, where the court is trier of the facts,

unsupported by any competent evidence but based solely on speculative or conjectural evidence, cannot stand and requires reversal by this court.

Section 30-803, R. R. S. 1943, provides in part: "Nothing herein shall be construed to prevent an executor or administrator, when he shall think it necessary, from commencing and prosecuting any action against any other person, * * * for the recovery of any debt or claim to final judgment, or from having execution on any judgment." See, also, Mead Co. v. Doerfler, 146 Neb. 21, 18 N. W. 2d 524, 158 A. L. R. 724; Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220; Minahan v. Waldo, 161 Neb. 78, 71 N. W. 2d 723. In the light thereof, we conclude that intervener had a right to prosecute the action as the representative of the estate of Bessie Mae Blake, deceased, to recover any unsatisfied or unpaid portion of her judgment for child support with interest thereon, as provided by law, and to enforce the lien of such judgment.

In Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600, we held that: "A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments."

Also, in In re Application of Miller, 139 Neb. 242, 297 N. W. 91, we held that: "A decree for child support, rendered in a suit for a divorce, does not become dormant because of the failure to issue execution thereon for more than five years."

In that connection, we reaffirmed in Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618, that: "A decree for child support in a divorce action is not a judgment within the meaning of sections 25-1420 and 25-1515, R. R. S. 1943."

In that opinion we said, citing applicable authorities: "In applying the doctrine of laches the true inquiry

should be whether the adverse party has been prejudiced by the delay. * * *

"Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the parties. * * *

"The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action."

For a discussion of equitable estoppel, which will not be elaborated upon here, see Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392.

In Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919, this court held that: "In a decree granting a wife a divorce and the custody of minor children, monthly instalments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the power of the court to reduce by modification of the original decree."

That proposition was reaffirmed in Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617, wherein we held that: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments."

In that connection, it has long since been established that such a judgment is for a definite amount and is a lien on the real estate owned by the husband in the county where the judgment was rendered or in which a transcript thereof has been filed, and unless affected by some jurisdictional infirmity the judgment cannot be

attacked collaterally by one who ignored the lien and purchased the husband's real estate, then seeks to defeat the lien of the judgment on the ground that it is not a final judgment. See, Howerter v. Olson, 145 Neb. 507, 17 N. W. 2d 483; Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753. However, in a case such as that at bar, he may establish by competent evidence, as distinguished from evidence which is speculative or conjectural, that such a judgment has been satisfied or paid.

In the light of such rules, we have examined the record, which discloses substantially the following: It was admitted that on March 7, 1922, Bessie Mae Bruner was awarded an absolute divorce from Harry E. Bruner by the district court for Douglas County, and that the decree required him to pay her $14 then and thereafter each week for the support of their minor children until their daughter, Catherine Bruner, who was born September 15, 1919, became 16 years of age. That event occurred on September 15, 1935.

Such children of the parties were defendants Bruner; Waunetta M. Corenman, a widow; and Catherine L. Bergman. Sometime after the divorce, Bessie Mae Bruner, their mother, married one William A. Blake, Sr., and to that union was born a son, defendant, William A. Blake, Jr. Harry E. Bruner, Sr., the husband and father, died May 26, 1955, and Bessie Mae Blake, the mother, died testate June 16, 1952. Admittedly, her son Harry E. Bruner, Jr., was duly appointed executor of her estate and duly discharged as such, but was thereafter duly appointed administrator de bonis non thereof.

The last will of Bessie Mae Blake appears in the record, but contrary to plaintiff's contention, it contains no language from which it could be properly found or inferred that the judgment for child support had been satisfied or paid.

It was also admitted that according to the docket records of the clerk of the district court for Douglas

County, Harry E. Bruner, Sr., paid in the sum of $100 on the child support judgment; that no further satisfaction of such judgment had been made on the docket; and that Harry E. Bruner, Sr., was one and the same person as Harry E. Bruner who received a deed to Lot 25, Block 2, Ak-Sar-Ben Hill Addition to Omaha on June 6, 1942, which was duly recorded June 15, 1942. The property will be hereafter called Lot 25, or 5211 North Thirty-eighth Street.

In that connection, it was stipulated between plaintiff, intervener, defendant children, and their surviving spouses, that the chain of title to Lot 25 from February 2, 1939, to January 1, 1957, as shown by the public records, was as follows: On February 2, 1939, a recorded land contract was entered into between Joseph T. McMahon as seller, and Harry E. Bruner as buyer of Lot 25. A quit claim deed to Lot 25 from McMahon to E. R. Van Horn, dated June 22, 1940, was recorded June 15, 1942. A limited warranty deed to Lot 25, dated June 6, 1942, from E. R. Van Horn and Alice Van Horn, husband and wife, to Harry E. Bruner, was recorded June 15, 1942. A warranty deed to Lot 25, dated May 26, 1945, from Harry E. Bruner, Sr., to Eugene C. Lloyd and Jeannette Lloyd, husband and wife, was recorded May 28, 1945. In that connection, Mrs. Lloyd testified as a witness for plaintiff that she took possession of and lived at 5211 North Thirty-eighth Street from July 1945 until July 1947, but no one demanded that she move out. She admitted, however, that she had so received a deed to the property from Harry E. Bruner, Sr., and also an abstract thereto which disclosed the divorce proceedings between Bessie Mae Bruner and Harry E. Bruner, Sr., and that her husband's friend, a lawyer for a company which made a loan on the property, examined the abstract and gave an oral opinion that the title was clear. She asked said lawyer "* * * why this divorce case was in there, and he said it had nothing to do with the title and that the title was clear to his knowledge."

It thus appears that she and her husband not only had constructive notice of the judgment here involved, but also had actual knowledge thereof when they bought Lot 25.

It was also stipulated that a warranty deed to Lot 25 and other property, dated July 15, 1947, from the Lloyds to Leon A. Bethel and Martha G. Bethel, husband and wife, was recorded August 4, 1947. In that connection, Leon A. Bethel, by affidavit offered by plaintiff and admitted without objection, testified that he so purchased the property and that he and his wife occupied same without challenge of ownership until July 9, 1948, when they sold it to Thomas J. Sheehan and Alberta L. Sheehan. It was stipulated that a warranty deed dated July 9, 1948, to said property from the Bethels to the Sheehans, as husband and wife, was recorded July 10, 1948. In that connection, Thomas J. Sheehan, as a witness for plaintiff, testified that he so purchased the property from the Bethels, took possession of same, and lived there about 8½ years until they sold it to plaintiff in December 1956, without anyone having made any claim against it, although defendant George E. Bruner was their next-door neighbor for about 2 years. He admitted, however, that he had obtained an abstract to the property when they purchased it; that he had it examined; and that an opinion was written thereon which they paid for, but Osborne Realty handled the sale and everything, and the opinion was left in their office, so the witness thought everything was all right and he never received a copy of the opinion until a month before this trial.

It was further stipulated that a warranty deed to said property, dated December 28, 1956, from the Sheehans to plaintiff, was recorded January 2, 1957. In that connection, plaintiff simply testified that he so purchased the property "From the Sheehans and Robert Mitchell," but that Sheehans were owners of the property and that he moved into the property in December and no one

had asked him to move out, although this action was filed on February 20, 1957.

In that connection, defendant Catherine L. Bergman testified that she knew her father, Harry E. Bruner, Sr., owned the property at 5211 North Thirty-eighth Street, and that after she was graduated from high school in 1939, she lived there with him until she married a Mr. Judd on October 12, 1940. That marriage resulted in divorce, and immediately thereafter, in July 1947, she and her little 6-year-old girl resided in her mother's home at 4227 North Thirty-sixth Avenue until in July 1948, when she married Carl G. Bergman. She testified that she knew her mother and father were divorced, but that her mother never told her that any judgment had been rendered in her favor for child support, and she had no knowledge thereof until in December 1956 when "Robert Mitchell," a realtor mentioned by Thomas J. Sheehan, asked her to sign some papers concerning a piece of property her father owned. Mitchell said it didn't amount to anything, and was a mere matter of form. She identified exhibits Nos. 4 and 5 as unsigned carbon copies of the original papers presented to her for signature by Mitchell. However, her husband, Carl G. Bergman, intervened, wanting to see the papers before she signed them, so Mitchell took the two originals and two copies thereof, along with the abstract, to her husband's office the next morning. Her husband, as a witness for defendants, verified that testimony and identified exhibits Nos. 4 and 5 as unsigned carbon copies of the unsigned original papers presented to and left with him by Mitchell until they were turned over to counsel for intervener and defendants prior to this trial. The originals were duly returned to Mitchell and never signed. They were offered in evidence by defendants, and although no objection thereto was made, their tender was erroneously refused by the court. They appear in this record, and will be considered here as evidence that plaintiff not only had

timely constructive notice but also actual knowledge, indicating that the child support judgment was an unsatisfied lien on the property when he purchased same.

Exhibit No. 4 was entitled: "In the District Court of Douglas County, Nebraska, Bessie Mae Bruner, Plaintiff, vs. Harry E. Bruner, Defendant, Doc. 190, No. 121, Application." It stated in substance that both of said parties were deceased; that during their lifetime certain orders were entered requiring payments of support and maintenance for their minor children by Harry E. Bruner, Sr., until Catherine Bruner Bergman, applicant, had attained the age of 16 years; and that all payments required by such orders were fully made directly to plaintiff (Bessie Mae Bruner), but through inadvertence and neglect same had not been entered of record in said case. The application provided for the signature of Catherine Bruner Bergman and a positive verification of the facts, and prayed for a finding and determination that full and complete compliance had been had under all orders of court requiring defendant (Harry E. Bruner, Sr.) to pay plaintiff (Bessie Mae Bruner) for all amounts so due and owing.

Exhibit No. 5 was an order in said cause to be signed by the judge, but never was, which by its terms adjudged that all required payments heretofore mentioned under any order of the court in said cause had been fully and completely made and complied with.

In that connection, Harry E. Bruner, Jr., testified as a witness for defendants that he knew his father and mother were divorced, but he was then only about 15 years old and never was aware of any provision in the decree requiring his father to pay child support to his mother until after "Mitchell" had approached his sister, Catherine L. Bergman, in December 1956, as aforesaid, and a named lawyer, who appeared herein as counsel for plaintiff, advised him of the paper, and wanted him to sign.

As heretofore mentioned, in July 1947, after her

divorce from one Judd, Catherine and her little 6-year-old girl took up residence with her mother at 4227 North Thirty-sixth Avenue, and remained there until in July 1948, when she married Carl G. Bergman. She testified that 4227 North Thirty-sixth Avenue was her mother's home, but was in her brother's name. Plaintiff argued that such home was then in the name of and belonged to Harry E. Bruner, Sr., and that Bessie Mae Blake, formerly Bessie Mae Bruner, and her daughter Catherine had the use thereof during the aforesaid period, after which Harry E. Bruner, Sr., deeded same to Harry E. Bruner, Jr., as satisfaction in some manner for the child support judgment. There is no competent evidence which could sustain such contention.

In that connection, a duly recorded warranty deed, dated November 13, 1950, and bearing 55 cents in revenue stamps, from Harry Edgar Bruner, admittedly the same person as Harry E. Bruner, Sr., to Harry Elmer Bruner, admittedly the same person as Harry E. Bruner, Jr., to Lot 24, Marx Subdivision, an addition to Omaha, for a consideration of "One ($1.00) Dollar and other valuable consideration * * * free from encumbrance except subject to the unpaid balance of a $3,500.00 mortgage to the North Side Bank of Omaha," appears in the record. There is no evidence of the value of that property, the balance then due on the mortgage, or the purchase price thereof. Harry E. Bruner, Jr., testified that his father never gave him any money; and that he purchased the property from his father and mother. He was asked by plaintiff's counsel, "Can you identify Lot 24, Marks Subdivision as 4227 North Thirty-sixth Avenue, Omaha?" He answered "No, sir." No competent evidence whatever appears in this record which could support a conclusion that they were one and the same property, as argued by plaintiff, or that the deed was given in satisfaction of the child support judgment.

Catherine L. Bergman testified that shortly after she and her little girl moved into her mother's home at 4227

North Thirty-sixth Avenue, her father, Harry E. Bruner, Sr., who formerly lived in a room downtown or in other property owned by him on Pratt or Patrick Streets, moved into and lived in the upstairs portion of her mother's home, but that the witness, her little girl, and her mother lived and slept downstairs. There was no evidence from which it could be inferred or implied that the mother and father ever lived together as man and wife during such period, or at any other time after the divorce. The witness, just divorced, then had a little 6-year-old girl. Her mother was working and her father was working. Without dispute, he so moved into her mother's house to help support and care for Catherine and her little girl after she was divorced from Judd. After Catherine was married to Carl G. Bergman she moved out to live with her husband, and her father moved out to live in Florence. The witness admitted that during the time she so lived with her mother, her father gave her mother some money at times to buy groceries so they could make ends meet and provide for the witness and her little girl. How much was so given she did not know. Also, Carl G. Bergman testified that while he was courting Catherine at 4227 North Thirty-sixth Avenue, when he called there 20 or 25 times between July 1947 and July 1948, he saw Harry Bruner, Sr., give Mrs. Blake some money, $5 or $10, on a number of occasions, usually on Friday or Saturday. Then the witness would take Mrs. Blake or Catherine or both to the store and buy groceries with the money. However, we find no competent evidence from which it could be determined with any degree of accuracy what the amount so given was, and there was no competent evidence in any event that it was given with intent to apply same upon or satisfy in any manner the mother's judgment for child support.

There is one other matter requiring discussion. A recorded survivorship warranty deed, dated May 3, 1951, to real property, the description of which is long and

unimportant here, but is known as 2574 Fort Street in Omaha, from Harry C. Hurlbut and Hazel L. Hurlbut to "William A. Blake, Jr. and Lois E. Blake (Husband and Wife) and Harry E. Bruner, Sr. (Step Father)" was offered by plaintiff and received in evidence. It bore $9.90 of revenue stamps but the recited consideration was "One dollar and other valuable considerations." A duly recorded survivorship warranty deed, dated April 30, 1953, purportedly for the same property but deficiently described and "subject to any and all encumbrances recorded and unrecorded" from Harry E. Bruner, Sr., a single man, to William A. Blake, Jr., and Lois E. Blake, husband and wife, for a recited consideration of "One Dollar and other valuable consideration" and bearing 55 cents in revenue stamps, was offered by plaintiff and received in evidence, apparently upon the theory that William A. Blake, Jr., being a son of Bessie Mae Blake and William A. Blake, Sr., such deeds somehow evidenced a satisfaction or payment of the child support judgment. As hereinafter observed, there is no merit whatever in that theory.

That is true because the record discloses that defendants also offered, and there was received in evidence, a photostatic copy of said original warranty deed of April 30, 1953, which showed on its face the deficiency of description, and also a photostatic copy of a warranty deed dated August 3, 1954, which was identical in form and substance except that it supplied the deficiency of description previously omitted from the warranty deed executed on April 30, 1953. In that connection, William A. Blake, Jr., testified, and it is not disputed in any manner, that at the time he purchased the property from the Hurlbuts, realtor "Robert Mitchell," heretofore mentioned, told Blake, Jr., that his salary was insufficient to get the loan required without a co-signer of the note and mortgage, so Harry E. Bruner, Sr., signed them as such, but requested as security therefor that his name appear as a grantee in the warranty deed from the Hurlbuts,

which was done. However, Harry E. Bruner, Sr., never paid anything or furnished any other consideration in the transaction, and after loan payments had been made on the property by the Blakes for about 2 years, the name of Harry E. Bruner, Sr., was removed from the note and he was released by the loan company from any liability on the note and mortgage. Thereupon, Harry E. Bruner, Sr., executed the two warranty deeds to the Blakes respectively on April 30, 1953, and August 3, 1954, as theretofore contemplated by the parties.

As heretofore noted, in cases such as that at bar, the statute of limitations was not available to defeat recovery of delinquent payments of the child support judgment. On the other hand, no element of laches appears herein except lapse of time alone, which was not sufficient to satisfy the judgment for child support. Also, contrary to plaintiff's contention, equitable estoppel by omission to speak or otherwise could not have application to defeat recovery of the child support judgment, because there was no false representation, omission, inconsistent conduct, or concealment of facts made by anyone for the purpose of misleading or inducing plaintiff to change his position and purchase the property. Rather, plaintiff and his predecessors had timely notice and knowledge that the judgment for child support was of record as a lien on the property before it was purchased by them, and plaintiff's own lack of diligence and negligence barred any right to rely upon estoppel.

In conclusion, we find no competent evidence that the child support judgment "was fully paid" as found and adjudged by the trial court. That conclusion was based solely on speculative and conjectural evidence, and the judgment cannot stand. The amount of the unpaid portion of such judgment, with interest at 6 percent, may be readily ascertained by a mere computation thereof by the court.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is re-

versed and the cause is remanded with directions to dismiss plaintiff's petition and render judgment in favor of intervener, Harry E. Bruner, Jr., administrator de bonis non of the estate of Bessie Mae Blake, deceased, for the amount of the judgment for child support which remains unpaid, with interest at 6 percent upon unpaid weekly installments thereof as they accrued prior to September 15, 1935, and upon the principal amount thereof remaining unpaid from September 15, 1935, to date, bearing in mind that interest shall not be compounded in any event. Further, the trial court is directed to adjudge that such an amount so found due and unpaid was a lien on Lot 25, Block 2, Ak-Sar-Ben Hill Addition to Omaha, to order said property sold as upon foreclosure of said lien, and to order the proceeds thereof applied in satisfaction of the judgment lien. All costs are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

O. C. HIRSCH CONSTRUCTION CO., APPELLEE, V. THURE E. PETERSON ET AL., DOING BUSINESS UNDER THE STYLE AND TRADE NAME OF PETERSON CARPET CO., APPELLANTS.
92 N. W. 2d 694

Filed November 7, 1958. No. 34407.

Contracts: Evidence. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument.

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

Towle, Young & McManus, Carl H. Peterson, and *Emory P. Burnett,* for appellants.

Wagener, Marx & Galter, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought in his first cause of action to recover the balance due on a written contract and on his second cause of action to recover an amount alleged to be due based on the reasonable value of materials and services furnished. Issues were made and trial was had resulting in a verdict for plaintiff on both causes of action. The verdict on the second cause is not involved in this appeal. That cause will not be mentioned further here. The refusal of the trial court to admit and permit the jury to consider certain evidence is the basis for the attack on the verdict in the first cause of action.

We affirm the judgment of the trial court.

Plaintiff O. C. Hirsch is an individual doing business under the name of O. C. Hirsch Construction Co. Defendants are Thure E. Peterson and Elva Peterson doing business as Peterson Carpet Co. They will be referred to herein as defendants or Mr. or Mrs. Peterson, as occasion requires.

The petition alleges that on or about July 16, 1956, defendants entered into a contract with the procurement officer of the Lincoln Air Force Base for the installation of asphalt tile in some barracks. On July 18, 1956, plaintiff, as a subcontractor with the defendants, agreed to do a certain part of the work for the sum of $49,688.91. Plaintiff alleged full performance and part payment and prayed for a recovery of a balance allegedly due on the contract. Defendants by answer denied generally; admitted that an agreement was entered into between plaintiff and defendants for work to be done at the air base, and that the work was partially done; and alleged that any and all amounts due plaintiff had been paid. Defendants prayed for a dismissal of the action.

The subcontract and specifications are in evidence. Plaintiff by the subcontract agreed to do four specific items of work for the consideration of $49,688.91. Only two of the four provisions are involved in this appeal. They are as recited in the contract:

"TP 1-03 General (c.)

"TP 1-04 Materials (2) Base."

The material part of TP 1-03 here involved as taken from the "Technical Provisions" of the specifications, is: "Remove base shoe where tile installed and replace same, after tile installation." TP 1-04 is: "Base: Unless otherwise indicated on the drawings existing base and shoe shall be used."

The evidence shows that the base is the strip of board along the wall which is in contact with the floor. The base shoe is a quarter round narrow strip placed above the floor and against the base.

The evidence shows that the plaintiff removed the base shoe and after tile was installed replaced the same. His work was accepted as being satisfactorily performed by the proper air base official, and defendants were paid therefor.

The dispute arises because of this situation: It appears that the plans and specifications originally contemplated removal of the base and base shoe and the installation of a different wall covering. This was changed before the contract was let and both the plaintiff and defendants knew it.

On June 16, 1956, at Mr. Peterson's request, plaintiff submitted an itemized estimate for each barracks which included "Replacing base & shoe * * * 228.80" which multiplied by 27 (the number of barracks) makes the $6,177.60 involved here.

The specifications were then changed so as to provide for the removal of the "base shoe * * * and replace same, * * *." Nevertheless after the contract with the procurement officer had been signed by the defendants, defendants, in the changed language above re-

cited, entered into a subcontract with plaintiff for the one amount to cover all the work he was obligating himself to do. The figures of the estimate of each of 10 items in nowise enter into the consideration of the subcontract except insofar as they form the basis for the total subcontract price.

The trial court at first admitted and then struck the estimate from the record and instructed the jury to disregard it. Defendants assign the ruling as error.

The rule is: In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301. See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176.

In Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637, we said: "This court has recognized and applied the doctrine of admissibility of preliminary negotiations subject to the limitation that plain terms of the writing resulting therefrom may not be varied."

Here it is patent that defendants would vary the plain terms of the subcontract, pleaded and proven. It calls for the payment of $49,688.91 for the performance of the covenants of the agreement. Defendants, so far as this item is concerned, would have the subcontract provide for the payment of $49,688.91 less $6,177.60. The trial court did not err in its ruling in the matter.

The subcontract between the plaintiff and defendants further provided: "That the Contractor or his superintendent shall have the right to order in writing the omission of the parts of the work, or materials as omitted from the general contract on the above named project by the architect and/or Owners; and that fair deductions shall be made in the contract price for such omitted work or materials; * * *."

Defendants offered in evidence a copy of a letter to

plaintiff dated July 19, 1956, reciting: "This letter will notify you that there was an error made on the original contract. Full credit will be taken for base and shoe which will not be furnished. Your revised figure will read $43,511.31."

Mr. Hirsch testified that he never received the letter. Defendants argue here the presumption of delivery based on evidence of mailing. The trial court first admitted and then struck the evidence from the record. Defendants assign it as error. It is an obvious attempt to correct "an error" in the amount of the subcontract. There was no contention that the reduction in the subcontract price was because of the "omission of * * * work * * * from the general contract * * *." The work here involved was never included in the general contract or the subcontract. The contention requires no further comment. Error is not shown.

There are subsidiary assignments of error which rest upon the premise that the above discussed assignments are meritorious. They do not require discussion.

The judgment of the trial court is affirmed.

AFFIRMED.

VIRGINIA A. TATE, ADMINISTRATRIX OF THE ESTATE OF WENZL J. SEIDL, DECEASED, APPELLANT, V. DONNA BORGMAN, APPELLEE.

92 N. W. 2d 697

Filed November 7, 1958. No. 34415.

1. **Automobiles: Evidence.** A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied.
2. ———: ———. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile.

3. **Automobiles: Negligence.** An allegation of negligence of a specific number of miles per hour as the speed of an automobile as constituting excessive speed does not limit the pleader to proof of that speed. He may prove a lesser rate as negligence.
4. ———: ———. The lawfulness of the speed of an automobile 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.
5. ———: ———. One is required only to have his automobile under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required.
6. **Trial: Appeal and Error.** Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission and, unless that is done, the judgment will not ordinarily be reversed for such defects.
7. **Trial.** A supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge.

APPEAL from the district court for Lancaster County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

Healey, Davies, Wilson & Barlow, Kenneth Cobb, and *Chambers, Holland, Dudgeon & Hastings,* for appellant.

Marti, O'Gara, Dalton & Sheldon, for appellee.

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

SIMMONS, C. J.

This is an action for damages arising from an automobile collision which occurred February 10, 1955, between a taxicab driven by Wenzl J. Seidl and a car driven by Donna Borgman. Seidl sued for personal injury and property damage. He died February 11, 1956. The action was revived in the name of the administratrix, and a second cause of action alleged on the

basis that death was the result of the injuries following the accident.

The defendant cross-petitioned for personal injury and property damage. Issues were made and trial was had resulting in a verdict and judgment for the defendant.

Plaintiff appeals, assigning as error the failure of the trial court to submit the issue of excessive speed of defendant's automobile to the jury; in striking the testimony of an expert witness regarding reaction time and speed as shown by skid marks; and in the giving of three instructions.

We reverse the judgment and remand the cause for further proceedings.

The accident occurred on West "O" Street about dusk at 5:30 p.m. At the point of the accident West "O" Street is a four-lane highway divided by traffic islands. At the point of the accident there is a 65-foot opening between the traffic islands to permit cross traffic. Immediately to the north of this opening and on the north side of the outer westbound lane is a driveway opening into the grounds of a garage, called herein the west drive. To the east and north of that is the garage. There is then a driveway leading to the garage called the east drive, and farther east of that is a second drive leading to a motor court. The center of this drive is 67 feet east from the center of the east drive.

The plaintiff's evidence is to the effect that Mr. Seidl had driven into the garage areaway through the west drive, had unloaded a passenger at the garage, and when last seen was in the east drive turning west. Plaintiff's contention is that Seidl drove west on the highway to the cross traffic opening and was making a left turn into the cross traffic lane when defendant's car ran into his taxicab.

Defendant's evidence is that she was driving west on "O" Street at about 35 or 40 miles per hour when she came up behind a slow-moving westbound car in the outer lane, turned to pass it, and when alongside she saw

the Seidl cab pull "right straight across" out of the west drive. There is ample evidence in the record that at that time the two cars were approximately 150 feet apart and that the distance between them was closed by the movements of the defendant's car. Defendant testified that "it" (the cab) was so close "I didn't have time enough to stop." Defendant also testified that "just before" she applied her brakes she "imagined" she was traveling about 35 to 40 miles per hour. Defendant further testified that she had turned a little toward the island when the collision occurred.

The undisputed evidence is that the defendant's car skidded a distance of 61 feet before the impact. The evidence also is that the damage to defendant's car occurred on the right front fender, light, and grill, causing $550 damage. The cab was hit with the greater impact on the left rear door, pushing it in. The cab was pushed sideways a distance of 10 feet and came to rest in a north and south position across the inner westbound lane and a line between the traffic islands. Defendant's car stopped almost at the point of impact.

Defendant further testified that she was thrown forward by the impact; her mouth hit the steering wheel; her teeth cut through her lip; one knee hit the ignition key and one hit the hand brake, bending both key and brake; her head hit the steering wheel; and her shoulder hit the door, all causing serious injuries.

The evidence is that the pavement was concrete, as distinguished from black-top, in "normal" condition and free of ice or snow. There is evidence of some gravel on the pavement alongside the traffic island. Plaintiff offered an expert witness on the questions of speed as shown by skid marks and speed as shown by reaction time. The witness testified that he had been a police officer engaged in traffic matters for 10 years or more; that he had had specialized training at Northwestern University in determining stopping distances of cars at various speeds; that he had made experiments testing

the formula for estimating speed from skid marks; that his experiments showed the formula to be true; that the type of a car makes no difference; that the weight of a car makes no difference; that the grade and condition of the pavement have to be considered; that the condition of the tires on good pavement makes no appreciable difference; and that the type of brakes makes no difference after the wheels are sliding. He testified that he was familiar with the surface of the West "O" Street pavement; that he was assuming it was dry; that it had a 1 percent uphill grade; and that he assumed the condition of the pavement to be as shown in the pictures in evidence. On that foundation he was allowed to testify as to stopping time and reaction time.

The witness testified that a car "at that particular location" traveling at 35 miles per hour should slide approximately 59 feet; that at 40 miles per hour the slide should approximate 77 feet; that at 45 miles per hour the slide should be in excess of 95 feet; that at 50 miles per hour the slide should be 110 feet to 112 feet; and that at 60 miles per hour the slide should be approximately 117 feet. From this evidence, considering the 61 feet of skid marks before the impact, the distance of 10 feet the cab was shoved west when in a sidewise position, the damage to the cab and car, and the force with which defendant was thrown about the car, it is obvious that the jury could properly have inferred that defendant's speed was well in excess of the 40 miles per hour she testified to when the brakes took hold and locked the wheels in skid position.

The witness also testified that by reaction time he meant the time it takes a driver, after he realizes a hazard exists, to take his foot from the accelerator and start applying the brake. He testified that, based on experiments conducted, the reaction time varied from slightly over half a second to a second and that the reaction time for the average person is recognized to be three-quarters of a second. He testified that the average person's re-

action time with a car going at 35 miles per hour would be 38 feet; at 40 miles per hour about 44 feet; at 45 miles per hour about 49 feet; at 50 miles per hour about 55 feet; and at 60 miles per hour the reaction time would be about 66 feet. Now remembering that the jury could have found a possible reaction time here of about 90 feet of travel, it is obvious that the jury could have found that the defendant's speed was well in excess of the 35 to 40 miles per hour she "imagined" she was going when danger became apparent.

After the above evidence had been given to the jury the witness was then asked what he regarded the condition of the roadway was from the photographs in evidence. He replied that the pictures did not tell him too much, and that he was going more on his personal knowledge. The court, then, on motion of the defendant, struck all of the above recited testimony from the record and instructed the jury not to consider it.

Plaintiff assigns the exclusion of the evidence as error. Defendant argues here that it was properly excluded for lack of foundation.

Patently the testimony of the witness as to reaction time could not have been involved in the statement of the witness above recited. We see no basis for rejecting the testimony as to reaction time because of lack of foundation. It was ample.

We have held: A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112.

In Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, we held: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating

the accident immediately thereafter. See 5 Am. Jur., Automobiles, § 630, p. 850."

We quoted this rule with approval in Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

Defendant to avoid the effect of the rule argues that the expert witness here was neither involved in the accident, nor was he one in authority investigating the accident immediately thereafter.

An examination of the text cited in Koutsky v. Grabowski, *supra,* shows that the rule is: "Various factors, such as skid marks, distance traveled after impact, force of impact, etc., are pertinent in arriving at an estimate of the rate of speed of an automobile." 5 Am. Jur., Automobiles, § 630, p. 850.

It is quite evident in Koutsky v. Grabowski, *supra,* we were applying the rule to the evidence of that case and not limiting the application of the rule. Further, in Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557, we said: "This rule relates specifically as to what facts may be shown as they can be said to bear on the question of speed, * * *." The rule is not limited as defendant contends.

Defendant further contends that the expert was not asked to relate his testimony into an estimate of the speed of the defendant's car under the conditions existing at the time of the accident. He was not required to do so to make his evidence admissible.

Defendant further contends that the exclusion of the evidence was not prejudicial because in any event it did not show a speed in excess of 50 miles per hour and that under the issues presented speed of less than 50 miles per hour would not constitute negligence. We dispose of that contention later herein contrary to the contention of the defendant in connection with the failure of the trial court to submit the issue of excessive speed to the jury.

Neither party discusses here the striking of the evidence as to reaction time as a separate question from the

evidence as to skid marks showing speeds. Obviously the foundational requirements are materially different.

In Vale v. Noe, 172 Wis. 421, 179 N. W. 572, the court held: "It is a matter of common knowledge that it requires an appreciable time for the mind and muscular system to act."

In State v. Belle Isle Cab Co., 194 Md. 550, 71 A. 2d 435, the court said: "It is obvious that, no matter how quick might have been the reflexes of the driver, the car did travel *some* distance while the driver was putting on his brakes and while the brakes were taking hold with sufficient grip to skid the wheels." See, also, Yeaman v. Storms, 358 Mo. 774, 217 S. W. 2d 495, and Smith v. St. Louis Pub. Serv. Co. (Mo. App.), 252 S. W. 2d 83, where the court took judicial notice of reaction time.

In Edwards v. Dixon (Mo. App.), 298 S. W. 2d 466, the court, in the absence of evidence, took judicial notice that three-fourths of a second is required after occasion to stop arises for a driver to apply the brakes. See, also, Ashbrook v. Cleveland Ry. Co., 33 Ohio Law Abstract 497, 34 N. E. 2d 992, where the court held: "It is a matter of common knowledge also that the so-called reaction time of the average man (that is the time elapsing from the moment one sees danger until the moment when he can actually get into action to avoid it) is about three-quarters of a second."

The expert witness here took a fact of common knowledge (reaction time) and gave the jury a measuring stick whereby reaction time could be translated into speed per hour if it wished.

We find the evidence as to speed as shown by skid marks and speed as shown by reaction time was properly admitted and that the trial court erred in striking it and instructing the jury to disregard it. It was prejudicial error.

Plaintiff had alleged negligence of the defendant in that "she drove said vehicle at an excessive rate of speed for the then existing conditions, to-wit, in excess

of 50 miles per hour." The trial court did not submit the issue of excessive speed to the jury. Plaintiff assigns error in not so doing.

The plaintiff argues here that the lawfulness of the speed of a motor vehicle within prima facie limits is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. Defendant concedes the rule but denies its applicability contending that plaintiff is limited by the above allegation to proof of speed "in excess of 50 miles per hour." Defendant cites no authority for the position taken. We find none. We find the rule to be: An allegation of negligence of a specific number of miles per hour as the speed of an automobile as constituting excessive speed does not limit the pleader to proof of that speed. He may prove a lesser rate as negligence. See Lindekugel v. Spokane, P. & S. Ry. Co., 149 Or. 634, 42 P. 2d 907, 99 A. L. R. 721, and decisions there cited. We find no merit in the above contention.

It has long been the rule that: 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. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

In passing it may be noted that there is some question as to the speed limit fixed at the time. The evidence is that it was "dusk" and that the night speed limit is 40 miles per hour. If that were true then defendant's evidence is that she was reaching that limit. However the matter is briefed here on the basis that the 50 miles per hour daytime limit is applicable and we proceed on that assumption. We have then the defendant driving on a main thoroughfare at the "imagined" speed of 35 to 40 miles per hour along a street where there were several approaches opening onto the highway; driving at dusk; seeing another car at least 150 feet ahead as it was crossing the highway; closing that 150-foot distance

without an application of brakes for about 90 feet; then skidding 61 feet to a collision hard enough to shove the car that was hit 10 feet sideways, damaging it severely; damaging her own car severely; and hitting with sufficient force to throw her about the car and cause severe personal injuries as well as car damage. In determining these matters each circumstance or condition is not to be weighed separately and so tested by the rule. The rule requires a consideration of all the circumstances and conditions taken together. The rule is applied to the integrated whole of the conditions.

We think this evidence sufficient to present a jury question as to whether or not the speed was greater than was reasonable and proper under the conditions then existing.

Defendant argues not only that there must exist special or unusual conditions which require a speed less than the prima facie limit but that the circumstances must be such that a "conclusion of excessive speed can be made with reasonable certainty." Here defendant relies on the following language taken from Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, which is: "Without describing the results with particularity it is reasonably inferable that the two vehicles came together with great force and violence. No definite or even reasonably definite conclusion may be drawn therefrom as to the speed at which the decedent was traveling at the time of the collision." Defendant overlooks the fact that we were there considering the issue of error in the granting of a judgment notwithstanding the verdict. We were weighing the evidence, in the quoted language, in the light of the convincing quality of the evidence that was required. Defendant also overlooks the fact that one of the issues was that of excessive speed, and that we held the evidence presented a jury question as to that issue. We so hold here. The trial court committed prejudicial error in

failing to submit the issue of excessive speed to the jury.

Plaintiff further assigns as error the giving of instruction No. 12 to the jury. It is: "You are instructed that a driver of an automobile upon the public highways of this state is required to have his or her auto under such reasonable control as will at all times enable him or her to avoid collision with other vehicles operated on said highway, but the law does not require such driver to anticipate negligence or violation of traffic regulation by another, in the absence of notice, warning or knowledge of such condition.

"It is for you to determine whether the plaintiff's decedent or the defendant failed to exercise due care in this regard."

Plaintiff relies on our holdings in Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669: "One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles *whose drivers exercise due care.* Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required." (Emphasis supplied.)

The above was quoted with approval in Burhoop v. Brackhan, *supra.* The objection is to the omission from the instruction of the requirement that the driver of the other vehicle must be in the exercise of due care. The contention is that the instruction as given places upon the driver of the one vehicle the duty to avoid collision with other vehicles operated on the highway.

Defendant does not disagree with the requirement that the "other" driver must be in the exercise of due care but contends that the last phrase of the instruction corrects the omission in telling the jury that the law does not require such a driver to anticipate negligence, in the absence of notice, etc.

The contention is a non sequitur. The first part of the

instruction relates to the measure of control that a driver must have of his own car to avoid collision with other vehicles using the highway. The second part relates to the anticipation of negligence on the part of the driver of the other car. This distinction appears in Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, where the instruction used the word "lawfully" operated on the highway. We repeated "the exercise of due care" rule and in effect held that "lawfully operated" was synonymous with the exercise of due care.

Defendant also asserts that the duty to exercise ordinary care is charged to both parties by instructions Nos. 10 and 11. "Ordinary care" is defined in instruction No. 10, but it is not mentioned in the challenged instruction, although "due care" is mentioned as we presently point out. Instruction No. 11 sets out the provisions of the statutes and advises the jury that their violation is not negligence but evidence of negligence. The challenged instruction was not prejudicially erroneous.

The trial court instructed the jury in part as follows: "In the event you find the defendant is entitled to recover on her cross-petition, you will consider the whole evidence as given in the case bearing upon the items of damages for which you find the defendant entitled to recover.

"In the matter of pain and suffering, the law has no fixed rule but leaves that largely to the sound judgment of the jury, in reference to which you are to consider all the evidence as to the nature of the injuries, the extent and effect upon the defendant, if any, as shown by the evidence the defendant has sustained."

The plaintiff assigns this instruction as error in that it did not include the rule as to the measure of future pain and suffering which is: The only future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

There was evidence from which it might be concluded that the defendant would have some future pain and suffering. However, the trial court in its instruction on the issues referred to pain and suffering "experienced" by the defendant. Other instructions were indefinite as to that matter. Reals v. Grazis, 125 Neb. 877, 252 N. W. 413, presented a similar situation and is contra to plaintiff's contention.

We think in this situation the plaintiff, had a specific instruction been desired, should have requested it under the rule that: Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission and, unless this is done, the judgment will not ordinarily be reversed for such defects. Coyle v. Stopak, *supra.*

Defendant's property damage and medical expense as established without dispute was $678.45. Defendant prayed for judgment in the sum of $10,000. In its instruction on the issues the trial court so advised the jury.

During their deliberations the jury submitted a written question to the court: "May we enter a verdict on $678.45 plus Costs for Defendant or must it B $10,000 & costs?" The court in a supplemental instruction recited the question followed by "will say that the amount of your verdict, if it is for the defendant, should be the amount of damages you find she actually sustained in the matter."

The court had given instructions on contributory negligence, the rule of comparative negligence, and the reduction of damages sustained by the one entitled to recover because of contributory negligence. No question is raised as to those instructions here. The essence of plaintiff's complaint is that the supplemental instruction conflicts with the contributory negligence instruction and permitted defendant to recover damages sustained without qualification or limitation.

It is patent that the jury at the time the question was submitted had considered favorably a verdict for the defendant. It wanted to know if it could return a verdict intermediate of the two sums or if it was required to accept one sum or the other. The court answered that question. It does not appear that the jury was in any doubt about the rules of law given to it in the original charge. It may be assumed that it comprehended such parts of the original charge concerning which it raised no question.

Defendant denies error in the instruction and contends that even if erroneous, it was not reversible error when there is no claim that the verdict is excessive, citing Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N. W. 355.

In Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398, this court held: "The rule is that a supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge." See, also, Shermer v. Crowe, 53 Ga. App. 418, 186 S. E. 224; Elliott v. Floyd, 85 Ga. App. 416, 69 S. E. 2d 620.

For the reasons given herein the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE ESTATE OF JOHN GLEASON, DECEASED.
HELENE I. GLEASON ET AL., APPELLANTS, V. HELEN GLEASON POORE, APPELLEE.
92 N. W. 2d 705

Filed November 7, 1958. No. 34431.

1. **Judgments.** In a proceeding to vacate a judgment for any reason, the applicant must allege facts sufficient to show that the failure to secure a just decision at the former hearing is not attributable to his own fault or want of due diligence.
2. **Wills: Appeal and Error.** A proceeding for the probate of a

will of a deceased person is in rem and all persons interested 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. One so appealing must take the pleadings in the county court as he finds them and he is necessarily limited on the appeal to the issues presented to the county court.

3. ———: ———. The district court has no power to hear the contest of a will except on an appeal of such proceedings from the county court. The county court has original exclusive jurisdiction of the probate of wills and the contest thereof in the first instance.

APPEAL from the district court for Kearney County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

William H. Meier, for appellants.

Dryden & Jensen, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Kearney County granting a new trial.

The evidence shows that John Gleason died on March 21, 1956, leaving a will. On March 28, 1956, a petition was filed in the county court of Kearney County praying for the admission of the will to probate. On the same day an order was made setting the matter for hearing on April 19, 1956, at 10 a. m., and directing the publication of notice as required by law. Notice was duly published. On April 19, 1956, a hearing was had. The witnesses to the will appeared and testified, and the will was duly admitted to probate. On April 27, 1956, the objector, a daughter of the deceased, filed a motion in the county court praying that the judgment of the county court be set aside and attached thereto a proposed answer which, among other things, alleged that the will of the deceased was the result of undue influence. A demurrer

was filed to the motion on the ground that the application failed to state a cause of action and for the further reason that it failed to allege diligence on the part of the moving party, or to otherwise excuse her failure to contest the will at the time of the hearing resulting in the order admitting the will to probate by the county court. The demurrer was sustained, and the objector refused to plead further and appealed to the district court. The proponents thereafter filed their petition in the district court, setting forth substantially the facts hereinbefore recited. The objector subsequently filed her answer in the district court, which among other things alleged undue influence. Proponents filed a motion to strike the allegations of undue influence. The motion to strike was sustained. A jury was waived and a trial had to the court. The trial court found that the will was in all respects properly executed and that the deceased had testamentary capacity at the time the will was executed; and admitted the will to probate. The trial court refused to permit evidence of undue influence at the trial. The motion for a new trial was sustained on the ground that the issue of undue influence was erroneously eliminated. Proponents appealed from the order granting a new trial.

The evidence shows that the objector had notice and actual knowledge of the hearing of April 19, 1956, in the county court seeking to have the will admitted to probate. The record affirmatively shows that objector had full and complete knowledge of the issues to be determined at the hearing. No showing of diligence by the objector was made. This court has stated the applicable rule as follows: "A petition setting forth facts sufficient to constitute a defense to the probate of a will and codicil does not meet the requirements necessary to be set forth in a petition to set aside a decree of the county court admitting a will and codicil to probate. More is required to be pleaded, as stated in Miller v. Estate of Miller, supra: 'These allegations are all ad-

mitted by the demurrer, and the only logical deduction from the admitted facts is that the decree is the product of false testimony, adduced by the appellees with a full knowledge of its falsity. That of itself would amount to fraud in procuring the decree. Secord v. Powers, supra (61 Neb. 615, 85 N. W. 846). But it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence.'" In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379. See, also, Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010. The motion of objector to vacate the order of the county court admitting the will to probate was properly denied and the tendered answer accompanying the motion did not become a part of the pleadings at the hearing on the petition to admit the will to probate in the county court.

The probate of a will of a deceased person is a proceeding 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. But when such an appeal is taken, the person appealing must take the county court pleadings as he finds them. He may not change the issues on appeal. This question was determined in the case of In re Estate of Shierman, 129 Neb. 230, 261 N. W. 155, wherein the court said: "The district court has no power upon appeal or as an original action to permit an election and hear the contest of a will except on an appeal of such proceedings from the county court. The county court has original exclusive jurisdiction of the probate of wills and the contest thereof in the first instance." See, also, Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150.

The objector filed her answer on appeal by which she denied the testamentary capacity of the deceased at the time the will was executed and alleged that the will was not executed in the form and manner provided by law. It is not questioned that these were issues in the county court that could be properly presented on appeal by the objector. In addition thereto the objector pleaded undue influence, an issue not raised in the county court. This issue was subject to a motion to strike on the ground of variance with the pleadings in the county court. The district court properly sustained the motion to strike the allegations of undue influence in the district court. On the trial of the case the court refused to permit evidence of undue influence. The trial court was clearly correct in ruling out evidence of undue influence. The trial court thereupon admitted the will to probate and dismissed the answer of the objector. The trial court on motion for a new trial held that the issue of undue influence could properly be raised in the district court, even though it had not been previously raised in the county court, and granted a new trial. The order granting a new trial was clearly erroneous.

The objector relies upon the case of In re Estate of Benson, 162 Neb. 825, 77 N. W. 2d 572, to sustain the granting of the new trial. It is the contention of objector that this case holds that new issues may be raised on appeal to the district court in a probate case whether or not they were first raised in the county court. This requires an examination of the holding of that case.

A careful consideration of the opinion in the Benson case shows that two heirs of the deceased who had not made an appearance in the county court appealed from the order of that court admitting the will to probate. The opinion holds that such heirs had a right to appeal since they were parties in the county court in an in rem proceeding. On appeal they pleaded lack of testamentary capacity and unsoundness of mind of the de-

ceased when the instrument was made. These were issues raised in the county court which could properly be raised on appeal in the district court. The contention that the two heirs could not intervene in the district court was overruled, the court saying: "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 opinion shows that the two heirs on appeal raised the issue of undue influence by their pleading. The fact that issues were alleged which were at variance with the issues raised in the county court does not warrant the striking of the pleading where proper issues were contained in it. The issues can be properly limited in such a situation by an appropriate motion to strike the allegations at variance with the issues raised in the county court.

We point out that the Benson case holds that the county court has original exclusive jurisdiction in all matters concerning the probate of the will of a deceased person. To permit the raising of new issues in the district court on appeal would have the effect of depriving the county court of its original exclusive jurisdiction to that extent. The previous decisions of this court consistently hold that an appeal to the district court in a probate proceeding limits the issues to those raised in the court below as in other cases. In re Estate of Shierman, *supra;* Weideman v. Estate of Peterson, *supra.* It would be novel indeed if we should hold that a party could properly be denied the right to vacate an order of the county court in order to assert a new issue because of the party's actual notice of the hearing and a want of due diligence in protecting his interests only, to have the same matter presented with judicial approval for the first time

on appeal in the district court. While there may be some language in the opinion that tends to support the objector's position, it does not in fact do so. The previous decisions of this court are not criticized nor overruled, nor is there a clear intention expressed to depart from those holdings. We necessarily conclude that the case of In re Estate of Benson, *supra,* does not hold as the objector contends. It does not support the action of the trial court in granting a new trial. We adhere to the rule that there may not be a change of issues on appeal to the district court in a probate proceeding and any purported holdings to the contrary in our previous decisions are disapproved.

Under the authority of the rule announced in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, the order granting a new trial is reversed and the cause remanded with directions to the trial court to reinstate the judgment of the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM J. KONOP ET AL., APPELLANTS, V. FRED KNOBEL ET AL., APPELLEES.
92 N. W. 2d 714

Filed November 7, 1958. No. 34450.

1. **Adverse Possession.** If one by mistake as to the boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
2. ———. The fact that a person never actually claimed to own a disputed tract of land and that his use and possession of it were based on a mistaken belief as to the boundary line of the tract is not a controlling factor in determining whether his possession was adverse.
3. ———. In such a situation the possession of the occupant is not less adverse because he took and had possession of it

innocently and through mistake. It is the visible and exclusive possession with intention to possess the land occupied under the belief that it is the possessor's own that constitutes its adverse character.

4. ———. The visible and exclusive possession of the occupant under such circumstances is notice to all interested persons that his possession is adverse.

5. ———. The assertion by a litigant that he had no intention to claim or that he did not claim to own any land beyond the true boundary line, the actual location of which was unknown to him, is not conclusive if such statement is inconsistent with his acts during the period of his possession of the land.

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

Dryden & Jensen, for appellants.

Tye, Worlock & Knapp, for appellees.

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

BOSLAUGH, J.

This litigation involves the ownership of an area of land 17 feet wide from north to south and 150 feet long from east to west immediately north of Lot 1 in the village of Odessa. The original sole plaintiff was William J. Konop but before the case was tried the court by order substituted Ethel H. Seiler and William F. Seiler as plaintiffs for and in the place of William J. Konop who had conveyed the real estate involved herein to them. The litigants in this controversy are Ethel H. Seiler and William F. Seiler, appellants, and Fred Knobel and Lottie E. Knobel, appellees. Lottie E. Knobel is not shown by the record to have an interest in the subject matter of the action except that which results from her marital relationship with Fred Knobel. He will be hereafter designated appellee.

A trial in the district court was had and as an incident thereof the premises were viewed by the court. The

case was taken under advisement and later the trial court found generally for appellees and against appellants and rendered a judgment of dismissal of the case. A motion of appellants for a new trial was denied and this appeal was prosecuted.

S. B. Halliwell, sometimes named and referred to in the record as Samuel Halliwell, was the owner of Lots 1 and 2 in the village of Odessa commencing with December 18, 1888, and thereafter until his death in the year 1939. The plat of the village of Odessa was vacated August 14, 1923, as to Lots 1 to 73, inclusive, in the village of Odessa, and all streets and alleys north of the north line of Odessa Street in that village. The effect of this was a vacation of all of the plat of the village north of the north line of Odessa Avenue. This vacated the plat as to Knobel Street which extended east and west immediately north of Lot 1 and the alley extending north and south through the block of which Lot 1 was the northeast lot of the block. Lot 2 adjoined Lot 1 on the south and Lot 8 was west of Lot 1 and was the northwest lot of the block.

S. B. Halliwell and his wife conveyed to Fred Knobel on February 26, 1926, what was before the vacation of the village plat the south 25 feet of the part of Knobel Street which adjoined Lot 1 on the north. This is described in the deed as the south half of Knobel Street.

Mary Lillian Birt, also named in the record as Lillian Birt, a daughter and one of the heirs of S. B. Halliwell, became the owner of Lot 1 and the north half of Lot 2 in the village of Odessa on December 31, 1943, by her purchase thereof at a partition sale and a deed to her from J. C. Tye, referee in the partition proceedings. The heirs of S. B. Halliwell were parties to the partition proceedings in which was involved real property owned by S. B. Halliwell at the time of his death, including Lot 1 and the north half of Lot 2 in the village of Odessa. Mary Lillian Birt, widow, conveyed Lot 1 and the north half of Lot 2 of the village of Odessa, and her interest

in the alley which adjoined the lots on the west, to William J. Konop June 23, 1951. He was unmarried and he conveyed the identical property to Edith H. Seiler and William F. Seiler, appellants, February 15, 1955. The land north of a line 17 feet north of the north line of what was Lot 1 in the village of Odessa was, after February 26, 1926, owned by Fred Knobel, appellee.

The issue for determination concerns the ownership of the 17 feet immediately north of and adjacent to the north line of Lot 1 in the village of Odessa as it was surveyed and platted. According to the record title it is owned by appellee. Appellants claim to own it by mesne conveyances, their adverse possession, and the adverse possession of their predecessors in title.

Appellee has lived all his life north of the village of Odessa in the vicinity of the land in litigation in this case. He was 69 years of age at the time of the trial in 1956. There were trees between his land and Lot 1 in the village of Odessa owned by S. B. Halliwell, hereafter referred to as Halliwell. The trees are described as willows and sometime later as willows and Chinese elms. Mention is also made of a plum thicket. It is probable that the original trees were planted in a row from east to west and that afterwards there was voluntary growth that grew into trees in an irregular pattern. There was a fence located and installed by Halliwell on the north of the original trees extending from east to west between his lot and the land of appellee. The fence consisted of 2 strands of barbed wire fastened to the trees and when there was no tree available, a post was put in to support the wire. There are very few of these trees still standing at the west part of the lot. The fence originally extended along the entire north edge of the block of which Lot 1 is a part. There was no one that had any concern with the properties mentioned herein that knew the true location of the north line of Lot 1 as it was surveyed and platted. The record does not show precisely when the fence was constructed.

Appellee testified that he farmed his land north of the fence for 46 years; that neither he nor Halliwell knew where the true line was; that Halliwell told appellee that the willows to which the fence wire was attached were on the north line of Lot 1 and appellee said he never doubted the word of Halliwell; that he and appellee never quarrelled or had disagreement about the north boundary line of Lot 1; and that appellee and Halliwell both considered the north line of Lot 1 was the fence line.

A witness said he was familiar with the fence and trees; that he assisted Halliwell in working on the fence about 50 years prior to the time of the trial; that it was on the north side of the trees; and that it extended east and west. He knew the fence was there for about 45 years. The fence was approximately on a ridge that formed on the ground. The ridge was at the time of the trial still visible to one viewing that location and it was seen and examined by the witness on the day of the trial. The ridge where the fence was located is 17 feet north of the true north line of Lot 1 in the village of Odessa.

A son of Halliwell has lived not more than 1 mile from and sometimes in Odessa for more than 40 years. He lived on Lots 1 and 2 in that village with his parents for a long time. He has known there was a fence north of a row of trees between the property which his father owned and the property of appellee since he was old enough to observe and remember such a fact. His knowledge in this respect has been for a period longer than 40 years. The trees and fence were along north of Lot 1. It was a barbed wire fence. There was a complete row of trees, mostly willows, from east to west. They did not last long but others came up from the roots and they occupied an irregular pattern over probably an area 8 feet wide. The trees died so that there were none for a considerable distance on the east but there continued to be a fence along where the trees had been.

Another witness who had lived in Odessa for about 35 years and knew the property in controversy since he was old enough to remember, stated that he played on the property of Halliwell as a boy; that there was a fence along the north side of the property, a remnant of which was there as late as 1951; that the fence was there, to his knowledge, for more than 20 years; that it consisted of barbed wire and posts and extended east and west the length of the Halliwell property; that there was a row of trees south of the fence; that the trees were willows; that later others sprung up of their own accord and covered a considerable area; that the new growth was not in a line as the first trees were; that the fence paralleled the trees and was straight from east to west; and that there were wild plum trees or bushes along a part of the fence and Halliwell picked and used the plums as his property.

A daughter of Halliwell bought Lot 1 and the north half of Lot 2 in the village of Odessa after the death of her father at a partition sale of the real estate owned by him when he died. The deed to her is dated December 31, 1943. She had possession and use of the real estate in issue in this case as owner thereof from that time until she sold and conveyed it in June 1951. There were trees along the north of the west half of the property and a fence along the trees during the time she owned it. There were trees along the north of the property when her father owned it and a fence east and west north of and adjacent to the trees that was fastened to them. The trees and fence were there for a great many years. They were supposed by the witness and her father to be on the north line of Lot 1. The fence was put there by her father and she knew it was there for more than 20 years. It was there as long as she could remember. There was never any dispute about the north line being where the fence was while her father was living or until after she conveyed the property in 1951. While she owned the property she used it for

garden and other purposes up to the trees and fence. Appellee used the property north of the fence but he had no possession or use of the property south of the fence and trees.

Appellants purchased Lot 1 and the north half of Lot 2 in Odessa in June 1951. The property was, for convenience, taken in the name of a son of Ethel H. Seiler and he conveyed it later to appellants. Ethel H. Seiler, hereafter spoken of as Mrs. Seiler, had known and was familiar with the property since 1943. She knew there was an old fence along the north part of the property which was pointed out to her as the north line thereof. There were trees for a considerable distance commencing at the west and extending eastward south of the fence. The fence was fastened to some of the trees and where there were no trees it was supported by posts. The fence extended east and west and was 17 feet north of the north line of Lot 1 as it was established by a survey made in the latter part of the year 1951. The fence and some trees were there when the survey was made. There was evidence on the premises that Halliwell and Mary Lillian Birt had used Lot 1 to the fence above described. The husband of Mrs. Seiler had knowledge of the property since 1946 at which time there was a fence along the north of it. There were wooden posts and 2 metal posts that were part of the fence at that time. There was an excavation on the north part which was about 1 foot or 2 feet from the fence. It had the appearance of having been an earthen cellar. The witness had hogs on the area in 1952 and there were then in evidence some of the posts and wire which had been a part of the fence north of the trees. The fence described by him was 17 feet north of the north line of Lot 1 as it was surveyed and platted. Appellants took possession of Lot 1 and the north half of Lot 2 in June 1951, moved a house thereon, and have since had the possession and use thereof except as interfered with by appellee after the correct

north line of Lot 1 was located by the survey made in the fall of 1951 at the instance of appellants.

Halliwell had the exclusive, unquestioned possession of and used the land in controversy in this case under a claim of ownership by him for more than 40 years prior to the time of his death in 1939. The fence north of it was recognized as the north line of Lot 1 by Halliwell and appellee during this period of time. Halliwell produced potatoes on the west half of Lot 1 for many years and he used the east half of the lot for garden purposes. He had a potato cellar near the fence which was north of the trees described above. The excavation referred to in the record was the location and remnant of the potato cellar. Halliwell maintained his possession and use of the land north to the fence and appellee occupied and used the land he owned south to the fence without claim of right to or ownership of the land south of the fence throughout the period above mentioned. The same situation was continued after the death of Halliwell by the persons who succeeded to his rights and ownership and by appellee until the true north line of Lot 1 in Odessa, as it was surveyed and platted, was determined by a new survey in the fall of 1951. The location of the north line of the lot as it was platted was not known by any of the interested parties until the 1951 survey thereof. It was then for the first time that appellee decided that the north line of the lot was not where the fence had been north of the trees and that he owned the land between the true north line of Lot 1 as established by the 1951 survey and the line where the fence had been north of the trees. The origin of the argument was when appellee cut down some trees, destroyed the grass of appellants on the disputed area, and asserted his ownership thereto.

The doctrine has long prevailed in this state that if a fence is constructed as a boundary line fence between two properties and if the parties concerned claim ownership of the land to the fence during the statutory

period without interruption in their possession or control during that time, they will acquire title by adverse possession to any land that was improperly enclosed with or added to the land they owned at the time the fence was constructed. Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331, states: "Where one by mistake as to the true boundary line enters upon and takes possession of lands of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession." See, also, Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

Halliwell conveyed the south 25 feet or the south half of Knobel Street, which adjoins Lot 1 on the north, to Fred Knobel February 26, 1926. The south 17 feet of this is the tract involved in this case. Halliwell maintained exclusive possession, control, and use, claiming ownership of it until his death in 1939, more than 10 years. The possession of this area by Halliwell, appellees argue, was permissive and subject to the rights of Fred Knobel. They say the possession of Halliwell during this period was not adverse to Fred Knobel because of the doctrine that if a grantor remains in possession of property after a conveyance of it, the possession of the grantor is presumed to be permissive and subject to the rights of the grantee and such possession cannot be adverse until notice of adverse claim is made known to the grantee. Walsh v. Walsh, 156 Neb. 867, 58 N. W. 2d 337. This principle is not decisive in the circumstances of this case. Halliwell had not actually claimed the 17-foot disputed tract. His possession, control, and use of it were based on a mistaken belief that the fence north of the trees was the true boundary line. Appellee had the same mistaken belief. Halliwell did not intend to have or continue in the possession of land which Knobel owned; neither did Knobel intend that Halliwell should. Halliwell and appellee continued the

precise situation and attitude in reference to the boundary line fence between their properties after the conveyance from the former to the latter for more than 13 years and until the death of Halliwell as that which existed between them before that conveyance was made. Halliwell's possession was not less adverse because he took possession of the land innocently and through mistake. His open, exclusive possession under claim of ownership constituted its adverse character and was notice to appellee of the adverse claim of Halliwell. In Purdum v. Sherman, *supra,* the court said: "The plaintiffs contend, however, that the defendant Sherman had never actually claimed the disputed tract and that her use of it was based only on a mistaken belief that the west fence on the railroad right-of-way was the true boundary line. The evidence sustains this contention. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. * * * The rule is stated in Annotation, 97 A. L. R., p. 58, as follows: 'In a steadily increasing number of jurisdictions, the possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character * * *. Or, as said in 1 R. C. L. 733, "the mere fact of possession is allowed to override the intention; and it is held that a possession beyond the true boundary lines, irrespective of the intention with which it was taken, becomes adverse." ' * * * It is evident, there-

fore, that while defendant Sherman did not know where the true boundary was, as shown by her deed, she occupied and used the disputed tract for grazing purposes for more than 10 years under the belief that the west fence on the railroad right-of-way was the boundary. It is evidence which establishes a use showing actual, open, exclusive, and continuous possession, and when such use has existed for the statutory period of 10 years, it is sufficient to sustain a claim of title by adverse possession."

There were statements made by Mary Lillian Birt while she was a witness to the effect that she did not at any time "claim to own that part of the street North of Lot 1," referring to Knobel Street, and that at no time did she ever "claim anything North of the actual lot line * * *." There were other similar assertions made by her. Appellees, because of these, assert that she did not claim to have had adverse possession of the tract involved during the period she owned Lot 1 from December 31, 1943, to June 23, 1951. Her statements in this respect are not conclusive. Her acts concerning the property were inconsistent with her asserted intention. In Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404, it is said: "With reference to the testimony of the defendants to the effect that the plaintiffs made no claim to any other land than to the true boundary line, * * * it is clear that not too much importance should be attached to what an occupant may claim on the witness stand on this point, particularly when it is apparent that his testimony is altogether inconsistent with his acts and conduct during the period of his possession. Any honest witness * * * would be likely to answer a question as to whether he claims more than to the true boundary in the negative, and would not be likely to think of qualifying it by stating that the true boundary of which he speaks is the boundary as appears to him to be the true one." See, also, Purdum v. Sherman, *supra.*

Appellants say in their brief that the question in-

volved in this case is are they "entitled to a decree quieting title to a 17 foot strip of land to the North of their legal lot line"? They state or refer to no other question in the case. It is said that the judgment is contrary to law and contrary to the evidence. There is no assignment concerning the absence of a judgment for any amount of money in favor of appellants and against appellee. There is no discussion in the brief in reference to any right of appellants to recover any amount of money from appellees. In the last paragraph it is asserted that plaintiffs (appellants) are entitled to damages because of loss of the trees in accordance with the prayer of the petition. The prayer of the petition in this regard is "that this plaintiff have and recover from the defendants and each of them the sum of $1500.00." The petition contains on this subject only the allegation "that said property has been depreciated in value by the cutting down of said trees at least the sum of $1500.00." The words "said property" therein, as shown by the context, definitely refer to the land of the plaintiffs. The only allegation concerning damages is that the land had depreciated $1,500 because trees had been cut therefrom. There is no evidence in the record as to the value of the land with the trees growing thereon immediately before they were destroyed, or of the value of the land without the trees. There is no evidence to support the allegation of the petition in this respect. If it was intended to claim recovery for the loss of the trees as such, then there is no pleading to support any recovery on that basis. The allegation of a pleading and the proof offered must agree. A litigant may not allege a basis of recovery and on trial rely upon proof tending to establish a different basis for recovery. Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489.

The judgment should be and it is reversed and the cause is remanded to the district court for Buffalo County with directions to render a judgment quieting title in fee

to the real estate, the subject of this action, in appellants.
REVERSED AND REMANDED WITH DIRECTIONS.

PERKINS COUNTY HIGH SCHOOL DISTRICT, APPELLEE, V. RUTH REES MCQUISTON, AS COUNTY SUPERINTENDENT OF PERKINS COUNTY, NEBRASKA, ET AL., APPELLEES, SCHOOL DISTRICT NO. 29 OF CHASE COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLANTS.

93 N. W. 2d 32

Filed November 14, 1958. No. 34386.

1. **Schools and School Districts: Parties.** School districts of the classes involved in this action as such were not real parties in interest in proceedings to organize and create a new high school district pursuant to the provisions of section 79-1102, R. S. Supp., 1955.
2. **Injunctions.** Injunction is available to test the constitutionality of a statute providing for the establishment of a new high school district.
3. **Schools and School Districts: Injunctions.** An established high school district is a proper party to maintain an action to enjoin proceedings to remove an area from such established district and to place it within a proposed new high school district on the ground that the legislative act providing for the removal is unconstitutional.
4. **Schools and School Districts: Constitutional Law.** The requirement of notice and hearing in proceedings to establish a new high school district is satisfied if the statute requires that the designated board or officer charged with the erection of the new district give notice of the action taken and afford opportunity to object thereto, and the requirement that there shall be opportunity for a judicial determination is fulfilled by the right of resort to the court through proceeding in error to review the proceedings before the designated board or officer.

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

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellants.

Marti, O'Gara, Dalton & Sheldon, for appellee Perkins County High School Dist.

W. C. Conover and *H. W. Curtis,* for appellees McQuiston et al.

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

YEAGER, J.

This is an action which was instituted in the district court by Perkins County High School District, plaintiff, against the county superintendents, county clerks, county assessors, and county treasurers of Perkins and Chase Counties, defendants. In the action school districts Nos. 29 and 49 of Chase County, school districts Nos. 8 and 65 of Perkins County, six members of the board of trustees of school district No. 65 of Perkins County, two electors of school district No. 49 and one elector of school district No. 29 of Chase County, one elector of school district No. 8, two electors of school district No. 65, one elector of school district No. 31, and one elector of school district No. 61 of Perkins County joined in a petition of intervention.

The action was one in equity to enjoin the defendants from effecting the creation, formation, or organization of a new high school district which would have comprised in it school districts in Perkins and Chase Counties.

The action was tried to the court and a decree was rendered whereby the injunction prayed for was granted. From the decree the interveners jointly appealed. The defendants have not appealed.

The facts in the case and the issues presented to the district court for determination are not in dispute. Pursuant to the terms of section 79-1102, R. S. Supp., 1953, school districts Nos. 29 and 49, both Class I country school districts that maintain and teach only elementary grades up to the eighth grade; school districts Nos. 31, 61, and 8 in Perkins County, all Class I country school

districts teaching only elementary grades up to the eighth grade; and school district No. 65 in Perkins County, a Class II school district that taught both elementary and high school grades, filed with the county superintendents of Chase and Perkins Counties petitions, identical in form, asking to have these districts united and formed into a single high school district for high school purposes. The board of education of school district No. 65 also filed a resolution asking for the creation of the new district. The county superintendents gave notice of the filing of the petitions and the resolution, and of a hearing thereon to be held on July 11, 1955, in the district courtroom at Grant in Perkins County. The petitions and resolution were denied. However, pursuant to the opinion and decision of this court in School Dist. No. 65 v. McQuiston, 163 Neb. 246, 79 N. W. 2d 413, the petitions and resolution were granted and the six districts were ordered united into a high school district.

The sole and only contention made by the petition in this case was that section 79-1102, R. S. Supp., 1955, is unconstitutional for the reason that it contains no provision for notice and hearing to determine the existence of the jurisdictional facts prescribed in the section. That was the only question determined by the decree. By the decree the statute was declared unconstitutional. Section 79-1102, R. S. Supp., 1953, was the statute which was in effect at the time of the commencement of the organizational proceedings but it is the same as section 79-1102, R. S. Supp., 1955, so for the purposes of this case this inadvertence is of no real consequence.

At this point it will be stated that the section does not contain a provision for notice and hearing. The appellants however contend substantially that this is of no importance if elsewhere in the statutes properly applicable provision is found. The plaintiff does not seriously contend otherwise.

This position of the appellants is without question correct. A reading of Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, makes this point abundantly clear.

Before considering the question of whether or not the statutes contain provisions for notice and hearing in a situation such as this it becomes necessary to ascertain whether or not the plaintiff is a proper party to maintain this action. The appellants contend that it is not.

The appellants insist that the plaintiff, a school district, is not a real party in interest to the formation of the proposed high school district or the removal of districts from the district over which the plaintiff has control and supervision, hence it may not maintain an action to enjoin severance of areas from its control whether section 79-1102, R. S. Supp., 1955, is or is not constitutional.

The contention of the appellants that the plaintiff was not a real party in interest in the matter of consolidation of the school districts involved here is sustained by the decisions of this court. As pointed out in Clausen v. School Dist. No. 33, 164 Neb. 78, 81 N. W. 2d 822, the electors were the real parties in interest.

It does not follow however that because of this the plaintiff was barred from maintaining the action. Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056, was a case wherein action was instituted to enjoin a county superintendent from erecting a new school district out of territory lying outside the city of Fremont but within the school district of Fremont on the ground that the legislative grant of power was unconstitutional. This court, without saying that the board of education of the school district of Fremont was a real party in interest in the erection of the new district, did point out that the board of education, having the power and duty to protect and preserve the property belonging to the district, had the right to maintain the action. See, also, Ruwe v. School Dist., 120 Neb. 668, 234 N. W. 789.

A further question should be passed upon before considering that of notice and hearing. The question is that of whether or not the constitutionality of section 79-1102, R. S. Supp., 1955, may be presented by petition for injunction. This court held in Schafersman v. School Dist., 120 Neb. 673, 234 N. W. 791, that injunction is a proper remedy to prevent a school district and its officers from assuming jurisdiction over, and taxing land in, another school district. This holding was approved in Nickel v. School Board of Axtell, *supra.*

Notice and hearing sufficient to satisfy the requirements of law mean a hearing on notice to all parties in interest who shall be accorded an opportunity to be heard on and have judicially determined whether the rights of such parties have been injuriously affected. Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347; Ruwe v. School Dist., *supra;* Nickel v. School Board of Axtell, *supra.*

The requirement as to necessity for notice and hearing has been satisfied if the statute requires that the designated board or officer charged with the erection of the new district shall give notice of the action taken and afford opportunity to object thereto. The statutes relating to review of the decisions of boards and administrative agencies by the district court by proceedings in error fulfill the requirement of opportunity for judicial determination. Nickel v. School Board of Axtell, *supra.*

Returning now to the question of whether or not the statutes contain provisions sufficient to satisfy the requirements as to notice in the event of the creation of a school district pursuant to the substantive requirements of section 79-1102, R. S. Supp., 1955, it appears advisable to trace the history and evolution of that section.

The legislative history of the joinder of school districts for the purpose of formation and organization of rural high school districts starts with the year 1901.

In that year the following was enacted as chapter 64, section 1, page 441, of the Laws of 1901: "Any two or more adjoining school districts in any county of this State which are not able or do not deem it expedient to maintain a school of more than eight (8) grades may unite for the purpose of forming one high school district and maintaining one high school as hereinafter provided."

Section 2 of the chapter provided for the submission of a proposal at any regular annual meeting or any special meeting called for that purpose in the manner provided by subdivision II, chapter 79, of the Compiled Statutes, and further provided that in order to become effective the proposal should be adopted by a majority of the qualified voters present at the meeting in each of the districts.

The pertinent provisions of the Compiled Statutes above referred to were contained in sections 4662, 4663, and 4664, Compiled Statutes of Nebraska for 1901. They relate to place of meetings, the date of annual meetings, the call of special meetings, and notice of annual and special meetings.

Section 1 of chapter 64 of the Laws of 1901 remained the same until it was changed slightly by the statutory revision of 1943. In the revision the words "as hereinafter provided" were deleted and the words "as provided in sections 79-802 and 79-803" were substituted. Section 1 of chapter 64, Laws of 1901, was section 79-801, in the 1943 revision.

By section 79-802, R. S. 1943, it was provided that when ten or more qualified electors submitted a proposal to join with another or other districts the proposition should be submitted at a regular annual meeting or at a special meeting called for that purpose and it should be voted upon at that meeting, and that in the districts where a majority favorable vote was cast the directors were required to so report to the county clerk.

No comment upon section 79-803, R. S. 1943, is required here.

In 1949 the school laws were largely revised and amended, and for all practical purposes section 79-801, R. S. 1943, became section 79-1102, R. R. S. 1943, thereafter. It is as follows: "Any four or more adjoining school districts in any county of this state, which are not able or do not deem it expedient to maintain a school of more than eight grades, may unite for the purpose of forming one high school district and maintaining one high school, upon the petition of fifty-five per cent of the legal voters residing in such districts addressed to the county superintendent, asking to have such districts formed into a high school district."

It is to be observed that the number of districts to be combined to create a district was increased to four and the combination was made to depend upon a petition of 55 percent of the legal voters of each district to the county superintendent requesting the formation of a district.

The provisions of the previously existing statutes specifically requiring submission to the voters of the respective districts of the proposals for formation of rural high school districts were removed and these were not replaced by any specific requirement for notice to the voters.

In 1953, section 79-1102, R. S. Supp., 1951, was amended in such manner as to extend the right of formation of rural high school districts to four or more districts in two or more counties. The conditions of formation were the same except that petitions were required to be submitted jointly to the county superintendents of the several counties for action jointly by them.

At the time the petitions and resolution were filed with the county superintendents for the creation of the rural high school district in question there was no statutory provision for notice and hearing directly referable

to the formation of high school districts under section 79-1102, R. S. Supp., 1953. However, section 79-402, R. S. Supp., 1953, which was in effect at the time the filings for formation of the new district were made, contained the following: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. * * * Provided, changes affecting cities or villages shall be made upon the petition of the school board or the board of education of the district or districts affected. Before the county superintendent authorizes any changes as provided in this section, the county superintendent must fix a date for hearing and give all interested parties an opportunity to be heard at such hearing."

It is to be observed that the provision contains no directly exclusionary language as to the source of the petitions and none from which an exclusionary intent is reasonably inferable. In plain and unmistakable language it is made to appear that the notice to all interested parties and opportunity for them to be heard applies in the case of creation of new districts or change of boundaries to all types and kinds recognized by statute including those permissible under section 79-1102, R. S. Supp., 1955.

In the present instance, as has already been indicated, the real parties in interest were the electors of the two elementary school districts in Chase County, the three in Perkins County, and the school board of school district No. 65, a Class II district in Perkins County.

It cannot be said therefore that section 79-1102, R. S. Supp., 1955, is unconstitutional as contended by the plaintiff. The decree of the district court therefore is reversed and the cause remanded with directions to deny injunction and to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES C. BRADFORD, APPELLEE, v. L. N. RESS, FIRST AND REAL NAME UNKNOWN, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

93 N. W. 2d 17

Filed November 14, 1958. No. 34414.

Automobiles: Judgments. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations, which judgment has been duly certified in regular form and sent to the director of motor vehicles with nothing appearing thereon indicating invalidity, cannot be collaterally attacked in an appeal to review mandatory and ministerial action of such director in revoking the license of such person to operate a motor vehicle in this state.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for appellant.

George W. Dittrick and *Moyer & Moyer,* for appellee.

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

CHAPPELL, J.

Plaintiff, James C. Bradford, appealed to the district court from an order of defendant, L. N. Ress, director of motor vehicles, which had revoked plaintiff's license to operate a motor vehicle in this state. Plaintiff's primary ground for relief was in substance that the order of revocation was erroneous and unenforceable because the justice of the peace of Norfolk, Madison County, who, upon one occasion had convicted plaintiff of speeding, was without jurisdiction to render judgment of conviction, and same was void because no complaint was on file in such court charging plaintiff with the offense at the time the judgment was rendered. Attached to and made a part of plaintiff's petition on appeal was a copy of a written notice dated November 19, 1956, sent by defend-

ant and received by plaintiff, which had notified him by registered mail that his license to operate a motor vehicle had been revoked for 1 year from November 8, 1956, because plaintiff had accumulated a total of 12 or more points within a 2-year period. Such notice also demanded return of plaintiff's license to defendant.

In that connection, plaintiff's license had thus been summarily revoked as required by section 39-7,129, R. S. Supp., 1955, and notice thereof to plaintiff contained the information required by section 39-7,130, R. S. Supp., 1955. Also, after such final order of revocation had been rendered, defendant timely prepared an admittedly true and complete certified transcript of his proceedings concerning revocation of plaintiff's license, and plaintiff timely filed same in the district court before answer day, as required by section 60-420, R. R. S. 1943.

Plaintiff's petition prayed for stay of revocation pending final determination of his appeal, which, upon hearing, was ordered by the trial court, and he still retains his operator's license. Plaintiff also prayed for vacation of the order of revocation, reinstatement of his license, and equitable relief.

Defendant's answer denied generally; and alleged that plaintiff's license to operate a motor vehicle was No. J7-7476, and that it was still possessed by plaintiff although it had been revoked by defendant as aforesaid, and its return had been demanded. Defendant also alleged that notice thereof had been sent to and received by plaintiff, which was admitted as heretofore pointed out. Defendant prayed for dismissal of plaintiff's petition and equitable relief. Plaintiff's stipulated reply was a general denial.

After hearing, the trial court rendered judgment finding and adjudging the issues generally for plaintiff and against defendant for the reason that when the judgment of conviction of plaintiff for speeding was rendered by a justice of the peace of Madison County no complaint was on file in that court, thus said court was without

jurisdiction to render the judgment and it was null and void. Upon such basis, the judgment expressly found and adjudged that plaintiff had not accumulated 12 points within any 2-year period; and it vacated and set aside the revocation of plaintiff's license, then reinstated his license, and taxed costs to defendant. Thereafter, defendant's motion for new trial was overruled and he appealed, assigning that the trial court erred in admitting exhibit No. 2 in evidence, and that the judgment was not sustained by the evidence. We sustain the assignments.

Neither plaintiff, defendant, nor any other witness gave any oral testimony. The record contains only the pleadings with admissions therein, stipulations, a signed and filed pretrial order, and exhibit No. 2, a certified transcript of the record of proceedings before the justice of the peace of Madison County and the judgment of conviction for speeding claimed by plaintiff to be void. Exhibit No. 2 was offered by plaintiff and admitted in evidence over defendant's objection that it was immaterial in this appeal proceeding. Defendant's contention in such respect was and is that validity of plaintiff's conviction was not a question "raised before the director," a limitation in the appeal provided by section 60-420, R. R. S. 1943, and that plaintiff's contention that the judgment of conviction was void was a collateral attack which could not be raised on appeal from defendant's mandatory ministerial revocation. Under the circumstances presented here, we sustain that contention.

The notice of revocation sent to plaintiff stated in substance that on April 1, 1955, and again on March 19, 1956, plaintiff was convicted of speeding in the justice court of Dodge County; that on March 28, 1956, plaintiff was convicted of speeding in the justice court of Madison County; that on November 8, 1956, plaintiff was convicted of speeding in the county court of Cuming County; and it set forth three points charged for each such conviction, as provided by subsection (10) of sec-

tion 39-7,128, R. S. Supp., 1955, making a total of 12 points within a 2-year period.

In that connection, section 39-7,129, R. S. Supp., 1955, provides in part: "Whenever it shall come to the attention of the director that any person has, *as disclosed by the records of such director,* accumulated a total of twelve or more points within any two year period, as set out in section 39-7,128, the director shall *summarily revoke* (1) the license of such person to operate a motor vehicle in this state, * * * for a period of one year from the date of the latest conviction of such person * * *." (Italics supplied.) It will be noted that the duty to revoke is mandatory.

Section 39-796, R. S. Supp., 1955, provides in part: "To enable the director of motor vehicles punctually and economically to perform his ministerial duties in revoking * * * operators' licenses and to insure uniformity in the keeping of the records of operators' licenses * * * revoked by courts * * * he shall prepare and furnish to all courts of the state a standard form of abstract for conviction report, which shall include a form for the certified copy of the judgment of conviction and all necessary information as to the parties to the case, the nature of the offense, the date of hearing, the plea, the judgment, the amount of the fine * * * as the case may be. Every such abstract shall be certified * * * as a true abstract of the record of the court. In the administration of sections 39-794 to 39-796 or of any section of the Motor Vehicle Operators' License Act, the powers and duties conferred upon the director of motor vehicles * * * with respect to the revocation * * * of any operator's license * * * are *ministerial in character.* The director of motor vehicles shall have authority to revoke * * * operators' licenses only when positively directed to do so by the terms of the certified copy of the judgment of conviction forwarded to him by the trial court, *except as otherwise provided* in sections 39-7,129, 60-416, and 60-419, and Chapter 60, article

5." (Italics supplied.) It will be noted that the revocation is a ministerial act.

Also, section 39-794, R. S. Supp., 1955, provides in part: "Every justice of the peace * * * or court in this state shall make complete entries in the court docket, including the judgment of conviction, of every case in which a person is charged with violation of any provision of sections 39-616, 39-723, and 39-726 to 39-7,127, or sections 60-401 to 60-440, or any amendments to any of such sections, or any traffic regulations in city or village ordinances. In the event that such person is convicted * * * a certified copy of the judgment of conviction shall be sent forthwith by the justice of the peace * * * or court to the director of motor vehicles and to the county treasurer of the county wherein the convicted person was licensed; * * *."

Further, section 39-795, R. S. Supp., 1955, provides in part: "Each clerk of any court of record of this state shall also, within ten days after any final judgment of conviction of any violation of any of the provisions of sections 39-616, 39-723, and 39-726 to 39-7,127, or sections 60-401 to 60-440, or any amendments to any such sections, or any traffic regulations in city or village ordinances, send to the director and to the county treasurer a certified copy of such judgment of conviction on the standard form of abstract for conviction reports. * * * The director and the county treasurer shall keep such conviction reports in their offices, and they shall be open to the inspection of any person during reasonable business hours."

The certified transcript of defendant's proceedings concerning the revocation of plaintiff's license, prepared at plaintiff's request, and timely filed by him in the district court, was admittedly true and complete. It disclosed that each justice of the peace and the clerk of the county court respectively complied with sections 39-794 and 39-795, R. S. Supp., 1955, on certified standard conviction report forms prepared and furnished by

defendant, as required by section 39-796, R. S. Supp., 1955.

In that connection, plaintiff raised no question with regard to the validity of his convictions for speeding on April 1, 1955, and March 19, 1956, in the justice court of Dodge County, or on November 8, 1956, in the county court of Cuming County. Plaintiff did argue that the standard certified forms of the abstract for conviction reports sent to defendant were fatally defective and erroneous because certain of them did not appear to have been certified by designating their official capacity as justice of the peace or clerk of the county court. However, a supplemental transcript thereof, filed by leave of this court, corrected plaintiff's misapprehension in that respect.

The "Abstract of Court Record" of conviction certified by the justice of the peace of Norfolk, Madison County, and sent to defendant as an admittedly true and complete abstract of the judgment of conviction of plaintiff here involved, was as follows: "Defendant's Full Name James C. Bradford Operator's License No. J7-7476 Complete Address Battle Creek, Nebraska * * * Justice Court Docket No. V5 Page No. 115 Defendant's Age 33 Sex M. Race W. * * * Section Violated 39-723 Offense SPEEDING Hearing Date 3-28-56 Plea Guilty X * * * Violation Date 3-25-56 Fine $10.00 Costs $4.50 * * * Arresting Officer O. H. Young Department State Patrol." Nothing appeared therein indicating invalidity of the judgment of conviction as claimed by plaintiff.

In that connection, section 60-420, R. R. S. 1943, provides in part: "The district court shall hear the appeal as in equity and without a jury, and determine anew *all questions raised before the director;* * * *." (Italics supplied.)

In the light thereof, and despite the italicized limitation aforesaid, plaintiff claimed the right, on appeal from the order of revocation, to show that the judgment of conviction for speeding set forth in the foregoing

recited abstract of record was void because he voluntarily appeared in said court on March 27, 1956, was then arraigned, waived reading of the complaint, pleaded guilty, and was fined and paid same, but there was no complaint then on file in said court and same was admittedly designated as made and filed March 28, 1956. No contention was made that plaintiff was not guilty of speeding upon that occasion or that the complaint for speeding was insufficient to charge the offense, and admittedly the judgment of conviction still stands of record, with its validity never having been challenged in that court or by appeal, error proceedings, or otherwise, except in this appeal from revocation of his operator's license.

Contrary to plaintiff's contention, this is not a case wherein the director had any discretion or acted in any quasi-judicial capacity. See Strasser v. Ress, 165 Neb. 858, 87 N. W. 2d 619. Section 39-7,129, R. S. Supp., 1955, required, and it was mandatory that when it came to defendant director's attention, that plaintiff had "as disclosed by the records of such director, accumulated a total of twelve or more points within any two year period, as set out in section 39-7,128" (here subsection (10) thereof), it was defendant director's duty to "summarily revoke (1) the license" of plaintiff "to operate a motor vehicle in this state * * * for a period of one year from the date of the latest conviction of" plaintiff. As stated in Stewart v. Ress, 164 Neb. 876, 83 N. W. 2d 901: "This was a duty, ministerial in character, required to be performed by appellant. § 39-796, R. S. Supp., 1955."

The question then arises, what are the "records of such director" referred to in section 39-7,129, R. S. Supp., 1955, from which defendant was required to acquire his information and summarily revoke plaintiff's license as a mandatory ministerial duty? They were the respectively duly certified standard forms of abstract for conviction reports setting forth the judgment of con-

viction and other related information, as required by section 39-796, R. S. Supp., 1955, and sent to the director by the court rendering the judgment, as required by sections 39-794 and 39-795, R. S. Supp., 1955. In this case, such records of judgments of conviction appear in the "stipulated and agreed * * * true and complete transcript of the record from the files in the Office of the Director of Motor Vehicles with reference to the plaintiff James C. Bradford, up to the date of December 3, 1956, * * *." Herein, plaintiff, by the use of exhibit No. 2, and based alone thereon, contended that one such judgment of conviction aforesaid for speeding was void for reasons heretofore set forth.

In such respect, defendant did not argue that plaintiff was not entitled to relief from that conviction of a misdemeanor if and when in other proper proceedings there was competent evidence that the judgment was void, but defendant did argue that under the circumstances, appeal by plaintiff from the order of revocation by the director in this civil proceeding was a collateral attack and not a proper method of seeking such relief. We sustain that contention.

Authorities relied upon by defendant are generally distinguishable from the case at bar, which involves a mandatory ministerial duty based upon statutory requirements. Authorities more directly in point under such provisions, and other authorities as well, which are generally distinguishable factually or by reason of statutory provisions, are found annotated in West Key Number System, Automobiles, § 144. One such late authority uses language which we approve and employ as controlling here. In In re Application of Gross, 284 App. Div. 786, 135 N. Y. S. 2d 435, the commissioner (comparable with our director) had revoked the driver's license of a motorist pursuant to mandatory provisions of the statutes because of successive traffic violations within a period of 18 months. At the time the commissioner acted and revoked the license, he had cer-

tificates of conviction required to be more comprehensive in substance than our own, which had been made out by the magistrates and forwarded to the commissioner. Upon appeal from the revocation, appellant claimed that his first conviction was void for want of conformity with certain jurisdictional statutes by the trial court. In the opinion the court indicated, under circumstances which we do not deem it necessary to recite, that appellant had waived such statutes, but that issue was not and could not be presented here.

In that opinion, the court said: "However, our decision need not depend solely upon the ground of waiver, because, even if the conviction were vulnerable to direct attack, it may not be collaterally attacked in this civil proceeding. If, in fact, the conviction was improper, petitioner's remedy was by way of a * * * proceeding to set aside the judgment of conviction * * * and unless and until that is done, he may not assert upon this appeal that the Commissioner acted improperly. The Commissioner was confronted with the proper certification of three convictions for a violation of Section 56, all occurring within eighteen months. All were in regular form with nothing to indicate the facts outlined above. He was bound to act as he did by Section 71, subd. 2, par. (c) of the Vehicle & Traffic Law, which says he 'must' revoke. The Legislature has neither required nor authorized the Commissioner to go behind and beyond the record of conviction and pass upon all questions relating to the validity thereof. * * * He could have been compelled to take the action he took upon the facts before him. It would impose an undue and unauthorized burden upon the Commissioner to mandate him to act upon convictions and at the same time require him to investigate the background of each one and pass upon its validity. On this record the Commissioner acted correctly upon the facts before him as he was required to do. Such a determination should not be annulled." That is a situation identical in all

material respects with the case at bar, and the conclusions set forth in such opinion are controlling. To hold otherwise would invite chaos and would delay and defeat the intended summary enforcement of plain mandatory statutes which were enacted to protect the public from the danger of repeated violations of traffic laws by heedless drivers of motor vehicles.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to sustain the order of revocation for 1 year from the date of the judgment rendered on the mandate herein, and to order plaintiff to return his license forthwith to defendant director as theretofore demanded. All costs are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

The court is concerned with the "summary enforcement" of the statutes by the director. That is not the question presented here.

Here we are concerned with the rights of a licensed driver, their extent under the statutes, and their protection in the courts of this state after the summary proceedings before the director have been exercised. We begin here where the summary proceedings end.

The proceedings before the director are summary. They are ex parte, no witnesses are called, no hearing had, and no opportunity given to the driver to present his contentions. The order of the director becomes as final an order as is the "judgment of a court of general jurisdiction." § 60-420, R. R. S. 1943. It is difficult to conceive of a more summary proceeding. But that proceeding as such is not an issue here.

For the statute gives a person feeling aggrieved the right of an "appeal." § 39-7,130, R. S. Supp., 1955; § 60-420, R. R. S. 1943.

And what is the right of appeal? The statute defines it: "The district court shall hear the appeal *as in*

equity, and without a jury, and determine *anew* all questions raised before the director; * * *." (Emphasis supplied.) § 60-420, R. R. S. 1943.

I am concerned with the impact of this decision on the right of trial on "appeal as in equity" and "anew." This decision reduces the right of appeal to the limited right of an error proceeding, and restricts that to the limitation as to whether the "records of such director" sustain his final order. Such is not the legislative intent in the plain language of the act.

The court quotes the statute in part, but does not undertake to define the rights which flow from it.

In Commonwealth v. Herzog, 359 Pa. 641, 60 A. 2d 37, the proper official suspended a driver's license for a statutory cause. He appealed to the court of common pleas and the suspension was affirmed. On further appeal, the Supreme Court reversed and vacated the suspension order. The pertinent provisions of the opinion follow: "It is implicit in the opinion filed by the court below that the primary concern of the hearing judge was whether the action of the Secretary of Revenue was justified by the available evidence in the case. Such an approach to the problem was, of course, contrary to the intent of The Vehicle Code. The relevant provision of the Statute (Sec. 616, 75 PS § 193), as frequently and uniformly construed by this Court, means that the hearing on an appeal to a common pleas court from an order of the Secretary of Revenue suspending an operator's license is to be de novo: * * * In Commonwealth v. Cole, 350 Pa. 369, 371, 39 A. 2d 361, Mr. Justice Patterson, speaking for this Court, said with respect to existing pertinent decisions,—'All of these cases hold that an appeal to the court is not for the purpose of reviewing the evidence taken before the secretary, and his action thereon, but *to hear evidence and determine,* in the exercise of the court's sound discretion and in the furtherance of justice, whether the license should be suspended'. Nor was the error of

the situation offset by the bald statement in the opinion, subsequently filed, that 'The Court heard the case de novo and at the conclusion of the testimony dismissed the appeal'. That expression was but a pro forma affirmation of the legal requirement in the circumstances which had not been followed in practice as will be seen.

"After treating with the evidence in the case and finding that the defendant was 'not entirely free of negligence', the court below dismissed the appeal because of the expressed feeling '* * * that the department has not abused the discretion which the law gives them in suspending the operator's license of any person operating a motor vehicle in an accident resulting fatal to any person * * *'. *Yet, the court's duty in the premises was to determine independently, on the basis of the testimony adduced at the hearing on the appeal, whether the suspension was merited.* One of the principal offices of the appeal, in obedience to constitutional requirements, is to furnish a judicial hearing on the merits. In no way does the appeal partake of the nature of a certiorari: see Commonwealth v. Funk, 323 Pa. 390, 397, 186 A. 65. In that case, it was held (p. 399) that the inclusion by the hearing court of testimony taken before the Secretary on the license suspension, merely as a part of the record on the appeal, was error. The offense of the court in the present instance was even greater." (Emphasis supplied.)

But we need not go afield for decisions construing the Legislature's meaning and the scope of the trial provided for in the instant case.

In Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. 2d 332, we had before us provisions of the Nebraska Unemployment Compensation Law.

I quote from that opinion: "On the trial of the case in the district court, the court permitted the introduction of additional and new evidence, to which objection was timely made on the ground that the case, under the

unemployment compensation act, was required to be heard on the record made before the appeal tribunal. Subsection (h) of section 48-706, Comp. St. Supp. 1939, states in part: 'In any judicial proceeding under this section, trial de novo shall be had to the judge of such court.' There is no other language restricting the scope of the investigation to be made by the district court. The district courts of this state are courts of general jurisdiction, and in the absence of specific statutory restriction a provision of statute providing for an appeal to and a trial de novo in the district court contemplates a trial in the commonly accepted sense of that term in a court of general jurisdiction, including the right to produce evidence in the same manner as if the action had originated in the district court." The syllabus point is: "A trial de novo in a court of general jurisdiction, in the absence of statutory language restricting its scope, means a trial in the commonly accepted sense of that term in such a court."

In Beecham v. Falstaff Brewing Corp., 150 Neb. 792, 36 N. W. 2d 233, we had before us this language from the same law as it existed at that time: " 'In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo *upon the record.*' " (Emphasis supplied.) I emphasize the above language because the court seems to place some importance to the "as disclosed by the records" provision of section 39-7,129, R. S. Supp., 1955, in connection with "all questions raised before the director" provision of section 60-420, R. R. S. 1943. Nevertheless in the Beecham case we followed the Deshler Broom Factory case and held: "It follows then that when this matter came before the district court it became the *duty* of that court to consider and determine the case de novo or in other words to try the case anew." (Emphasis supplied.) The syllabus point is: "In a hearing in the district court on appeal from a determination of an appeal tribunal set up under the provision of the Placement and Unemploy-

ment Insurance Law of the State of Nebraska the trial *is required* to be de novo, or in other words anew." (Emphasis supplied.)

Finally in A. Borchman Sons v. Carpenter, 166 Neb. 322, 89 N. W. 2d 123, we held: "Preliminary to a statement of fact and issues, it is necessary that we determine two matters. First. By the provisions of sections 48-639 and 48-640, R. R. S. 1943, of the Employment Security Law, the district court *and this court* consider the causes de novo upon the record, or 'in other words to try the case anew.' * * * This means also that it is the duty of this court to 'retry the issue or issues of fact involved in the finding or findings of fact complained of' and 'reach an independent conclusion' thereon." (Emphasis supplied.)

In the face of the mandate of the statute and the decisions of this court, the court now directs an affirmation of the order of the director based on a review of the purported record of the proceedings before the director. A trial de novo is denied.

What were the issues made in the trial court?

By his petition on appeal the plaintiff alleged in part: "The Plaintiff expressly denies that he was lawfully convicted of the offense of speeding at the times and on the dates set forth in the Defendant's letter of November 19, 1956, * * *." The court refers to this letter and it relates to the four alleged convictions for speeding upon which the action of the director rests.

The director answered summarizing the record of the four convictions upon which he had based the revocation order. There was no reply filed but in a pretrial order it was admitted by plaintiff that certain allegations of the director as to plaintiff's residence, the identifying number of his operator's license, and the entry of the revocation order were true, and "by way of reply plaintiff denies each and every other allegation of affirmative defense contained in said answer; * * *."

In the face of that state of the pleadings, the court

states: "* * * plaintiff raised no question with regard to the validity of his convictions for speeding on April 1, 1955, and March 19, 1956, * * * or on November 8, 1956, * * *." I submit that by the pleadings plaintiff put those matters in direct issue.

What was the evidence in the district court that this driver had accumulated a total of 12 or more points? I hold that question was a direct issue in the district court. It was likewise the question before the director.

The court states that a "certified transcript of defendant's proceedings * * * timely filed by him in the district court, was *admittedly* true and complete." (Emphasis supplied.)

But what about the "certified transcript * * * was admittedly true and complete" statement of the court?

Following defendant's answer, in the transcript, is a page entitled "Certificate" and reciting that the "attached is a complete and accurate transcript" of the proceedings in re operator's license of plaintiff. Only the first page, which contains the "Certificate" has a filing mark. This is followed by nine unidentified pages containing no filing mark. They are no more "attached" to the certificate than they are to all other documents in the transcript. Then comes a pretrial order. This "Certificate" is not identified in or referred to in defendant's answer.

The court holds that the record of judgments of conviction appear in the "stipulated and agreed * * * true and complete transcript of the record from the files in the Office of the Director of Motor Vehicles with reference to the plaintiff James C. Bradford, up to the date of December 3, 1956, * * *." The quote is correct, and taken from the pretrial order, but is incomplete. Omitted is "Exhibit 1 is a" ahead of true and complete, and omitted from the conclusion is "and may be offered and received in evidence without further foundation."

The important thing is that "Exhibit 1" was neither identified, offered, nor admitted in evidence. The con-

tents of the exhibit do not appear. "Ex. No. 1" appears on the certificate page of the paper filed with the clerk of the district court. There is no attempt to identify the transcript filed in the district court clerk's office with "Exhibit 1" referred to in the pretrial order.

Obviously the stipulation was the standard form for stipulating a waiver of foundation. It is so expressed. The exhibit to be considered in the trial should have been offered in evidence. This is the construction that the parties put on the stipulation, for exhibit 2, under a stipulation in the pretrial order, containing the exact condition was offered and received in evidence. To be considered here the exhibit must have been offered in evidence. It was not so offered.

The long established and heretofore followed rule is: "In order that a stipulation of facts may be considered on appeal, such stipulation must be identified and offered in evidence on the trial of the case and preserved in a bill of exceptions." Higgins v. Postal Life & Casualty Ins. Co., 161 Neb. 278, 73 N. W. 2d 175.

Even on the court's theory of the limited review afforded there was obviously no sufficient evidence before the trial court to sustain the director's action. He at least should be required to prove his "record" that sustains his action. And yet the trial court is ordered to direct the affirmance of the director's order even though there was no evidence before the trial court to show the required convictions to sustain the accumulation of 12 points.

The court holds that the plaintiff is making a collateral attack on a judgment and there is the suggestion that he should have made a direct attack on the judgment in a court of competent jurisdiction and, having succeeded, then come to the director for relief from his "final order." Nowhere in the statute is there a suggestion that the Legislature contemplated such a circuitous multiple suit route to relief.

The court is concerned with the "chaos" and "delay"

that will follow any other decision than the one it makes.

Section 39-7,131, R. S. Supp., 1955, provides: "Upon receiving a certified copy of the judgment of conviction of any resident of this state in any other state, the director shall charge such person with the number of points such offense would have justified if committed in this state."

This decision can not only mean that a resident of Richardson County might be required to go to Sioux County to make such a direct attack, and all action in the director's office be enjoined in the meantime, but under these exact circumstances, if there were a questioned judgment by a court of Maine or Washington or Florida or Alaska, a resident of Nebraska could be required to go to an extreme point in the United States, now even to Alaska, and there in a foreign state, in a foreign tribunal, seek relief from a void or voidable judgment, and all as a condition precedent to proving that a certificate filed with the director was false. Where is "delay" or "chaos" avoided?

Under this decision the certified summary of the judgment imports absolute verity. No relief from a foreign judgment may be had in the courts of this state. Certainly there can be no legislative intent that such be the result.

For all practical purposes the right of appeal in this class of cases is now a useless procedure.

CALLIE JAMERSON, ALSO KNOWN AS CALLIE JIMERSON, ET AL., APPELLANTS, V. DILLON REALTY COMPANY ET AL., APPELLEES.

93 N. W. 2d 10

Filed November 14, 1958. No. 34423.

1. **Pleading.** 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.

2. **Courts: Executors and Administrators.** A district court of this state lacks original jurisdiction to hear and adjudicate a cause of action for money only claimed to have existed against a person at the time of his death. Original jurisdiction of such a claim and the allowance or rejection thereof is, by the Constitution of the state, conferred upon the county court having jurisdiction of the estate of the deceased debtor.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed as modified.*

Frederick D. Williams and *Robert H. Blanchard,* for appellants.

Schmid, Snow & Ford, Swarr, May, Royce, Smith, Anderson & Ross, A. J. Whalen, Ephraim L. Marks, and *Paul A. Rauth,* for appellees.

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

SIMMONS, C. J.

This is an action in equity seeking the rescission and cancellation of a deed to real property, or in the alternative for an accounting.

The plaintiff, Callie Jamerson, is a single person and the plaintiffs, Donald Johnson and Johannah Cromwell Johnson, are husband and wife, Mrs. Johnson being the daughter of Mrs. Jamerson.

The status of the defendants will be made to appear later herein.

The cause of action as to one defendant was dismissed before trial. We refer to that later herein.

Trial was had as to the remaining defendants. The trial court sustained motions to dismiss at the close of plaintiffs' case-in-chief. The trial court rendered judgment for two defendants on a cross-petition. Plaintiffs appeal here.

We sustain the judgment of the trial court in dismissing the plaintiffs' cause as to all defendants and

modify the judgment on the cross-petition as to judgment debtors only.

We review the evidence subject to the rule that: "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, 162 Neb. 360, 76 N. W. 2d 267.

Mrs. Jamerson and Mrs. Johnson were the owners of a residence property in Omaha which was Mrs. Jamerson's home. It was encumbered by two mortgages. It was decided to sell it so that Mrs. Jamerson could purchase a home in a more desirable section of Omaha. Mrs. Jamerson called the Dillon Realty Company (one of the defendants) and advised them of her desire to sell. A representative of that company called and Mrs. Jamerson listed the property for sale on a form provided for that purpose. It provided in part: "Permission is hereby given to list this property with the Multiple Listing Exchange of the Omaha Real Estate Board." The Multiple Listing Exchange of the Omaha Real Estate Board is made up of members of the real estate board who make their listings available to the other members for cooperation in effecting sales. It is made a defendant here because this listing was made available to the members of the exchange. Within a few days one Hubert B. Russell, a member of the exchange, appeared at the Jamerson home with a prospective purchaser named Herbert S. Wintroub. He made an offer of purchase which was accepted in writing by Mrs. Jamerson and Mrs. Johnson. In course of time the transaction was ready for closing. Russell took a warranty deed to the plaintiffs who executed and acknowledged it and gave it to Russell to take to Wintroub, complete the deal, and receive the money for them.

In the meantime Russell had been negotiating for a new home for Mrs. Jamerson and it was agreed be-

tween them that $1,000 of the price received for the sale of the old home should be used as the down payment on the new home.

Russell delivered the deed to Wintroub. It recited that Wintroub and his wife were grantees. They are defendants and are cross-petitioners herein. Wintroub paid Russell the balance due after adjustment of taxes and other items. Russell then submitted a statement of the transaction to Mrs. Jamerson. It showed deductions for taxes, commission, and rent pending the closing of the deal, etc., and a balance due of $1,170.35. There was a deduction for rent to be paid to Wintroub and a $10 error in calculation. In any event Russell gave to Mrs. Jamerson his check for $70.35 and retained $1,000 to be used as the down payment on the other house. Mrs. Jamerson endorsed the check and put it in process of payment. Before it reached the bank on which it was drawn, Russell died and accordingly the check was not paid. This check had written on its face: "Including $1,000.00 down payment on 2565 Pratt; Bal of proceeds on 934 N. 26 St.," (the property sold).

The record does not show what was done by Russell with the $1,000. It was not used by him as a down payment on the new home property. Plaintiffs join Dillon Realty Company and Multiple Listing Exchange as defendants on the theory that Russell was their agent and acting for them, and on that basis apparently seek to recover the $1,070.35, being the $1,000 retained by Russell and that represented by the check of Russell for $70.35.

We need explore this contention no further than to point out that the transaction of the sale of the property, with which Dillon Realty Company and the Multiple Listing Exchange were concerned, was entirely closed and satisfactorily so to Mrs. Jamerson and Mrs. Johnson. So far as this record is concerned, Russell proceeded in accord with their directions. He retained the purchase money for a purpose entirely separate and

apart from the sale of the property and as a result of an agreement made by Russell with Mrs. Jamerson, and with Mrs. Johnson's knowledge and acquiescence.

There is neither pleading nor fact which challenges the validity of the conveyance from the plaintiffs to the defendants Wintroub. The deed is challenged for a failure of consideration. Yet consideration was paid and received as above set out.

The trial court did not err in dismissing the plaintiffs' petition as to the defendants above named.

Evelyn Russell, executrix of the estate of Hubert B. Russell, was also made a party defendant. The petition recites no basis for liability of the executrix save as inferentially plaintiffs desire to secure a judgment for the money retained by Russell. The trial court sustained a demurrer of the executrix. The plaintiffs having failed to plead further, the trial court dismissed the cause as to the executrix. In that it did not err. Obviously the only relief the court could grant the plaintiffs would be for money only. The rule is: "A district court of this state lacks original jurisdiction to hear and adjudicate a cause of action for money only claimed to have existed against a person at the time of his death. Original jurisdiction of such a claim and the allowance or rejection thereof is, by the Constitution of the state, conferred upon the county court having jurisdiction of the estate of the deceased debtor." Flessner v. Wenquist, 156 Neb. 378, 56 N. W. 2d 294.

During the time elapsed for closing the transaction Mrs. Jamerson paid rent to Mr. Wintroub, at first through deductions made by Russell, and then direct to Mr. Wintroub after the deed had been delivered. She continued to pay rent to him until about the inception of this litigation. She remained in possession of the property. Neither Mr. nor Mrs. Johnson occupied it during that time.

By cross-petition the defendants Wintroub sought to recover for loss of rentals on the property purchased

by them. It was stipulated that the reasonable rental value of the property was $55 per month from April 1956. The trial court awarded judgment for that amount per month against the plaintiffs from August 15, 1956, until such time as the plaintiffs vacate the premises and surrender possession to the defendants Wintroub. Plaintiffs assign as error the rendering of the judgment against Mr. Johnson. We deem it error, as also is the judgment against Mrs. Johnson. Neither of the Johnsons were in possession of the property as tenants or otherwise. Neither of them is liable to pay rent. Neither of them can surrender possession for they do not have it. The findings and decree are accordingly modified so as to provide that the judgment, insofar as rents are concerned, shall be against Mrs. Jamerson only. In all other respects the judgment is affirmed. All costs are taxed to the plaintiffs.

AFFIRMED AS MODIFIED.

MANLY RUMBEL ET AL., APPELLEES AND CROSS-APPELLANTS, v. L. N. RESS, STATE ENGINEER OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, IMPLEADED WITH VAUGHN A. HALL, APPELLANT AND CROSS-APPELLEE, SAFEWAY STORES, INCORPORATED, INTERVENER-APPELLEE AND CROSS-APPELLANT.

92 N. W. 2d 904

Filed November 21, 1958. No. 34351.

SUPPLEMENTAL OPINION

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion for rehearing. For original opinion, see 166 Neb. 839, 91 N. W. 2d 36. *Motion for rehearing denied.*

Joseph T. Votava and *John R. McCormack,* for appellant.

Frost, Meyers & Farnham and *Charles W. Peasinger,* for appellees Rumbel.

Kennedy, Holland, DeLacy & Svoboda and *Thomas R. Burke,* for appellee Safeway Stores, Inc.

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

MESSMORE, J.

On motion for rehearing our attention has been directed to that part of the opinion wherein this court directed the trial court to dismiss plaintiffs' cause of action. We conclude that that part of the opinion should be eliminated and the following substituted in place thereof: The trial court is directed by proper order to make the State of Nebraska a party to this cause as prescribed by law. See, § 25-323, R. R. S. 1943; Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630.

The motion for rehearing is hereby denied.

JOHN W. PHILSON, APPELLEE, V. CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES, OMAHA CONSTRUCTION & BUILDING TRADES COUNCIL ET AL., INTERVENERS-APPELLANTS.

93 N. W. 2d 13

Filed November 21, 1958. No. 34402.

1. **Municipal Corporations.** A home rule charter is a grant of power to a city and not a limitation of general power. The grant of power is to be construed strictly against the public officials of a home rule charter city.
2. ———. Where a home rule charter specifies the method for exercising a granted power, such method constitutes the measure of the power.
3. ———. The provisions of a home rule charter requiring that contracts for public works be awarded upon a public letting to the lowest responsible bidder are intended to secure unrestricted

competition among bidders, to eliminate fraud and favoritism, and to avoid excessive cost.

4. ———. An ordinance which permits bidding on a public works contract only by contractors who agree to pay a minimum wage prescribed by the city is void as being in contravention of the home rule charter requiring that all public works be awarded by contract to the lowest responsible bidder.
5. ———. An ordinance fixing a scale of wages to be paid by all contractors bidding on a public works contract cannot be sustained as an implementation of a fair labor standard adopted by statute which provides that no less than going wages for like labor shall be paid by the contractor at the time and place the work is performed.
6. Constitutional Law. The fixing of a scale of wages by a city to be paid by a successful contractor at a public letting constitutes the taking of the private property of the taxpayer without due process of law and is violative of Article 1, section 3, Constitution of Nebraska.

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

David D. Weinberg, for appellants.

Smith & Smith, for appellee Philson.

Herbert M. Fitle, for appellees City of Omaha et al.

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

CARTER, J.

This is a suit by a taxpayer of the city of Omaha. In his first cause of action he prays for a declaratory judgment determining his rights, status, and legal relations with reference to Ordinances Nos. 18515 and 18743 of the city of Omaha and proceedings had thereunder; that such ordinances be declared null, void, and unenforcible; and that the specifications for improvements in Special Improvement District No. 5116 insofar as they contain a requirement for a minimum wage be declared null, void, and unenforcible. In his second cause of action the plaintiff prays for injunctive relief against the city and its officers in enforcing or attempting to enforce said

ordinances by including in its specifications for project No. 5116 any predetermined minimum or other wage scale which a bidder must agree to pay.

The answer of the city and its officers alleges that Ordinances Nos. 18515 and 18743 are legal and valid; that the fixing of the wage scale as provided in said ordinances is legal and valid; and that the prayer of plaintiff's petition should be denied.

The interveners are the Omaha Construction & Building Trades Council and the hod carriers', operating engineers', and common laborers' local unions. They allege an interest in the result of the litigation and assert the validity of the said ordinances and the proceedings had under them. They pray that such ordinances and the proceedings had under them be held valid and enforcible. The prayer of the interveners is that the prayer of plaintiff's petition be denied.

The trial court held that Ordinances Nos. 18515 and 18743 were invalid; that the city of Omaha was without power to require such wage scale requirement by ordinance; and that contracts by the city for public improvement must be let to the lowest responsible bidder. The interveners have appealed to this court.

It is stipulated in the record that the cost of one-half of the grading, curbing, and paving in Special Improvement District No. 5116, here involved, will be paid by the city of Omaha because a public park abuts on one side of the street where the improvement is to be made. It is further stipulated that the plaintiff is a taxpayer of the city of Omaha, regularly paying money into its treasury as a general taxpayer for public purposes. The right of the plaintiff to maintain the action is not and could not be successfully questioned.

The city of Omaha is a city of the metropolitan class operating under a home rule charter. A home rule charter is a grant of power to a city as distinguished from a limitation of general power. The grant of power is to be construed strictly in favor of the public and against

the public officials of the charter city. Where the charter specifies a method of exercise of a power, such method constitutes the measure of the power. A city council cannot, therefore, extend its powers by the enactment of an ordinance beyond the limits prescribed in its charter. Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113; Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

The record shows that the city council of the city of Omaha called for bids for work in Special Improvement District No. 5116. The specifications for such bids required the bidders to comply with a predetermined minimum wage scale which had been adopted in accordance with the provisions of Ordinance No. 18743. The home rule charter of the city required all bids to be let to the lowest responsible bidder. It is the contention of the plaintiff that the ordinance fixing a minimum wage scale which bidders would be required to observe contravenes the charter provision that bids shall be let to the lowest responsible bidder.

The question presented is one of first impression in this state. We think the reasoning contained in Hillig v. City of St. Louis, 337 Mo. 291, 85 S. W. 2d 91, controls the disposition of the case at bar. The court there said: "In this State it is well settled that charter provisions requiring that contracts for public work be awarded, upon a public letting, to the lowest responsible bidder are intended to secure free and unrestricted competition among bidders, to eliminate fraud and favoritism and to avoid undue or excessive cost which would otherwise be imposed upon the taxpayer or property owner. (Citing cases.) As a corollary to the elementary principle just stated our courts hold in general that where in the letting of contracts for public work restrictions or conditions are imposed upon bidders, which tend to increase the costs of the work such conditions and restrictions are violative of charter provisions requiring that the contract for the work be let to the lowest responsible bid-

der. (Citing cases.) Applying the foregoing principles to the case before us we are clearly of the opinion that Ordinance No. 40179 is void because it is in contravention of the provisions of the St. Louis charter requiring that 'all public work' be awarded by contract to the 'lowest responsible bidder.' The ordinance, if effective, permits bidding only by those contractors who agree to pay the prescribed minimum wages. Other contractors who might, if permitted, do the work for a lower price are prohibited from bidding or performing the work by the terms of the ordinance. Thus we have a situation where a contractor who can do the work equally as well, although cheaper, is excluded from bidding, while the ordinance clearly contemplates that the successful bidder will do the work at a cost which will at least equal the minimum amount specified for wages by the ordinance in question. Furthermore, since the ordinance in question requires all bidders for public work to pay a stipulated minimum wage to their employees it is clear that the ordinance imposes a limitation other than responsibility upon all bidders and hence the free competition prescribed by the charter is excluded and stifled." See, also, Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S. W. 815; Bohn v. Salt Lake City, 79 Utah 121, 8 P. 2d 591; Frame v. Felix, 167 Pa. 47, 31 A. 375, 27 L. R. A. 802.

In Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, 52 L. R. A. N. S. 728, Ann. Cas. 1915D 967, this court, in discussing an ordinance fixing wages in contracts for public works, quoted the following with approval: "Here we have an ordinance saying, not that a sum no less than the going wage for like labor shall be paid, but that a fixed sum irrespective of going wages or the worth of the employee shall be paid. In the instant case, the wages paid are from 50 to 90 cents higher for eight hours than are wages paid in private employment for like labor for ten hours. To hold this arbitrary resolution to pay an excess of wages to be reasonable, reference to some

fixed principle of law must be had. It would seem that no such reference can be had. * * * If a council can pay $3 when the current wage is $2.25, they can fix the price of commodities entering into the construction of a public work and provide that material must be purchased of certain persons or firms when the same commodity might be had of others at a less price. Under such a system there would be no limit to the 'discretion' of the city officers, who to serve personal or political ends might burden the taxpayer beyond the point of endurance. In cases of this character it is well to recur to fundamental principles for our guidance, one of the most salutary of these being that all municipal ordinances shall be reasonable, to the end that a favor to one citizen shall not find sustenance in the burden of another."

We necessarily conclude that the ordinances in question are inimical to the provisions of the home rule charter that public contracts shall be let to the lowest responsible bidder. They are therefore void and unenforcible.

The appellants urge that the ordinances here questioned can be upheld as being an implementation of sections 73-101 to 73-105, R. R. S. 1943, relating to public lettings. Insofar as applicable here, these statutory provisions provide that the state and its governmental subdivisions, in awarding contracts for public works, shall require bidders to file a statement that they will pay a wage scale and maintain conditions of employment as are paid and maintained by at least fifty percent of the contractors in the same business or field of endeavor as the contractor filing such statement. This is a penal statute providing that violations shall be punished by fines fixed by the act. The foregoing statutes require compliance with the fair labor standards contained in the act at the time the work is performed. The fixing of an arbitrary wage scale before the public work is let to bidders, which must be followed irrespective of the

wages paid by fifty percent or more of the contractors in the same business or field of endeavor as the successful bidder at the time the work is performed, does not implement such statutes but, in fact, provides a new condition having no relation thereto. There is a constitutional difference in a legislative act providing that a sum no less than the going wage for like labor shall be paid and one providing for a fixed sum irrespective of going wages or the worth of the employee. The former is generally upheld as a proper fair labor standard while the latter is held to be violative of Article I, section 3, of the Nebraska Constitution, in that it would take the private property of the taxpayer without due process of law. This principle was declared by this court in Wright v. Hoctor, *supra,* wherein we said: "And there should be no fixed rate of wages provided by the legislature, without reference to the going wages for that kind of work at the time and place where it is to be performed. The contracts were not let so as to admit of competition. Section 128, ch. 17, laws 1909, contains a provision that contracts of this character shall be awarded 'to the lowest responsible bidder of the class (of material) so designated.' The manner of letting these contracts would take the private property of the taxpayer without due process of law, and is in violation of section 3, art. I, of the Bill of Rights."

The trial court having arrived at the same conclusion, the judgment of the district court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

DUGDALE CONSTRUCTION COMPANY ET AL., APPELLEES, V. CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES, OMAHA CONSTRUCTION & BUILDING TRADES COUNCIL ET AL., INTERVENERS-APPELLANTS.

93 N. W. 2d 17

Filed November 21, 1958. No. 34403.

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

David D. Weinberg, for appellants.

Smith & Smith, for appellees Dugdale Constr. Co. et al.

Herbert M. Fitle, for appellees City of Omaha et al.

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

CARTER, J.

This is a companion case to Philson v. City of Omaha, *ante* p. 360, 93 N. W. 2d 13, released herewith. The controlling issues in the two cases are the same. For the reasons stated in that case the judgment of the district court in the instant case is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

T. J. PLUMMER, APPELLEE, V. JEROME S. FIE, APPELLANT.

93 N. W. 2d 26

Filed November 21, 1958. No. 34432.

1. **Reformation of Instruments.** It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties as it should have been expressed in the writing in order to enforce it or have the advantage of it as a defense.
2. **Contracts.** Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly.

3. **Forfeitures.** Forfeitures are not looked upon with favor by the courts, and will not be created by intendment, nor enforced unless the court is compelled upon the facts and law to do so.
4. **Contracts: Forfeitures.** One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part.
5. **Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
6. ———. In such a case, it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.

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

Kenneth S. Gotobed and *J. Karr Taylor,* for appellant.

Baskins & Baskins, for appellee.

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

CHAPPELL, J.

Plaintiff, T. J. Plummer, brought this action at law against defendant, Jerome S. Fie, seeking to recover $1,000 and interest thereon, same being a down payment made to defendant by plaintiff for the purchase of real property under a written contract dated May 29, 1954. Defendant allegedly failed, refused, and was unable to perform the contract, and thereafter, upon demand, refused and failed to return the down payment to plaintiff. A copy of said contract, marked exhibit A, was attached to and made a part of plaintiff's petition.

Defendant's answer admitted that he entered into such a written contract with plaintiff on the date alleged; that plaintiff individually paid the $1,000 to defendant; and that plaintiff and defendant were the sole and only parties who signed the contract. However, defendant denied that exhibit A was a true copy there-

of because description of the land therein did not clearly represent the intent of the parties. Defendant's answer admitted that the balance of $4,500 was to be paid by plaintiff when defendant furnished satisfactory title, but denied generally and alleged that he did furnish satisfactory title and tendered a deed to plaintiff but plaintiff wrongfully refused to accept same or perform the contract, whereupon defendant terminated same, and plaintiff forfeited the down payment as liquidated damages. For a so-called counter-claim, defendant alleged that plaintiff's wrongful refusal and resulting delay caused defendant additional stated damages and expenses. Thus he prayed that plaintiff recover nothing and that defendant be awarded a judgment for $1,180 or in the alternative that he be authorized to retain the $1,000 down payment and recover judgment for $180. Plaintiff's reply was a general denial.

After a hearing by the court, a jury having been waived by agreement of the parties, a judgment was rendered on November 27, 1957, which dismissed defendant's cross-petition and found and adjudged the issues generally in favor of plaintiff and against defendant. It awarded plaintiff a judgment for $1,000 with interest at 6 percent from the date of the judgment despite a specific finding that demand was made by plaintiff's attorneys upon defendant for return of said $1,000 down payment on September 30, 1954, which demand was refused. Thereupon defendant filed a motion for new trial, assigning as far as important here that the judgment was not sustained by sufficient evidence, and was contrary to law. Plaintiff also filed a motion for new trial, assigning that the trial court erred in rendering judgment for interest from date of the judgment, November 27, 1957, instead of from September 30, 1954, the date of demand and refusal.

After hearing upon said motions for new trial, and during the same term, the court first considered plaintiff's motion, and in disposing of same found and ad-

judged that the judgment of November 27, 1957, should remain as rendered except that same should be and was modified to permit plaintiff to recover $1,000 plus interest thereon of $188.50, same being from September 30, 1954, to November 27, 1957, date of the original judgment, which made the total judgment $1,188.50 with interest at 6 percent from November 27, 1957. No contention is made here that the trial court erred in so doing if plaintiff was entitled to recover.

Defendant's motion was taken under advisement, and thereafter overruled, whereupon he appealed, assigning and arguing in substance that the judgment was not sustained by sufficient evidence and was contrary to law. We do not sustain the assignment.

At the outset, defendant argued that: "This is a case in equity triable de novo." He admitted that plaintiff's action was to recover at law, but claimed that defendant's answer, having alleged "that the legal description in said contract did not correctly represent the intent of the parties," required reformation of the contract in equity without asking for it, and the parties, having tried it as in equity, converted the action to one in equity, triable here de novo. We do not agree. Both parties simply prayed for a money judgment. There was no matter presented by the pleadings, or relief sought therein, requiring or justifying trial of the issues in any manner other or different than was appropriate in an action at law. The parties evidently so recognized that fact when a jury was waived by agreement and same was tried by the court as a law action.

In that connection, as concluded in Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315, and held as recently as Gurske v. Strate, 165 Neb. 882, 87 N. W. 2d 703: "It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties as it should have been expressed in the writing in order to enforce it or have the advantage of it as a defense."

Also, as held in Clark v. Hall, 54 Neb. 479, 74 N. W. 856, and approved in Martin v. Reavis, 117 Neb. 219, 220 N. W. 238: "Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly."

In Hile v. Troupe, 84 Neb. 266, 121 N. W. 109, this court said, quoting authorities: "Forfeitures are not looked upon with favor by the courts, and will not be created by intendment, nor enforced unless the court is compelled upon the facts and law to do so."

In Cadwell v. Smith, 83 Neb. 567, 120 N. W. 130, and approved in Oman v. City of Wayne, 152 Neb. 341, 40 N. W. 2d 916, the court said: "One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part."

Also, having concluded that this was an action at law, we apply the elementary rules reaffirmed in Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132, that: "The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.

"In such a case, it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong."

In the light of the foregoing rules, we have examined the rather voluminous record, which as summarized discloses the following pertinent facts: On the evening of May 29, 1954, about 8 p. m., plaintiff, one Wayne Elliott, defendant, and defendant's agent, one Worden, who was engaged in the insurance, real estate, and loan business in Ogallala and had a mortgage of about $4,500 on de-

fendant's property, met by prearrangement in Worden's office.

Elliott, a contractor and builder, had previously contacted defendant about buying a tract of land purportedly belonging to defendant south of U. S. Highway No. 30 in Ogallala on which to construct a motel, but Elliott had no money. Defendant had moved from Ogallala to Gibbon and wanted to sell the property and get out from under his obligations to Worden. He had previously sold his property north of U. S. Highway No. 30 to Elliott's father-in-law, and owned only some platted property south of that highway which is here directly involved. Finally plaintiff offered to furnish Elliott the money to buy the property if it would be deeded in plaintiff's name as security. Plaintiff and Elliott had talked about forming a partnership in the motel business, but they had never agreed to do so, and contrary to defendant's contention, they were not partners.

When the parties met as aforesaid in Worden's office, they agreed upon a price of $5,500, with $1,000 as a down payment. The balance was to be paid when defendant furnished a warranty deed, abstract of title had been examined, and title proven to be satisfactory. It was understood by the parties that the purchase was for property supposedly owned by defendant south of U. S. Highway No. 30, and the parties then had a plat or copy of a plat thereof before them, depicting a survey which defendant had the county engineer make and which had been recorded August 19, 1950. There plaintiff pointed out on the plat showing the foot frontage intended to be purchased south of U. S. Highway No. 30, and upon inquiry defendant said that was correct as far as he knew.

There Worden, as directed, prepared the contract in typed and printed form, naming defendant as seller and plaintiff and Wayne Elliott as buyers, but admittedly only plaintiff and defendant ever signed the contract, and plaintiff individually paid the $1,000 down to be

held by Worden pending performance of the contract provisions. The hour was late, Worden's secretary was not present, and the legal description of the property was long and too complicated for the ordinary person to understand, so it was agreed that Worden could put the description in the contract the next morning, which was done by using the deed defendant had originally received and the mortgage Worden held, which mistakenly included all property supposedly owned by defendant both north and south of U. S. Highway No. 30.

Plaintiff was given a copy of the contract, and on June 3, 1954, Worden wrote plaintiff a letter stating that the abstract had been extended to date and suggested that plaintiff call at his office and take it to whomever he wished to examine it. Plaintiff did so, and took the plat, abstract, and contract to a lawyer in Ogallala for examination. A few days later the lawyer reported to plaintiff that the title was a mess; that the abstract and contract did not anywhere near fit each other; and that the contract included considerable land that defendant did not own and should not have been in the contract. As soon as they were able to determine the particular tract agreed to be purchased by plaintiff, which defendant supposedly owned south of U. S. Highway No. 30, plaintiff was informed by his lawyer that a quitclaim deed would have to be obtained for a portion of such tract which defendant did not own. Plaintiff then took the papers back to Worden, who gave plaintiff his check for $1,000, dated June 15, 1954, in order to return the down payment.

In that connection, Worden told plaintiff that if he didn't take the land, he would buy it for the same price. Worden, having notified defendant of the necessity for a quitclaim deed, it was decided that Worden should obtain one which plaintiff's lawyer had prepared, so plaintiff got the papers back from Worden, returned the $1,000 check to Worden, and returned the papers to plaintiff's lawyer. However, Worden was busy with

other matters and did not obtain the quitclaim deed after some lapse of time. The party from whom the quitclaim deed was required was a distrustful 90-year-old gentleman who was represented by another lawyer in Ogallala. In that situation, plaintiff and Elliott consulted with that lawyer, and Elliott paid him to prepare and obtain a quitclaim deed with defendant as grantee therein. That was done, and the deed was given to plaintiff, who that day or the next turned it over to Elliott, who retained it, and plaintiff never had possession of it again.

After said deed had been obtained, plaintiff's lawyer informed him that the state highway department claimed part of the tract of land, and advised a survey of the land. Thus the county surveyor went out to do so, and found that part of the land was in the highway, and part in a road and on land owned and leased by the Union Pacific Railroad Company. Elliott then consulted the district highway engineer who produced a plat, exhibit D, and claimed that the state owned the land shown upon it. Elliott then borrowed that plat, showed it to plaintiff, and they decided they didn't want the land under such circumstances.

Thereupon, plaintiff took the papers back to Worden who gave plaintiff back the same check for $1,000. However, after they discussed the situation, Worden informed plaintiff that under such circumstances he didn't want the land either, and feared for his own security on his loan, whereupon he told plaintiff that he was going to stop payment on the $1,000 check, and he did so.

Defendant, having received word from Worden that the papers had been returned another time, came back to Ogallala but on the way stopped at North Platte and consulted with the district highway engineer, where he was informed of the claims made by the state highway department. Thereafter a meeting was held between plaintiff, Elliott, and defendant in the office of plaintiff's lawyer. There defendant offered to give plaintiff

back his $1,000 if he would give defendant the quitclaim deed which plaintiff did not possess, and Elliott, upon demand, refused to give it to defendant. Later he told defendant that, having spent time and money to obtain it, he was going to return it to grantor, whereupon defendant, who never at any time ever tendered a deed to plaintiff, said with an oath that he had the $1,000 and he was going to keep it.

In that connection, it is interesting to note that defendant had already obtained a quitclaim deed of his own which was duly recorded to the same property contained in the quitclaim deed then possessed by Elliott. Also, afterward defendant had the land surveyed and then sold that which he actually owned south of U. S. Highway No. 30 to another party for $7,250 cash by warranty deed, which had attached thereto and made a part thereof the plat so made by defendant's surveyor. Worden's mortgage was then paid. In the meantime, the last of September 1954, plaintiff's attorneys demanded return of the $1,000 down payment made by plaintiff, which was refused.

In the light of such evidence and authorities heretofore cited, we conclude that the judgment of the trial court was amply supported by the evidence and was not contrary to law. Therefore, the judgment should be and same hereby is affirmed. All costs are taxed to defendant.

AFFIRMED.

FRED G. CAPPEL, APPELLEE, V. MARLIN D. RIENER, APPELLANT.

93 N. W. 2d 36

Filed November 21, 1958. No. 34433.

1. **Automobiles: Highways.** If automobiles collide in an ordinary intersection of streets and there is no evidence of a substantial difference in the speed of the vehicles, it is generally self-evident

that they approached the intersection at approximately the same time under the statutory rule of right-of-way at intersections.

2. ———: ———. The drivers of automobiles approach an intersection at approximately the same time whenever two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way.
3. ———: ———. The driver of an automobile entering an intersection of two streets is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
4. ———: ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
5. ———: ———. The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law.
6. **Trial.** A trial court should eliminate immaterial and superfluous matters and submit to a jury by instructions only matters properly to be considered by it in arriving at its verdict in the cause.
7. ———. It is the duty of a trial court to submit to a jury a specification of negligence if it is properly pleaded in the cause and there is evidence tending to establish the truth of it.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Frank B. Morrison, William W. Lyons, and *Clyde F. Starrett,* for appellant.

Charles E. McCarl, for appellee.

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

BOSLAUGH, J.

Appellee sought damages from appellant alleged to have been sustained by the former as the result of an

automobile owned and operated by appellant colliding with an automobile of appellee on an intersection of streets in the city of McCook.

The negligence charged by appellee against appellant was in substance that he failed to respect the right-of-way of appellee to cross the intersection; that the speed of appellant was excessive and such as to endanger other persons and their property and was unreasonable under the existing conditions; that the motor vehicle of appellant was not kept under proper control and its speed was not reduced as it approached and entered the intersection as prudence required it to be; and that appellant did not have a proper lookout for traffic in the intersection and especially the vehicle of appellee. Appellee alleged damages for personal injuries, the destruction of his automobile, loss of the value of time he was disabled from injuries he sustained, and for expenses incurred incident thereto.

The answer of appellant admitted the identity, operation, and collision of the automobiles as alleged by appellee; denied all other allegations of the amended petition; and alleged the destruction of the automobile of appellant and the amount of loss resulting therefrom to him. Appellant pleaded that the collision and damages he claimed were the result of negligence of appellee consisting of his failure to respect the right-of-way of appellant to use the intersection because he was first therein; failure of appellee to operate his automobile at a proper speed under the circumstances; failure to keep his vehicle under proper control; failure to reduce the speed of the vehicle; failure to turn aside and avoid colliding with the automobile of appellant; and failure of appellee to keep proper lookout for traffic in the intersection and especially for the automobile of appellant. He asked to recover the damages he alleged. The new matter in the answer and counterclaim of appellant was put in issue by denial contained in a reply.

The trial of the case resulted in a verdict against ap-

pellee on his amended petition and against appellant on his cross-petition. The trial court rendered a judgment of dismissal of the case. A motion by appellee for a new trial was sustained and from that action of the district court appellant has prosecuted this appeal.

Appellee was at about 5 p. m. on October 12, 1956, traveling south in his 1949 Dodge 4-door sedan on West Third Street towards the intersection of that street with West C Street in the city of McCook. The weather was clear, the sun was shining, and the streets were dry. Appellee intended to cross the intersection and continue therefrom farther south. He approached the intersection at a speed estimated by him to be 10 to 15 miles per hour. There was evidence that he had stated in conversation that his speed was between 20 to 25 miles per hour. He had been an operator of automobiles for about 30 years and was acquainted with the intersection. A building at the northeast corner thereof was built up to the inside sidewalk line on the west and south of the building. There was a parking area for vehicles west of the building between the east curb line of West Third Street and the west sidewalk line. It was 42 feet long and about 15 feet wide. It was entirely occupied with parked vehicles when appellee passed it at the time mentioned above. There were also vehicles parked along the curb south of the building on the north side of West C Street at that time. The building and parked vehicles interfered with the view of a traveler from the north on West Third Street to the east down West C Street and with the view of a traveler from the east on West C Street to the north down West Third Street.

Appellee as he approached the intersection at the speed stated looked for traffic in or near it. He first looked to his left, then to his right, and turned to look to his left again when he saw the automobile of appellant as it collided with the automobile of appellee. He was rendered unconscious and realized nothing there-

after until he recovered consciousness in the hospital where he was taken immediately after the collision. Appellee testified that the speed of the automobile of appellant immediately before the collision was more than 25 and as much as 30 miles per hour. Appellee suffered multiple serious injuries and his automobile was demolished beyond repair.

Appellant had lived in McCook and was familiar with the intersection and its surroundings where the collision occurred. He was 19 years of age. He was operating a 1951 Chevrolet 2-door automobile on West C Street in McCook traveling west at the time of the collision. When he approached the intersection of that street with West Third Street he said he looked to his right, then to his left, and as he was looking back to his right he knew there was going to be a collision of his automobile and the automobile of appellee. Appellant claimed his vehicle was hit by the vehicle of appellee. Appellant testified that he did not see the automobile of appellee until it struck the Chevrolet automobile. He estimated the speed he was traveling was 20 or 25 miles per hour. He did not claim, nor was there evidence produced, that he changed his course, manner, or speed of travel as he went west to and into the intersection and collided with the automobile of appellee. The record contains no proof that appellant was first to enter the intersection.

The place of contact of the automobiles at the time of the collision was the left front of the Dodge car and the right front of the Chevrolet car. The automobile of appellee was forced and skidded from the place where the collision occurred, as demonstrated by tire marks on the pavement, until it came to rest toward the west side of the intersection, standing north and south with the front end almost due west of the place of the collision. The automobile of appellant traveled after the collision in a circular course to the southwest, south of the intersection, crossed the curb on the west side of West Third Street, curved to the northwest, crossed the

curb on the south side of West C Street west of the intersection, struck two parked automobiles near the curb on the south side of West C Street, and stopped between the two parked cars. The distance the Chevrolet automobile traveled after the collision, measured on a straight line and disregarding the arc of its travel, was 82½ feet.

Appellee as he approached the intersection was to the right of appellant. There is no proof that the appellant reached or entered the intersection first. This record presents a situation in which the operators of two automobiles did, within the meaning of the law, approach an intersection at approximately the same time. Appellee had the right-of-way and was entitled to cross the intersection first.

Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303, states: "When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection 'at approximately the same time.'"

Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496, contains the following: "The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way."

Appellant maintains he looked for other traffic as he approached the intersection but he did not see appellee until the time of the collision. It is certain that the automobile of appellee was there and appellant was required to have seen it. He may not, as a matter of law, be heard to say he did not see what was there within the radius which denoted the limit of danger. This failure of appellant to see the automobile which was

favored over him under the rules of the road barred him from any recovery from appellee.

Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, states: "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. * * * If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law." A part of the discussion in the opinion is as follows: "We think, however, that a proper interpretation of the foregoing rules requires one to see other automobiles approaching or entering intersections which have been favored with the right of way under the statutory rules of the road, and the failure to see such a favored car bars recovery. To hold otherwise would permit one to ignore the rules of the road as to right of way with impugnity (impunity) and render valueless the beneficent purpose of the right of way statute by the mere expedient of saying that he did not see the approach of the favored car." See, also, Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

The trial court in the charge to the jury recited the substance of the contents of the cross-petition of appellant and included in it the following: "* * * if you find that the defendant has established each and every allegation of his cross petition, by a preponderance of the evidence, and that he is entitled to recover damages on account of the injury and damage to his automobile as a direct and proximate result of the collision involved herein, then your verdict should be for the defendant. The measure of defendant's damages is the difference between the reasonable value of defendant's car immediately before the collision involved herein and immediately after the collision involved herein."

Appellant could not have recovered in any event on his cross-petition because of what has been herein determined. The cross-petition should not have been presented to the jury. It, as the case developed, contained matter which was entirely immaterial but it could and it may have defeated appellee on his cause of action. A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669; Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696; Strnad v. Mahr, 165 Neb. 628, 86 N. W. 2d 784.

A charge of negligence made by appellee against appellant was in substance that he operated his automobile into the intersection where the collision occurred at a speed that endangered other persons and their property and greater than was reasonable and prudent under the then existing conditions. This charge was entirely omitted from the instructions given the jury by the trial court. There were matters in the proof tending to support the charge. It should not have been omitted. It is the duty of the trial court to submit to the jury a material matter pleaded if it is supported by evidence tending to establish the truth of it. Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

The judgment should be and it is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

HELEN PANKONIN, APPELLANT, V. LEONARD BOROWSKI ET AL., APPELLEES.

93 N. W. 2d 41

Filed November 21, 1958. No. 34445.

1. **Automobiles: Highways.** A motor vehicle which has entered an intersection or is passing through it at a lawful speed has

the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle.

2. **Automobiles.** The operator of a motor vehicle is required to have it under such control as to be able to avoid collision with another motor vehicle which is operated with due care.
3. **Trial.** If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.
4. **Automobiles.** The duty of a guest riding in an automobile is to use care in maintaining a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver.
5. ———. A guest need not generally watch the road and advise the driver in the management of the automobile. It is the duty of a guest with knowledge of approaching danger to exercise ordinary care to warn the driver of the danger unless to a reasonably careful person it appears that the warning would be of no avail or that the driver observed or should have observed the danger as well as the guest.
6. **Negligence: Appeal and Error.** If contributory negligence is pleaded as a defense, but there is no proof thereof, it is prejudicial error to submit the issue of contributory negligence to the jury.
7. **Trial.** The charge of the trial court to a jury should omit any issue made by the pleadings which is not supported by evidence and any law not applicable to the cause.

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

Clinton & McNish, for appellant.

McGinley, Lane, Powers & McGinley, for appellees.

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

BOSLAUGH, J.

Appellant was on August 6, 1955, at about 1 o'clock in the afternoon riding as a guest in a 4-door, 1953 Ford automobile operated by Cliff Holaway, herein called Holaway, traveling towards the west on Second Street in the city of Grant at a speed of 15 to 20 miles per

hour. Appellant was an occupant of the front seat of the automobile, sitting to the right of its operator. Leonard Borowski, described herein as appellee, was then traveling south on Washington Street in the city of Grant in a 1948 Ford pick-up truck. The streets intersected at right angles. There were no traffic controls at the intersection. Each of the streets was graveled. Second Street was 36 feet in width and Washington Street was 44 feet wide. There was no grade on either of the streets. It was a clear, dry day and there was no other traffic as the two vehicles described above approached and entered the intersection of the streets. Appellee claimed that the speed of his vehicle was at that time 15 to 20 miles per hour.

The automobile driven by Holaway as it approached the intersection was traveling near the center of Second Street with its left wheels near but north of the center of the street. He had to clear a truck which was parked on the north part of the street facing west near the east line of Washington Street. As the automobile in which appellant was riding approached and entered the intersection of the streets, Holaway, its operator, looked to the north and saw the vehicle driven by appellee to the north of the intersection a distance estimated by Holaway as probably 2 to 3 rods. He said the face of appellee was turned to the west and he appeared to be looking in that direction. Appellee drove the truck he was operating into the intersection and the front of it struck the automobile of Holaway in about the center of the right or north side of it. The contact of the vehicles occurred at about the center of the intersection. The skid marks made by the wheels of the truck commenced 12 feet north of the north line of Second Street and continued 15 feet south into the intersection. The total length of the skid marks was 27 feet and they ended about 2 feet north of the center of Second Street. Their course was somewhat towards the southwest. Holaway, when he concluded appellee was not going to stop, turned

his automobile to the left and attempted, without success, to avoid the vehicle of appellee. The Holaway automobile moved southwest and came to rest on the south part of Second Street west of the intersection. The truck, when it stopped, was facing to the southwest near the place of the collision. The right front door of the Holaway car was pushed in and damaged until it had to be pried from its position. The post between the doors was forced inward out of position and the back right door damaged and almost torn from the vehicle. Its use as a door was destroyed.

Appellant was looking forward of the automobile in which she was riding to the west as it approached and entered the intersection. She was near the center thereof when she first saw the truck driven by appellee. She estimated that it was then a distance from her of twice the length of an automobile. The truck had not yet reached the intersection but was then ready to enter it. The truck seemed to her to be directly to her right when she saw it. She gave Holaway no warning of its approach because the time intervening between when she first saw it and the collision of the vehicles was not sufficient to permit it.

The view to the east of a traveler approaching the intersection on Washington Street from the north and the view to the north of a traveler approaching the intersection from the east on Second Street were somewhat interfered with by a truck equipped with a grain box, the front of which was a few feet east of the east line of the intersection, and another truck, similarly equipped, parked on the east side of Washington Street the front of which was to the north and the rear of which was only a few feet north of the north line of the intersection. The lot at the northeast corner of the intersection was vacant except there were a few pieces of machinery on it. The surface of the lot was about 2 feet higher than the surface of the streets. The persons concerned in this litigation had traveled by or across

the intersection frequently. The foregoing includes in substance the proof of appellant of the facts concerning the collision of the vehicles.

Appellee admitted that before he came to the intersection he had a view of it and that he was unable to avoid a collision with the Holaway automobile. There was evidence that appellee at the scene of the collision told the officer who investigated the happening that appellee did not see the Holaway automobile until it was too late to avoid the collision.

The claim of appellant in this litigation was for damages caused her as a result of injuries suffered by her in the collision of the vehicles described above caused, as she charged, by the negligence of appellee. The substance of the answer of appellees was an admission that the truck involved in the collision was owned by them and was operated by Leonard Borowski at the time of the accident, a general denial, and a plea of contributory negligence of appellant which proximately caused the collision.

The trial of the case produced a verdict and judgment for appellees. A motion for a new trial was denied. Appellant complains of this action of the trial court.

The record exhibits a sharp conflict of evidence concerning material matters affecting this controversy. However, this is not a primary concern of this appeal. It is important that the evidence of appellant concerning negligence charged by her against appellee is sufficient to create a question of fact for the jury. Otherwise any error of the trial court would be unimportant.

Appellees contend that proof of appellant does not tend to show any negligence of appellees which in any degree contributed to the collision of the vehicles. Appellant produced evidence noticed above that the Holaway automobile traveling at a speed of 15 to 20 miles per hour entered the intersection when appellee was some considerable distance north of it; that when the Holaway automobile had nearly reached the center of

the intersection appellee was just entering it; and that the place of the contact of the truck with the Holaway automobile was about the middle of its right side. This, if accepted, would have sustained a finding that the Holaway automobile entered the intersection first and was proceeding at a lawful speed in which event it had the right-of-way. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137. There was evidence that appellee had opportunity for a view of the intersection before he reached it and that he did not see the Holaway automobile until he was so near to it he could not avoid an accident. There was proof to sustain a finding that appellee could have seen the approaching automobile and that by slight care he could have prevented the accident. Appellee saw the Holaway automobile when he was more than 27 feet from the point of collision because he made skid marks for that distance. This was evidence appellee did not have or maintain a proper lookout, or that if he did he failed to see an approaching vehicle that was in plain sight, and that he did not have his vehicle under proper control. Even a traveler who has the right-of-way and is approaching an intersection may not on that account disregard the surrounding circumstances. He is not thereby relieved from the duty of exercising ordinary care to avoid an accident. A traveler in a like situation who does not have the right-of-way is not permitted to exercise less care and caution. Long v. Whalen, *supra*. The operator of a motor vehicle is required to have his vehicle under such reasonable control as to be able to avoid collision with another vehicle being operated with due care. Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290; Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557. There was evidence in this case tending to establish negligence of appellees as charged by appellant. If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it

and decide the case as a matter of law. Long v. Whalen, *supra;* Stanley *v. Ebmeier,* supra.

Appellees, to support their contention in this regard, appeal to the rule that when testing the sufficiency of evidence to support a verdict, it must be viewed in the most favorable light for the successful party and he must have the benefit of all reasonable inferences therefrom. This well-established doctrine is not an important consideration in the disposition of this appeal. A successful litigant is entitled to have the benefit of the verdict he has won if it results from proper evidence and if the trial in which it was secured was free of prejudicial error. Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372. The decisive problem in this case is the correctness or error of the trial court in charging the jury on the subjects of contributory and comparative negligence. This inquiry concerns the presence or absence of prejudicial error in the trial in which the verdict for appellees was secured. A guest riding in an automobile generally has a right to assume that the driver is a reasonably safe and careful operator. There is no duty for the guest to warn the driver until there is presented some fact or situation not usual or ordinary.

Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682, declares: "The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. * * * It is the duty of an invited guest * * * with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver

observed or should have observed the danger, as well as the guest * * *." See, also, Erickson v. Morrison, 152 Neb. 133, 40 N. W. 2d 413; Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N. W. 2d 466; Burhoop v. Brackhan, *supra.*

Appellees attempt to justify the submission of the defense of contributory negligence of appellant because she did not warn Holaway that there was some interruption of view because of two trucks parked near the northeast corner of the intersection on which the collision occurred. One truck was on the north side of Second Street and the other on the east side of Washington Street, and there were a few pieces of machinery stored or parked on the vacant lot northeast of the intersection. It is usual for vehicles to be parked on streets and near intersections of streets and for objects to be placed on vacant lots adjacent to intersections. Neither of these is novel. The condition and danger, if there was any, were as apparent to Holaway as they were to appellant. The hazard, if any, was not unexpected but frequent and known to all persons traveling by motor vehicle. It was not such that a guest in the exercise of care would be expected to warn the host of imminence of danger. Under the circumstances of this case there was no proof of contributory negligence of appellant and that defense pleaded by appellees should not have been submitted to the jury by the trial court. The error in this respect is prejudicial. Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88; Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. It follows from what has been said that it was likewise prejudicial error under the circumstances of this case for the court to instruct the jury on the subject of comparative negligence. The charge of a trial court to a jury should omit any issue made by the pleadings which is not supported by evidence and any law not applicable to the cause.

The judgment should be and it is reversed and the cause is remanded for further proceedings, according to law.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

ALLIED BUILDING CREDITS, INC., A CORPORATION, APPELLEE, v. PETER C. DAMICUS, APPELLANT, IMPLEADED WITH JAMES E. ANDERSON, APPELLEE.

93 N. W. 2d 210

Filed November 28, 1958. No. 34401.

1. **Fraud.** In order to maintain an action for damages for false representation, the plaintiff, in substance, must allege and prove by a preponderance of the evidence: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of damages.
2. **Trial.** In order for a party to be entitled to have a verdict directed in his favor or the equivalent thereof, there must be no controverted issue of fact essential to a determination of the litigation.
3. ———. Where different minds may reasonably draw different conclusions from the evidence as to whether or not the evidence establishes a cause of action or a defense to a cause of action, the issues must be submitted to a jury for determination.
4. **Corporations: Fraud.** The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant.
5. **Trial.** A proper motion for directed verdict is a necessary condition precedent to a motion for judgment notwithstanding the verdict.
6. ———. The trial court cannot properly, either on its own motion or on motion for judgment notwithstanding the verdict, set aside a verdict and enter judgment notwithstanding the verdict, where no preliminary motion for directed verdict has been made.

7. ———. A requisite motion for directed verdict, to afford a basis for a valid motion for judgment notwithstanding the verdict, must contain a statement of the specific grounds why a verdict should be directed.

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

O'Sullivan & O'Sullivan, for appellant.

Charles S. Reed and *Franklyn K. Norris,* for appellee.

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

YEAGER, J.

This is an action by Allied Building Credits, Inc., a corporation, plaintiff and appellee, against Peter C. Damicus and James E. Anderson, defendants, commenced in the district court for Douglas County, Nebraska, to recover $2,100. Anderson defaulted and judgment was rendered against him for the amount prayed for by the plaintiff. As to Damicus there was a trial to a jury which resulted in a verdict in his favor. He is appellant here. The plaintiff corporation, hereinafter called appellee, filed a motion in the alternative for judgment notwithstanding the verdict or for a new trial. The court sustained the motion for judgment notwithstanding the verdict and rendered judgment in favor of appellee and against the appellant for $2,100. From this judgment notwithstanding the verdict the appeal herein has been taken. The motion for new trial was overruled by the order of the court.

The errors assigned as grounds for reversal are: (1) The evidence adduced by the plaintiff was insufficient as a matter of law to justify a verdict being in effect directed by the district court in its favor; (2) it was error to vacate the judgment on the verdict of the jury and enter judgment in favor of plaintiff; and (3) there was no proper motion for a directed verdict made by the

plaintiff such as would authorize the court to invoke the provisions of "25-1305.15 R. S. Nebr." Obviously the intention was to make reference to section 25-1315.02, R. R. S. 1943.

Before proceeding with a consideration of the assignments of error the issues will be defined as will also the respective theories on which the case was presented to the district court.

In the petition and in the amended petition on which the case was tried the appellee is described as a corporation. The true relationship of appellee to the transaction must be ascertained from the results of a pretrial proceeding and the record made on the trial of the case.

From the record it appears that appellee was a corporation engaged in the purchase and discount of securities; that at all times of concern International Fiberglass, Inc., a corporation, had a business in Omaha, Nebraska, and the appellant was an officer active in the operation of the business of this corporation with the other defendant; that for the purpose of setting up an arrangement for the purchase of promissory notes and contracts by the appellee from International Fiberglass, Inc., the appellant, designated as general manager, with the other defendant, designated as president, executed a document which was delivered to the appellee declaring the relationship of the two to the corporation with other pertinent information; that after this arrangement was made International Fiberglass, Inc., sold one note to the appellee signed by Art Hornig and Clara S. Hornig for $1,500, which was of the face value of $1,815, and one signed by Manie Swanson and Alvina Swanson for $600, which was of the face value of $726; that the principal amount of neither of the notes was filled in at the time of receipt by International Fiberglass, Inc., but both were filled in after receipt, and in the evidence it is not disputed that this was done without the knowledge or consent of the makers; that the Swanson note was

for work to be done for the Swansons which, according to testimony which is not denied, was to cost not to exceed $450; and that the Hornig note was for the building of a retaining wall which, also according to testimony which is not denied, was not to exceed $300.

By the petition the appellee charged that the defendants entered into a conspiracy to obtain notes in blank payable to International Fiberglass, Inc., from customers such as the ones herein, to fill them in for larger amounts than those due and owing, and thus to defraud the makers; that in furtherance of that conspiracy they did obtain the notes which they sold to the appellee for the amounts mentioned; and that on account of this the appellee is entitled to recover the amounts paid for these notes from the defendants in this action. No question of the propriety of the action or the right to maintain it is raised.

The appellant denied that he was a party to any conspiracy or that he had any knowledge thereof, and denied that he participated in or had any knowledge of any of the matters of which complaint has been made by the appellee.

The evidence of appellee discloses that the two notes, after being signed, were, without the knowledge or consent of the makers, filled in by an employee in the office of International Fiberglass, Inc., at the direction and dictation of the defendant Anderson; that this was done in the presence and hearing of the appellant; that the appellant was at the office regularly; and that appellant signed no instruments except some checks and shipping orders. Appellee adduced no evidence the effect of which was to say that appellant had any knowledge as to any of the incidents attendant upon the procurement of the notes.

The appellant denied categorically and specifically any knowledge of the procurement of the notes or of any of the attendant circumstances. He admitted that he was present when at least one of the notes was filled

in after procurement. He effectually denied any knowledge as to whether or not the notes properly represented amounts owing by the makers thereof to International Fiberglass, Inc.

The appellee and appellant stipulated that the appellant was actively engaged in the operation of International Fiberglass, Inc., and that he signed the instrument which had for its purpose the setting up of the relationship pursuant to which the two notes were sold to the appellee.

There is no direct evidence that the appellant had any knowledge of the transactions which have been described except the arrangement for the disposition of notes and securities by International Fiberglass, Inc., to the appellee.

The appellant has denied categorically and specifically any additional knowledge. It becomes apparent therefore that the question of whether or not the appellant may be held liable in the premises is dependent upon the surrounding circumstances and the relation of the appellant to the transactions as disclosed by the evidence.

Whether or not the three assignments of error, or any of them, afford a basis for a reversal of the judgment depends upon the record as it has been summarized and applicable legal principles.

The burden of proof was on the appellee, not necessarily to prove that there was a conspiracy, but to prove that the appellant participated in or committed the act or acts of which complaint is made, or that he knew or, in the exercise of the care required of him in the circumstances, should have known of them. In Peterson v. Schaberg, 116 Neb. 346, 217 N. W. 586, it was said: "To maintain an action for damages for false representation, the plaintiff, in substance, must allege and must prove by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was

false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages." See, also, Paul v. Cameron, 127 Neb. 510, 256 N. W. 11.

Obviously the theory on which the judgment notwithstanding the verdict was rendered in this case was that under the evidence there was no issue of fact essential to a determination of the litigation, hence the appellee was entitled to a directed verdict in its favor at the conclusion of the evidence.

In order for the appellee to be entitled to have a verdict directed in its favor or the equivalent thereof, there must be no controverted issue of fact essential to a determination of the litigation. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

Where different minds may reasonably draw different conclusions from the evidence as to whether or not the evidence establishes a cause of action or a defense to a cause of action, the issues must be submitted to the jury for determination. In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526.

Returning now to the assignments of error it appears that the first and second deal generally with the same problem, therefore they will not be treated separately. They deal with the question of whether or not there was sufficient evidence for submission of the pleaded defense to the jury.

The following which has application here was stated in Ashby v. Peters, 124 Neb. 131, 245 N. W. 408: "The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant."

In that case corporate officers were sued for fraud

in the issuance and sale of bonds. A verdict was directed in favor of defendants. The ground or grounds on which it was directed have not been made known. It is apparent however that one of the defenses was that the defendants were not parties to the alleged fraud because of lack of participation or knowledge of representations made. This court said in reversing and remanding the case: "We conclude, therefore, that this case should have been submitted to the jury for determination of the issues of fact involved." See, also, Paul v. Cameron, *supra;* Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843.

It would appear, reasonably, that if knowledge or lack of knowledge of representations made or participation in the transaction was a question for a jury in that case it would be a like question under the evidence in this case.

The reasons for saying that there would be a question for a jury in this case appear more compelling than in that case. In that case, of course, the face value of the bonds was presumably well known to the defendants. They were muniments of liability issued by the corporation, whereas here the securities involved were merchantable and marketable assets the details of acquisition and cost of which could not have become known to the appellant except by participation in the transactions or by receipt of information in some other manner.

As pointed out, the appellant denied knowledge or information. Under the evidence therefore the conclusion reached is that the question of whether or not the appellant had knowledge of the transactions or that the circumstances were such as to charge him with knowledge was an issue of fact triable to a jury. This being true it must be said that the court was in error when it set aside the verdict and rendered judgment notwithstanding the verdict in favor of the appellee on the

ground that there was no evidence to sustain the defense to the action.

There is another reason why the judgment notwithstanding the verdict may not be allowed to stand, as set forth in appellant's third assignment of error. A proper motion for directed verdict is a necessary condition precedent to a motion for judgment notwithstanding the verdict. "Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made." In re Estate of Kinsey, *supra.* See, also, Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. A requisite motion must contain a statement of the specific grounds why a verdict should be directed. § 25-1315.01, R. R. S. 1943; Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174; Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678. The record discloses that at the close of the evidence the appellee made a motion as follows: "All right, I then move that in view of the Plaintiff's (defendant's) Motion, the Court dismiss the jury in this action and award judgment in favor of the Plaintiff in accordance with the prayer of the Petition." No ground whatever is stated as a basis for the motion. The motion made in nowise provides a basis for the rendition of judgment notwithstanding the verdict.

The judgment notwithstanding the verdict is reversed and the cause is remanded with directions to reinstate the verdict and the judgment which was originally rendered thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

ALBERT P. HAUKE, APPELLANT, V. JOHN H. FREY, APPELLEE.
93 N. W. 2d 183

Filed November 28, 1958. No. 34410.

1. **Partnership.** The existence and scope of a partnership may be evidenced by written or oral agreement, or implied by the conduct of the parties and what was done by them.
2. **Partnership: Injunction.** A partner may not by injunction deprive another partner of his possession of the partnership property and his rights in the management of the partnership business.
3. **Partnership.** As a general rule one partner may not maintain an action against his copartner on account of a partnership transaction where there has been no settlement of the partnership accounts and business.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Lyman & Holscher, for appellant.

Wright, Simmons & Harris, for appellee.

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

YEAGER, J.

This is an action in equity instituted by Albert P. Hauke, plaintiff and appellant, against John H. Frey, defendant and appellee, the purpose of which was to enjoin the defendant from taking possession of assets of a business known as Bowl Arena in Scotts Bluff County, Nebraska, claimed to be owned exclusively by the plaintiff; from in any manner interfering with the operation and management of this business; from going upon the premises; from making any charges which would become an obligation against plaintiff as the owner and operator of the business; and for an accounting.

The case was tried to the court, injunction was denied, and the petition was dismissed. From the judgment the plaintiff has appealed.

The pleadings in the case were voluminous but the matters finally submitted for consideration became determinable upon the question of whether or not the plaintiff was the sole owner of the business above named. By his petition the plaintiff declared that he was the owner of certain lots in Terry's Addition in Scotts Bluff County, Nebraska, on which he had constructed a building which was completed about August 31, 1956; that in the building is a business which he owns and operates known as Bowl Arena; that from August 31, 1956, to March 17, 1957, the defendant was the agent in management of the business for the plaintiff at a salary of $425 a month; that for the purposes of operating the business and prior to the commencement thereof he purchased bowling alleys, bowling equipment, and miscellaneous equipment to be used in the business; and that on March 18, 1957, he discharged the defendant as manager of the business. Reasons for discharge are set forth in the petition but it is not deemed necessary to set them forth here since the defendant does not contend that they were insufficient if the plaintiff was sole owner of the business. This is a brief summary of the allegations of the petition which are pertinent to the determinable issues.

The answer to the petition is a general denial. The substantial position of the defendant however, as disclosed on the trial and by the briefs in this court, is that the plaintiff was not the sole owner of the business but that he and the defendant were partners.

One witness was called to testify in the case. That witness was the plaintiff. He testified substantially, as alleged in the petition, that he was the owner of the real estate referred to; that he had constructed the building thereon in which was operated the business known as Bowl Arena; that the business was managed by the defendant under an arrangement whereby he was to receive out of the revenue of the business $425 a month for his service as manager; that plaintiff was to

receive for the use of the premises to be paid out of revenue $500 a month; that the business started on August 31, 1956; that the defendant was dismissed as manager by notice given by plaintiff on March 18, 1957; and in general that he was the sole owner of the business.

Specifically on the question of whether or not the defendant was a partner he testified on direct examination that before the business started equipment and merchandise were bought by plaintiff and defendant; that the bank account was a partnership account and checks required the signatures of both of them; and that all business was conducted on a nominal partnership basis. He never on his direct examination attempted to clearly define the relationship of plaintiff and defendant to the business. He gave testimony the effect of which was to say that from the beginning there were discussions concerning and proposals for the organization of a corporation but in this respect nothing was accomplished.

On cross-examination, however, by his testimony, he made it clear, contrary to his pleaded cause of action, that he did not regard himself as sole owner of the business and the defendant as only an employee. He made it clear that it was a business in which the two were interested and engaged and that this was the intention of the parties from the beginning. Questions and answers in the bill of exceptions, as follows, make this clear: "Q Well, anyhow, at that time you knew you were going to go into business together? A Yes. Q If arrangements could be worked out? A Yes. Q You went to Brunswick's office? A Yes. Q When we talk about Brunswick you mean the Brunswick-Balke-Collender Company, is that correct? A That is right. Q And you talked with someone there? A Yes, with a salesman there. Q And all of these conversations with the salesman from Brunswick-Balke-Collender Company, you and Mr. Frey were both present? A Yes. * * * Q Was that before or after your contract was signed? A I

don't remember. Q You did sign a contract that day? A A sales agreement or whatever— Q An order? A An order, Yes. Q And Mr. Frey signed the order? A Yes. * * * Q Handing you Exhibit No. 6, I will ask you if that is the order you signed in Denver on March 27, 1956? A Yes, it is. Q And calling your attention to the signatures on the back, is the first signature that of Mr. Frey? A Yes. Q And is the word 'Partner' written in his handwriting? A Yes. Q And is the next signature there your signature? A Yes. Q And is the word 'Partner' written in your handwriting? A Yes. * * * Q What I mean to say was you and John Frey were going into business together when you made the deal with Brunswick-Balke-Collender Company, is that correct? A Yes. * * * Q And it was you and John, and you were going to run the bowling business and be together in that? A John was going to manage it, yes. Q John being the manager, but the two of you would be together in it? A Well, I don't know. You mean we would both manage it? Q No. I mean you were going to be in the business together? A Yes. Q Both have an interest in the business? A Yes. Q And John would be the Manager? A Yes. Q You talked about how long this arrangement was going to last? A No, I don't believe so."

In the light of this testimony of the plaintiff himself it becomes apparent that the plaintiff was not the sole owner of this business. He has described definite ownership in the two which in certain respects left an area of indefiniteness and uncertainty, but nevertheless a dual ownership.

It was, under the evidence, the intention of the parties to convert the relationship into a corporation but this they were apparently never able to accomplish. Nothing however was disclosed in the evidence which operated to give the plaintiff the right to declare an end to the dual ownership and claim the business as his own.

The description given this ownership by plaintiff ef-

fectually declared it to be a partnership. The defendant does not contend that it was not a partnership.

The conclusion reached is that here was a partnership although there is not in evidence an agreement containing either complete details of organization or of functions after organization. This court said in Bard v. Hanson, 159 Neb. 563, 68 N. W. 2d 134: "The scope of a partnership may be evidenced by written or oral agreement, or implied from the conduct of the parties and what was done by them." The acts of the parties and what was done, as disclosed by the testimony of plaintiff, indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place.

This being a partnership the plaintiff could not by injunction deprive the defendant of his possession of the partnership property and his rights in the management of the partnership business.

Section 67-318 (e), R. R. S. 1943, provides: "All partners have equal rights in the management and conduct of the partnership business."

The general rule is that one partner may not maintain an action against his copartner on account of a partnership transaction where there has been no settlement of the partnership accounts and business. See, Sanley v. Davies, 113 Neb. 614, 204 N. W. 385; Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485.

In the light of this it must be said that the judgment of the district court is correct and it should be and is affirmed.

AFFIRMED.

JAMES WLASCHIN, APPELLANT, V. MARIE AFFLECK, APPELLEE.

93 N. W. 2d 186

Filed November 28, 1958. No. 34447.

1. **Trial.** If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.
2. **Vendor and Purchaser: Improvements.** Where a vendee, under and in reliance upon an oral contract to purchase real property, makes valuable improvements thereon and the vendor fails or refuses to carry out the contract, the vendee may recover for such improvements to the extent that they enhance the value of the property at the time possession is surrendered, but the vendor may have a set-off for the value of the use and occupation of the premises from the inception of occupancy by the vendee without the improvements contributed by him.
3. ———: ———. The right to recover for such improvements is based on the ground that the vendor, through whose fault the contract failed, ought not to obtain the enhanced value given to his property by the money, work, labor, and material of the vendee without making compensation therefor.
4. **Vendor and Purchaser.** After the vendor has failed or refused to perform the oral contract, tender of further performance by the vendee is unnecessary.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

McGinley, Lane, Powers & McGinley, for appellant.

Firmin Q. Feltz and *W. I. Tillinghast,* for appellee.

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

CHAPPELL, J.

Plaintiff, James Wlaschin, brought this action at law against defendant, Marie Affleck, seeking to recover the fair and reasonable value of certain work, labor, and materials allegedly performed and supplied by plaintiff to defendant at her request for the improvement of a house and described lot in Keith County, or in the al-

ternative to recover the enhanced value of said property caused by such improvements. Exhibit A, an itemized statement of work, labor, and materials so furnished and supplied, was attached to and made part of plaintiff's amended petition.

For answer and cross-petition, defendant denied generally and alleged that on March 17, 1955, the parties inspected a house which was for sale but required removal from the owner's premises; that at that time, defendant offered to purchase the house and move it onto Lot 14, Affleck's Subdivision, and furnish certain described material for such house; that defendant offered to sell said house and lot to plaintiff for $4,500, provided plaintiff would perform all the labor of installing said material and constructing a foundation for such house; and that plaintiff agreed to do all the labor of installation and to purchase the house and lot on contract for $4,500, payable $49.96 on the first day of each month for the next 10 years, which included interest at six percent. Defendant then alleged that such a contract was executed by her and her husband on May 9, 1955, but upon notification thereof, plaintiff failed, refused, and neglected to sign it, although he moved into said house pursuant thereto on June 4, 1955, and thereafter made a $50 payment thereon, and continued to reside on said premises until August 13, 1955, when he voluntarily abandoned the contract and all rights thereunder, and vacated the premises. Defendant also alleged that all labor was performed and material was placed on the premises by plaintiff voluntarily, without consultation with defendant and without any express or implied agreement by defendant to pay for same, but were done pursuant to his oral agreement of March 17, 1955, to purchase the property; that about July 3, 1955, plaintiff made known to defendant that he was not going to execute the contract because he objected to paying interest on the purchase price; and that thereupon plaintiff wrongfully and unlawfully rescinded the

contract, but notwithstanding such fact he remained in possession of the premises and continued to expend labor and material thereon until July 25, 1955. Defendant then denied that the labor and material placed on the premises by plaintiff had enhanced the value thereof because such labor and material were not installed in a workmanlike manner. Thereafter, defendant prayed for dismissal of plaintiff's amended petition, and after alleging that $50 was a reasonable monthly rental value of the premises, and after giving plaintiff credit for $50 paid on the contract in June, defendant sought a judgment against plaintiff for $100 as rental of the premises for July and August 1955.

For reply and answer, plaintiff denied generally except as thereinafter admitted. He then alleged that sometime prior to April 1, 1955, he discussed purchase of the house and removal of same by defendant to the lot involved; that at or about that time, defendant represented to plaintiff that she would move said house, furnish all material and fixtures therefor, and sell the house and lot to plaintiff for $4,500 without interest, payable $50 each month, if plaintiff would perform all labor in connection with installations in said house, and the improvement and alteration thereof; and that relying on defendant's said false representations, plaintiff performed all work and labor and furnished all material which defendant failed to supply, as described in his amended petition. Plaintiff then renewed his prayer for recovery of damages from defendant; alleged that in June he had paid $50 to defendant, believing that it was the first payment on the contract, which defendant had falsely and fraudulently entered into with plaintiff; and prayed for dismissal of defendant's cross-petition.

After a hearing before a jury whereat voluminous evidence was adduced by plaintiff, defendant moved for directed verdict on the grounds that the evidence on plaintiff's theory of express or implied contract was insufficient to sustain a verdict in favor of plaintiff, and

that, as a matter of law, plaintiff could not recover from defendant upon a theory of enhanced value of the premises. Thereupon, defendant's motion was sustained, and judgment was rendered which dismissed plaintiff's action, dismissed defendant's cross-petition, and taxed all costs to plaintiff. Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning that the trial court erred in sustaining defendant's motion for directed verdict and in overruling plaintiff's motion for new trial. We sustain the assignments.

It is elementary that: "A motion for directed verdict * * * must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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." Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238.

It is also well known 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." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

Viewed in such light, we summarize the material and relevant evidence from which a jury could have reasonably concluded the following: Plaintiff and his wife Emily lived with their three children in a very crowded basement apartment in Ogallala. Both parents had regular employment. Defendant's husband, Bill Affleck, was the father of plaintiff's wife. Defendant was a welfare worker. She owned several lots in Affleck's Subdivision, including Lot 14 here involved. Most of such lots had been purchased by defendant from the county.

On or about March 15, 1955, plaintiff and his wife, together with her father and defendant, drove to Grant to look at a farm house which was for sale but had to

be removed from its location. A few days later the parties discussed the terms of a possible purchase of the house and Lot 14 by plaintiff after the house had been purchased and moved to said lot by defendant. There and then it was orally proposed and agreed that defendant would purchase the house and have same moved to Lot 14 and furnish the material necessary to improve, remodel, and make a livable house for plaintiff and his family if plaintiff would do and have done all the labor necessary to so improve the property as a down payment, and defendant would sell plaintiff the house and lot for $4,500 without interest, said balance to be paid for by plaintiff at the rate of $50 each month.

The lot was then vacant and staked out according to the records. It was covered with weeds, and, after cleaning off the lot, plaintiff, with the help of his father and several other named employees who worked mornings, evenings, and Sundays, began building forms, digging trenches, and mixing and pouring concrete for the foundation, measurements for which had been previously made on the house with Bill Affleck's steel tape and in his presence. A cesspool, 6 x 8 x 8 feet was also dug and installed by plaintiff, and the house was moved upon the lot by defendant about May 12, 1955. It was later set down on the foundation.

At that time, the kitchen was not in good condition. Moving had cracked the ceiling plaster, requiring its removal. There was only one small window in the room. The insulation between the side walls consisted of mud and packed dirt, so the plaster had to be removed from the walls and replaced with plaster board furnished by defendant. It was also necessary to cut a window in one of the walls wherein a set of double windows was installed on the south side with another window in the west end of the kitchen. Defendant and her husband furnished the windows. They were present when that work was being done, and made no protest then or at other times. The fact is that they commented in the

presence of another workman that the house looked nice and that plaintiff was doing a good job. As a matter of fact, Bill Affleck was present and voluntarily assisted in doing some of the works of improvement.

When the house was moved in, there was only one kitchen cabinet. It hung on the wall and was replaced by a work bench with cabinets on top of it. They were made by plaintiff's father, an experienced carpenter. There was no sink in the kitchen. An archway to replace a door was cut between the kitchen and the living room. The electric wiring was changed around and wall plugs were installed. Defendant provided a used kitchen sink in fair condition, and it was installed. There was a cracked brick chimney in the living room. It actually hung from braces on the wall, about 4 feet above the floor, and went up to the second story. It was in bad condition and unsafe to use, so plaintiff took it out and replaced it with a metal-bestos steel chimney furnished by defendant.

There was no bathroom in the house, so plaintiff constructed one by extending the wall of the back porch which adjoined the kitchen, thereby adding 4 more feet of room in order to have a bathroom and utility room. This was done by taking out and moving the back wall of the porch, setting the porch on a foundation, building the roof on out to the extension, pouring a concrete floor, and building a frame for the door. The lumber for that and some other work was taken from a scrap pile located south of the house or from pieces of old lumber taken from the house itself.

There was no city water available, so plaintiff dug a hole for a well down to water, installed the casing therein, and connected thereto a water pump furnished by defendant. Plaintiff, his wife, and his father also painted the outside window casings, the frames, and mopboards with paint furnished by plaintiff. Plaintiff also provided the tile and employed his brother, who was engaged in that business, to lay the tile in the kitchen.

He also fitted the kitchen sink and covered the bench board with linoleum. The plumbing work was done by plaintiff and his father. Further, a foundation was put under the front porch, but such porch was not yet completed when plaintiff left the house.

In order to connect up the gas, it was necessary for plaintiff to dig a trench from the house to the gas company's main pipe in the alley, and lay a pipe furnished by defendant from the alley to the house, then hook up the gas to the hot water heater and hook up the water to the hot water heater, the bathroom tub, other facilities, and stool, all furnished by defendant. However, plaintiff furnished the necessary copper tubing and brass fittings.

During remodeling, much time was spent hauling out debris and cleaning up the house to fit it for occupancy. Plaintiff and his family moved into the house in June before it was entirely ready for occupancy, but they did so because their apartment was very small, and they assumed that the oral agreement theretofore made would be carried out by defendant.

In that connection, defendant had asked plaintiff two or three times to go up to her lawyer's office and sign the written contract, but plaintiff was employed during the day elsewhere and was working on the house early every morning, late evenings, and Sundays, because of the immediate urgent need for a place to live. As a consequence, he and his wife did not go up to sign the written contract or inspect it until about July 3, 1955. However, prior thereto and before they had seen the written contract, plaintiff had paid defendant $50, believing that it was the first payment on the contract. Upon seeing the contract, plaintiff and his wife then discovered that the written contract, dated June __, 1955, and appearing in this record, did not incorporate the terms previously orally agreed upon. Rather, the written contract provided that the purchase price was $4,600 instead of $4,500, and that the $4,600 was made

payable at the rate of $51.07 on July 1, 1955, and the first day of each month thereafter for the next 10 years. Nothing was directly said in the written contract about interest, but it was made mathematically and otherwise certain that it included interest, despite the fact that the purchase price was previously agreed to be $4,500, payable $50 a month without interest. In other words, instead of paying $4,500, plaintiff would be required to pay $6,128.40.

In that situation, plaintiff and his wife did not sign the contract then or thereafter, but went and talked to defendant about it in the presence of defendant's husband. Upon inquiring of defendant why she had charged interest, she replied that she did not loan money without interest, and if they didn't like it they could just move out. Plaintiff's wife trusted her father, and because of their family relationship, plaintiff and his wife thought it would be possible to come to an agreement, so they continued to reside in the house and do some work thereon, but no agreement was ever reached. Thus, just before moving out on August 13, 1955, defendant's husband informed plaintiff and his wife that no agreement could be reached and ordered them to move out. Contrary to defendant's contention, we find no evidence which would justify a conclusion that plaintiff voluntarily made the improvements or abandoned his rights under the oral contract.

Oral evidence adduced by plaintiff was that he supplied material for the house of the fair and reasonable value of $166.32, and five exhibits received in evidence support that amount either charged to or paid for by plaintiff. Evidence adduced in plaintiff's behalf, by him, his wife, and several of his employees, was that the foregoing work and labor were performed; that the improvements were made on the house and lot as aforesaid; and that the fair and reasonable value of such work and labor was $1,400.

In that connection, there was also evidence adduced

in plaintiff's behalf by one witness who testified that before any work was done on the house and lot, the reasonable market value thereof was $1,000, and after the work was completed, it was so worth $4,000 to $4,500. Three other witnesses testified with regard to such values, and fixed them respectively as: $1,400 and $4,500; $950 to $1,000 and $4,500; and $800 and $4,500.

We are confronted then with the question of what amount if any plaintiff should recover from defendant. In that connection, plaintiff did not come within the provisions of Chapter 76, article 3, R. R. S. 1943, as an occupying claimant (Williams v. Beckmark, 146 Neb. 814, 21 N. W. 2d 745), but nevertheless, under the circumstances presented herein, his measure of recovery if any should be determined as hereinafter indicated.

In Schultz v. Thompson, 156 Minn. 357, 194 N. W. 884, a case almost identical with that at bar, the court said: "It is well settled that where a vendee under and in reliance upon an oral contract to purchase makes valuable improvements on the property and the vendor refuses to carry out the oral contract, the vendee may recover for such improvements to the extent that they enhanced the value of the property. (Citing authorities.) We need not stop to inquire whether the contract, unenforceable because not in writing, is sufficiently definite and certain to be specifically enforced if it had been in writing. The right of the vendee to recover for improvements made in good faith in reliance on an oral contract which fails through no fault of his, does not rest on the contract or any right to enforce it, but rests on the ground that the vendor, through whose fault the contract failed, ought not to obtain the enhanced value given to his property by the money and labor of the vendee without making compensation therefor. * * * Defendant urges that plaintiff did not show a tender of performance on his part. After defendant had refused to make the written contract unless made subject to the deed to the hunting club, and for an increased

rate of interest on the deferred payments, a further tender of performance by plaintiff was unnecessary."

In that case, the court specifically held: "Where a vendee, under and in reliance upon an oral contract to purchase, makes valuable improvements on the property, and the vendor refuses to carry out the contract, the vendee may recover for such improvements to the extent that they enhanced the value of the property.

"The right to recover for such improvements is based on the ground that the vendor, through whose fault the contract failed, ought not to obtain the enhanced value given to his property by the money and labor of the vendee without making compensation therefor.

"After defendant refused to perform, tender of further performance by plaintiff was unnecessary."

Such rules were reaffirmed as recently as Tompkins v. Sandeen, 243 Minn. 256, 67 N. W. 2d 405, 49 A. L. R. 2d 1162, a materially comparable case citing numerous authorities, wherein the court said: "Consequently we conclude that the rules to be applied in this case must necessarily be the same as control situations where the purchaser, unable to compel specific performance because the contract is within the statute of frauds or too indefinite in its terms, seeks to recover for the improvements made in reliance upon the contract. There is no doubt that the purchaser can have such a recovery, which should properly be measured by the enhanced value of the land at the time possession is surrendered and not by the cost of the improvements.

"However, in this type of action this court, as well as others, has allowed the vendor to set off the reasonable value of the use and occupation of the premises by the purchaser against the value of improvements. The theory permitting the purchaser to recover for improvements does not rest on the contract but rather on the principle that the defaulting vendor ought not to be unjustly enriched."

Thereafter, the court cited and quoted with approval

from Schultz v. Thompson, *supra,* and said: "While some courts do not specifically characterize the action as one for 'unjust enrichment' or 'quasi contract' as this court has done, it is clear that the basis of most of the decisions rests on the same principle. It is well settled that under the unjust enrichment theory the parties are to be restored to the status quo as far as practicable, which necessarily involves the return of any benefits received by the plaintiff. Thus, while rescission of the contract is not involved, the result is substantially the same as if the plaintiff had elected to rescind. We conclude that defendant is entitled to set off the reasonable value of plaintiff's use and occupation of the premises from the inception of her occupancy.

"The reasonable rental value found by the trial court was apparently based on the use of the premises as improved. The proper measure of the setoff should be the value of the use and occupation of the premises *without the improvements* contributed by the plaintiff." The foregoing rules are controlling in the case at bar.

We conclude that the evidence adduced by plaintiff was amply sufficient to sustain a verdict for plaintiff, and that the trial court erred in directing a verdict for defendant and overruling plaintiff's motion for new trial. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

NEBRASKA NATURAL GAS COMPANY, APPELLANT, V. CITY OF LEXINGTON, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

93 N. W. 2d 179

Filed November 28, 1958. No. 34454.

1. **Pleading.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable,

relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

2. ———. 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.
3. **Municipal Corporations.** By statute, all ordinances, by-laws, acts, regulations, rules, and proclamations, existing and in force in any city at the time of its incorporation as a city of the first class, shall remain in full force and effect after such incorporation until the same are repealed or modified by such city.
4. **Municipal Corporations: Franchises.** A franchise for the sale of gas granted by a city of the second class which subsequently becomes a city of the first class to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract.

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

Sidner, Lee, Gunderson & Svoboda and *Stewart & Stewart,* for appellant.

Smith Brothers and *Hugh Stuart,* for appellees.

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

MESSMORE, J.

The Nebraska Natural Gas Company, a corporation, as plaintiff, brought this action in the district court for Dawson County against the City of Lexington, a municipal corporation, C. L. Bieck, president of the city council, Fred C. Warnemunde, Jr., Oden Delp, George Keller, and Walter Judge, council members of the City of Lexington, defendants, to obtain a judgment enjoining the defendants from preventing the plaintiff putting into effect a rate schedule for the sale of gas to customers in the defendant city.

The defendants demurred to the plaintiff's petition. The trial court sustained the defendants' demurrer. The plaintiff thereafter filed an application requesting leave

to amend its petition. This application was overruled and the plaintiff's petition was dismissed. The plaintiff filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the plaintiff appeals.

The plaintiff's petition alleged in substance that the City of Lexington, hereafter referred to as the city, was a municipal corporation, being a first class city organized and existing under the laws of the State of Nebraska, having been created a first class city on June 3, 1953, and at all times mentioned prior to said date it was a city of the second class. The petition then alleged the position of the defendants as members of the city council of the city. The petition further alleged that the plaintiff was a Delaware corporation fully qualified and authorized to do business in the State of Nebraska, and was engaged in the business of purchasing and selling at retail natural gas in various cities in Nebraska including the defendant city; that the plaintiff, in the course of its business, was serving gas customers in the city under the terms of a franchise dated October 31, 1950; that the plaintiff accepted the terms of the franchise by an instrument dated November 13, 1950; that the plaintiff, in order to serve the residents of the city, had invested and will be required to invest, large sums of money in equipment and services; that the plaintiff does not produce any of the gas which it furnishes, but purchases all of the same from a pipe line company over whose rates and costs plaintiff has no control; that the cost of gas purchased constitutes a very substantial portion of the plaintiff's cost of complying with said franchise; that the plaintiff is a public utility and as such is required, under the terms of its franchise, to furnish gas to the citizens of the city; that the rates charged by the plaintiff are subject to the regulations of the city council of the city under the laws of the State of Nebraska; that the plaintiff is entitled to a fair and reasonable return on its invested capital required for the

service of its customers within the city; that the refusal of the city council of the city to regulate the rates in such a manner as to permit the plaintiff to make a fair return on its investment will result in the confiscation of plaintiff's property without due process of law; that on October 1, 1957, the supplier of gas to the plaintiff increased the cost thereof 19.9 percent; that on October 22, 1957, the plaintiff orally requested the approval of an increase in rates at a meeting of the city council, and presented in support thereof a written report entitled "Statements of Operating Income for Year Ending December 31, 1956"; that in connection with said requested relief, the plaintiff submitted to the city council an amendment to the franchise ordinance providing for a rate which would make it possible for the plaintiff to furnish the service required by said franchise ordinance; that the defendants, notwithstanding the obligation placed upon them by law, have failed and refused to grant the requested relief and to amend said rate section of the franchise and are continuing in their refusal; that on January 14, 1958, the plaintiff requested the defendants to exercise the regulatory authority vested in them, but defendants have failed, neglected, and refused to exercise the powers delegated to them by law, and have refused to either consider said request or to grant the same; that defendants, by their action of failure and refusal to establish for the plaintiff the new rate, are depriving the plaintiff of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of Article I, section 3, of the Constitution of the State of Nebraska; that rates provided and contained in an exhibit furnished by the plaintiff are reasonable, lawful, and valid, and are necessary to provide for the plaintiff a fair and reasonable return on the invested capital required for the service of gas customers in the city; that the plaintiff has no adequate remedy at law against defendants, nor against the gas customers in the

city served by plaintiff; and that the plaintiff has suffered, and continues to suffer, irreparable injury unless the defendants are prohibited from preventing the plaintiff to put into effect the rates set forth in an exhibit, and to collect the same.

The prayer was, in substance, that the defendants be enjoined and prohibited, by proper order of the court directed to defendants, from preventing the plaintiff from putting rates set forth in an exhibit attached to the petition into effect as reasonable, lawful, and valid rates, and collecting the same; that a writ of injunction be granted; and that upon a final hearing the same be made a permanent injunction.

The pertinent assignment of error necessary for a determination of this appeal may be stated as follows: The trial court erred in sustaining the demurrer to the plaintiff's petition and dismissing the plaintiff's cause of action which was contrary to law.

A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. 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. See Montgomery v. Blazek, 161 Neb. 349, 73 N. W. 2d 402.

The petition and the exhibits attached thereto and made a part thereof filed in the instant case disclose that on October 31, 1950, the franchise ordinance was adopted by the defendant city, and accepted by the plaintiff, Nebraska Natural Gas Company on November 13, 1950, and that the defendant city became a city of the first class on June 3, 1953.

In the case of Kansas-Nebraska Natural Gas Co. v. City of St. Edward, *ante* p. 15, 91 N. W. 2d 69, referring to the franchise considered in that case, it was stated: "Section 4 of the franchise ordinance provided: 'Grantee

shall file and make effective initially the schedule of maximum rates for natural gas service set forth below, and shall furnish natural gas at such rates, or at such other reasonable, lawful, and valid rates as may hereafter be established from time to time by Grantee, subject to the approval of the proper body having jurisdiction over such rates for gas service by Grantee in said city.' "

Section 4 of the franchise ordinance adopted by the defendant city in the instant case is in part as follows: "That the Grantee shall file and make effective initially the schedule of maximum rates for gas service as set forth below, and shall furnish gas at such rates or at such other reasonable, lawful and valid rates (not higher than the schedule of maximum rates below) as may be hereafter established from time to time, subject to the approval or acceptance thereof by the legal body having jurisdiction over such rates for gas service of Grantee in the said City; * * *."

It is apparent that both ordinances purport to fix the schedule of maximum rates, and contain substantially the provision: Subject to the approval or acceptance thereof by the legal body having jurisdiction over such rates for gas service of grantee in said city. Both ordinances were granted by cities of the second class and pursuant to the provisions of the same law.

The franchise granted to the plaintiff herein was granted pursuant to section 17-125, R. S. 1943, which provided in part as follows: "Such franchise shall fix the amount that may be charged during such period for such gas or electricity and provide that such city may, after such period, make any reasonable regulation with reference to any person, firm or corporation holding such franchise either as to charges for such gas or electricity or otherwise."

In 1955, the Legislature, by an independent act, Laws 1955, c. 41, § 1, p. 156, provided: "Cities of the second class and villages shall have power to regulate and fix

the rents or rates of gas, and to regulate and fix the charges for gas meters or other device or means necessary for determining the consumption of gas." This became section 17-528.01, R. S. Supp., 1955, and became effective September 18, 1955.

In 1957, the Legislature repealed both original sections 17-125, R. R. S. 1943, and 17-528.01, R. S. Supp., 1955, and enacted what is now section 17-528.02, R. S. Supp., 1957, which provides in part: "Such city or village may make any reasonable regulation with reference to any person, firm, or corporation holding such franchise as to charges for such gas." This amendment became effective September 20, 1957, prior to the date of filing of this action and prior to the order sustaining the defendants' demurrer and order dismissing the plaintiff's petition.

In the case of Kansas-Nebraska Natural Gas Co. v. City of St. Edward, *supra,* this court said: "The power to regulate the rates is at all times in the Legislature or in a regulatory body to which the Legislature delegates the power. The delegation to the city here of the power does not affect the power, but provides a body competent to exercise the power." After reviewing the cases of McCook Irrigation & Water Power Co. v. Burtless, 98 Neb. 141, 152 N. W. 334, L. R. A. 1915D 1205; Marquis v. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927; and Furstenburg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, this court went on to say: "From these decisions the rule necessarily follows that a franchise for the sale of gas granted by a city of the second class to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract; and that power rests in the Legislature until such time as it is delegated to a proper body. This rule is necessary either to protect the public service agency from confiscatory rates or to protect the public from exorbitant rates if so fixed by a franchise. The fact that the delegation of the power to

another body occurs after the granting of the franchise is not material."

As heretofore stated, the defendant city became a first class city on June 3, 1953.

Section 16-679, R. R. S. 1943, provides in part that cities of the first class may regulate and fix the rents or rates of gas and to regulate and fix the charges for gas meters.

Section 16-116, R. R. S. 1943, provides: "All ordinances, by-laws, acts, regulations, rules and proclamations, existing and in force in any city at the time of its incorporation as a city of the first class, shall remain in full force and effect after such incorporation until the same are repealed or modified by such city."

It is apparent that whether the rule as to first class or second class cities is followed, there is no fundamental difference in the result thereof.

The judgment should be, and is, reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

MAPLEDGE CORPORATION, A MAINE CORPORATION, ET AL., APPELLANTS, V. J. B. COKER ET AL., APPELLEES.
93 N. W. 2d 369

Filed December 5, 1958. No. 34446.

1. **Trover and Conversion.** A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite period of time.
2. ———. In an action for conversion of property the motive which prompted the defendant to dispose of, or appropriate to his own use, the property of the plaintiff is an immaterial issue.
3. **Pledges.** Unsecured creditors of a pledgor of chattels are entitled to have the lien of the pledge agreement foreclosed as required by law, and a sale or transfer of the pledged chattels

otherwise than as the law provides is no protection to those participating in the transfer or sale.

4. **Liens.** A lien upon chattel property, though valid, is not evidence of ownership of the property by the lienholder.
5. **Trial: Appeal and Error.** It is the duty of the trial court to submit to and instruct the jury upon all material issues raised by the pleadings and supported by competent evidence. Ordinarily it is error to submit issues which are outside the scope of the pleadings.
6. **Trover and Conversion.** In an action for conversion the measure of damage is the value of the property at the time and place of conversion, with interest from the date of the conversion.

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

Viren, Emmert, Hilmes & Gunderson, for appellants.

Crawford, Garvey, Comstock & Nye, for appellees.

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

CARTER, J.

This is an action to recover from the defendants the value of a quantity of bowling pins alleged to have been converted by the defendants to their own use. The verdict of the jury was for the defendants and the plaintiffs have appealed.

The plaintiffs are the Mapledge Corporation, a Maine corporation which we shall hereafter refer to as Mapledge, and Rolland E. Irish, its receiver whom we shall refer to as the receiver. The defendants are John B. Coker and Regina W. Coker, husband and wife. We shall refer to the husband as Coker and the wife as Mrs. Coker. The Eagle Lake Lumber Mills, Inc., a Maine corporation, is indirectly involved in this litigation, and for convenience we shall hereafter refer to it as Eagle Lake. The Development Credit Corporation of Maine, a Maine corporation, is also involved in the action, and for brevity we shall refer to it as Development.

In 1951 Eagle Lake was incorporated for the purpose

of engaging primarily in the manufacture of bowling pins. Its manufacturing plant and office headquarters were located in the city of Eagle Lake, Maine. The defendants invested $10,000 in the capital stock of Eagle Lake. In February 1952, Eagle Lake borrowed $45,000 from Development to finance its operations. On May 29, 1952, Coker became a director of Eagle Lake.

Shortly after the incorporation of Eagle Lake, Mapledge was organized to handle the sales and distribution of bowling pins manufactured by Eagle Lake. Qualifying shares of stock were issued to three individuals who became the directors of the corporation. Eagle Lake subscribed for $44,290 in stock in Mapledge for which payment was not made. On November 15, 1953, Coker purchased the share of stock held by one of the owners of the qualifying shares of stock hereinbefore mentioned. Coker became the president and a director of Mapledge in 1953. Eagle Lake and Mapledge operated out of the same office in Eagle Lake, Maine, and one Michaud became the secretary and bookkeeper for both corporations. Mapledge was considered a subsidiary of Eagle Lake, its directors also being directors of Eagle Lake.

The $45,000 loan to Eagle Lake was secured by a factor's lien upon the material, goods in process, merchandise, and stock of Eagle Lake. On October 10, 1953, Eagle Lake was in default in its payments on the loan made by Development. To secure forebearance by Development in the collection of its loan and to insure the manufacture and delivery of bowling pins to it, Mapledge on January 9, 1954, assigned to Development all merchandise, present and future accounts receivable, and all proceeds from the sale or disbursement of its products as further security for the loan.

The evidence shows that Coker resided in San Diego, California. He had long been and continued to be a jobber of bowling pins. He had purchased and paid for a large quantity of bowling pins from Mapledge

over the years, the total purchase price being in excess of $340,000. The evidence shows that Coker, prior to August 1954, had made advancements on pins which he had in Omaha in the amount of $46,000. In August 1954, Coker paid $20,000 in cash and turned the pins back to Mapledge, accepting stock in Mapledge in the amount of $66,000 as payment of these two amounts. During the same month Mapledge moved its bank account to Omaha and authorized Coker to draw checks on its account.

In the spring of 1955 Eagle Lake closed down its operations. In July following, Development took possession of the assets of Eagle Lake under its factor's lien and sold the same. On July 22, 1955, Development advised Coker and Mapledge that it was claiming all cash, accounts receivable, and stock inventory of Mapledge under the assignment of January 9, 1954. On August 1, 1955, Development filed an action in the Supreme Judicial Court of Maine to secure the appointment of a receiver for Eagle Lake and Mapledge, and for an order restraining the two corporations and its officers from transferring or disposing of any of the assets of the corporations. Coker employed legal counsel who appeared in the action. A restraining order was entered as prayed for. On January 13, 1956, the temporary receiver was appointed. On March 2, 1956, this action was commenced in the district court for Douglas County, Nebraska. Jurisdiction of the subject matter existed by virtue of an attachment of a quantity of bowling pins in an Omaha warehouse which the receiver contended belonged to Mapledge but had been converted by Coker to his own use. Coker appeared in the action and the case was tried, with the result hereinbefore noted.

A primary question for consideration is whether the attached bowling pins were the property of Coker or whether they belonged to Mapledge and were converted by Coker to his own use. The defendants rely on the

validity of the pledge agreement to Mrs. Coker dated January 14, 1955, and the assignment of the bowling pins to her on August 12, 1955. In this respect it is not disputed that Mrs. Coker had advanced $40,000 to Mapledge and that it was indebted to her in that amount.

The evidence shows that there were 1,875 sets of bowling pins in the warehouse at the time of the attachment, and that they had a value of $21,000, according to Coker who is amply qualified to fix their value. It shows also that $6,300 worth of pins had been sold from the warehouse, which amount was being held by the warehouseman subject to the order of the court. The evidence of Coker is that he paid the Moore Bowling Pin Company $2,000 for 400 sets of pins which were placed in the warehouse. He purchased 139 sets of pins for $4,517.50 from Mapledge, which were left in the warehouse. He purchased 278 sets for $5,185.78 from Mapledge which were also left in the warehouse. These 817 sets of pins were admittedly purchased and paid for prior to August 12, 1955. There were 17 sets of pins sold from the warehouse by mutual agreement of the parties. We necessarily conclude that there were 1,058 sets of pins in the warehouse, or cash on hand in lieu thereof, over and above the pins purchased by Coker and sold by the agreement of the parties.

The record clearly demonstrates that Coker, over a long period of time, engaged in the practice of paying in advance for pins ordered by him and had subsequently received shipments of the purchased pins when they were available. The practice had met the approval of Mapledge. The sale of the 817 sets in the warehouse appears to be consistent with the mutual practice of the parties. The pins in the warehouse were held in the name of Coker. From this evidence we think the jury could properly find that the 817 sets of pins hereinbefore described were the property of Coker. Of the 1,058 sets of pins remaining, many were defective pins that had been returned and had no value. The warehouse-

man has a lien for storage, personal taxes paid, and for transportation in the amount of $2,171.02, which is a primary lien on the pins remaining. It is evident that there are pins on hand, or cash in lieu of pins, the ownership of which is alleged to depend upon the validity of the assignment to Mrs. Coker bearing the date of August 12, 1955. The value of the pins purchased by Coker is $11,703.28. The value of the bowling pins over and above the value of those owned by Coker is $9,296.72. These pins were pledged to Mrs. Coker on January 14, 1955, and assigned to her on August 12, 1955. The latter assignment was made after the Supreme Judicial Court of Maine had restrained Mapledge and Coker from transferring or disposing of any of the assets of Mapledge. Coker contends that Mapledge had no creditors other than he and Mrs. Coker when the receivership action was commenced in Maine; that the only purported creditors who filed claims were not creditors of Mapledge; and that Coker had no notice of the restraining order. From the record of the receivership case which was received in evidence, the findings of the court were that Mapledge had existing creditors and that the appointment of a receiver was necessary to protect their rights. Coker appeared in that action by his attorney and made a general appearance. He is bound by the action taken in that case. It is res judicata as to him and he may not contest in this case the issues determined in that litigation.

We point out here that the Supreme Judicial Court for Kennebec County, Maine, has obtained jurisdiction of the receivership proceeding against Mapledge. Coker appeared in that action by legal counsel and the court has acquired jurisdiction of his person. The court issued an order restraining Coker from making any transfer, encumbrance, or assignment of any right, title, or interest, legal or equitable, in any of its property, or property in its possession. The assignment made by Coker to Mrs. Coker on August 12, 1955, was in viola-

tion of the aforesaid restraining order. Such assignment was unlawful and of no force and effect. It could not operate as a valid transfer of title by Coker to his wife. It is asserted that Mrs. Coker had a valid lien on the bowling pins by virtue of her pledge agreement bearing the date of January 14, 1955. The evidence shows however that Mrs. Coker did not foreclose her lien by any legal method provided by law. A general creditor of a pledgor of chattels is entitled to have the lien thereof foreclosed in accordance with law. Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236. Evidence that one holds a lien on personal property is not evidence of ownership. We necessarily hold that we must give full faith and credit to the judgment of the Supreme Judicial Court for Kennebec County, Maine, and further hold that the legal title to the bowling pins belonging to Mapledge upon which Mrs. Coker claims a lien is in the receiver of Mapledge as a matter of law, there being no evidence in the record to support any other conclusion. We do not determine the nature or validity of the collateral pledge agreement executed in favor of Mrs. Coker, bearing the date of January 14, 1955. This is a matter to be determined in a proper action in this state or by the court having jurisdiction of the receivership in the State of Maine.

The present case must be determined upon the issues presented by the pleadings. The plaintiff claims that Coker converted pins belonging to Mapledge. The defendant Coker alleges that he is the owner of the attached bowling pins. This presents the only issue. The jury could well find that Coker owns 817 sets of pins in the warehouse of the value of $11,703.28. There is no evidence to sustain a finding by the jury that Coker owns the remaining pins of the value of $9,296.72. As a matter of law, under the issues in the case, the receiver is the owner of the remaining pins. The court in the instant case instructed the jury that it could find that Coker was the owner of all of the bowling

pins attached. There being no competent evidence in the record that Coker owns more than 817 sets of pins of the value of $11,703.28, it was error for the court to instruct that the jury could find that Coker owns pins in excess of that amount.

The plaintiffs allege as error the failure of the trial court to define a conversion in its instructions to the jury. We think the point is well taken. The jury should have been instructed that a general creditor is entitled to have a lien foreclosed in the manner provided by law, and that a purported conveyance of title by a voluntary assignment, after a receivership proceeding is commenced and the selling or encumbering of the corporate assets restrained, is in fraud of creditors and constitutes a conversion of the property. In Hill v. Campbell Commission Co., 54 Neb. 59, 74 N. W. 388, this court announced the applicable rules governing the subject of conversion. We there said: "A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite time. * * * In an action for conversion the motive which prompted the defendant to dispose of, or appropriate to his own use, the property of plaintiff is an immaterial issue. Whether defendant acted in good faith or not is of no consequence." The lien of Mrs. Coker, even if it is subsequently held to be valid, does not vest her with title to the bowling pins. The voluntary assignment of title, made in defiance of the court's restraining order, was void and unenforcible, and did not have the effect of vesting Mrs. Coker, or her assignee Coker, with title to the property. Since the lien and the purported assignment did not have the effect of vesting Mrs. Coker with title, Coker obtained no title. It follows that Coker failed to produce evidence of ownership of the bowling pins in excess of 817 sets of the value of $11,703.28. The jury should have been so instructed.

The trial court in its instructions to the jury submitted questions concerning the collection of proceeds of ac-

counts receivable due to Mapledge and their subsequent payment on a loan made to the bank in Omaha and to Coker on a loan made by him. The trial court also submitted questions concerning the validity and scope of the collateral pledges made to Development and to Mrs. Coker. These issues are outside the scope of the pleadings in the case. The petition alleges that Mapledge was the owner of all the bowling pins and that they were unlawfully converted to the use of Mrs. Coker and her assignee Coker. The answer alleges that the bowling pins were owned by Coker and Mrs. Coker. The only question at issue under the pleadings was the ownership of the pins. The validity of existing liens was not in issue as they are not evidence of ownership. Neither is the question of the payment of $10,000 to himself to be applied upon a $15,000 loan made by him to Mapledge an issue in the case. The sole question under the pleadings was the ownership of the attached pins, and the jury should have been so instructed in a manner to properly present the fact questions supported by the evidence. Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386.

It is evident that the jury could find that a part of the attached bowling pins belonged to Coker. If the jury so finds, there is no liability on the part of the defendants for such bowling pins. As to the bowling pins upon which no competent evidence of ownership was offered by the defendants, it must be held that their purported assignment to Mrs. Coker was a conversion. As to any such bowling pins, the jury should have been instructed that the measure of damage is the value of such pins at the time and place of conversion, with interest from the date of conversion. It is for the jury to fix the value of the bowling pins converted. The discussion of the evidence of value in this opinion is a reflection of the evidence in the record before us, and the inferences we have drawn therefrom. Such review of the evidence is not intended as a re-

striction upon the jury's function in the retrial of the case.

The verdict of the jury in favor of the defendants is not supported by the evidence. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

PAUL H. GALLENTINE, APPELLEE, V. WORLD INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLANT.

93 N. W. 2d 374

Filed December 5, 1958. No. 34452.

1. **Insurance: Trial.** The plaintiff has the burden of proving that the insured was in good health on the date of issuance of the policy, where good health at the date of issuance is a condition precedent to the assumption of liability by the insurer.
2. **Insurance.** The delivery of an accident and health insurance policy, the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in good health on the date of the issuance of the policy.
3. **Insurance: Trial.** The insurer may produce evidence to rebut the evidence introduced by the plaintiff to the effect that the insured was in good health at the date of the issuance of the policy, but the burden of proof does not shift to the defendant to disprove the same as an affirmative defense.
4. ———: ———. Where the evidence introduced by the insurer is wholly insufficient to rebut the evidence of the plaintiff that the plaintiff was in good health at the date of the issuance of the policy, it is not error for the trial court to direct a verdict in favor of the plaintiff.
5. ———: ———. Where a policy of accident and health insurance provides that it shall not take effect if on the date thereof the insured be not in good health, but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums.

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

Jack W. Marer and *Roger C. Andrews,* for appellant.

Marks & Clare, for appellee.

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

MESSMORE, J.

The plaintiff, Paul H. Gallentine, brought this action at law in the district court for Douglas County against the World Insurance Company, a corporation, defendant, to recover disability and hospital benefits under a credit life and sickness insurance policy issued by the defendant to the plaintiff. The case was tried to a jury. At the close of the plaintiff's case, the defendant moved for directed verdict on the ground that the plaintiff failed to produce sufficient evidence to prove his case. This motion was overruled. At the close of all of the evidence, the defendant renewed its motion for directed verdict. At the same time the plaintiff moved for directed verdict. The defendant's motion was overruled and the plaintiff's motion was sustained. Judgment for the plaintiff in the amount of $674.51 was rendered, together with attorney's fee in the amount of $350 to be taxed as costs for the benefit of plaintiff's attorney, and costs of the suit. Defendant filed a motion for new trial. From the order overruling the defendant's motion for new trial, the defendant appealed.

The pleadings admit that the plaintiff is a resident of Omaha, Nebraska, and that the defendant, an insurance corporation licensed to do business in this state, issued insurance policy No. A219210CL in favor of the plaintiff.

The plaintiff's petition, in substance, alleged that on or about August 15, 1955, for a premium paid by plaintiff, defendant issued its insurance policy insuring the plaintiff against continuous total disability resulting from sickness lasting for a period of more than 14 days and agreed to pay the insured on said policy at the rate

of $31.90 per month during the period of said disability extending through the term of the policy which was for a period of 20 months; that said policy further provided for an indemnity of $5 per day for each day the insured was confined in a hospital; that on or about October 18, 1955, while said policy was in full force and effect, the plaintiff became ill from pulmonary tuberculosis, by reason whereof the plaintiff was totally disabled; that plaintiff's disability would continue for an indefinite time in the future; that by reason thereof plaintiff was entitled to recover from the defendant the sum of $31.90 per month, beginning October 18, 1955, and continuing to March 15, 1957, a period of 18 months, or a total of $574.20; that plaintiff was confined as a resident patient in the Douglas County Hospital and the Nebraska Hospital for the Tuberculous at Kearney, Nebraska, continuously from October 19, 1955, to November 8, 1956, and by reason thereof plaintiff was entitled to recover $5 per day during the period of his hospitalization, subject, however, to the provision that the aggregate amount of indemnity payable should not exceed the monthly benefit of $31.90; and that the plaintiff was entitled to receive hospital benefits of $414.70 from October 19, 1955, to November 8, 1956. The prayer of the petition was for the amount of $674.51, attorney's fee, and costs.

The defendant's answer constituted a denial of the allegations of the plaintiff's petition except certain admissions made therein. The answer also alleged that the policy contained the provision: "If at the time this policy is issued, the Insured is not in good health * * * the accident and sickness insurance under this policy shall not be valid and the premium paid therefor will be refunded." It was further alleged that the plaintiff was not in good health at the time the policy was issued and therefore said accident and sickness insurance had never been valid, and the defendant had no liability on the policy; and that all premiums had been refunded.

It prayed that the plaintiff's petition be dismissed and the defendant recover its costs expended.

The plaintiff's reply to the defendant's answer alleged that during the month of May 1956, the defendant paid the Asco Loan Company, first beneficiary under the insurance policy, the sum of approximately $314, being benefits payable under the insurance policy, and being in full payment of the balance then owing on a loan made by the plaintiff from the Asco Loan Company; that by reason of said payment made by the defendant, the defendant acknowledged liability under the policy, recognized the validity thereof, and waived all breaches of conditions thereof; that by reason thereof, the defendant was barred and estopped from claiming or asserting that the policy was not in full force and effect at all times since the date of issuance thereof; that the defendant having voluntarily and with full knowledge of the facts and having previously denied liability under said policy, voluntarily assumed liability thereunder by making payment, or payments, to the Asco Loan Company on account of benefits due under said policy; and that the defendant, having assumed liability and paid benefits under said policy, could not, after litigation had begun, "mend its hold" and claim and assert its nonliability. The reply renewed the prayer of the plaintiff's petition.

The record discloses that the plaintiff, at the time of trial, was 44 years of age. He was employed as a machinist by the Omaha Production Company on November 1, 1954, where he worked until October 18, 1955. Prior to that time he was employed by Sears Roebuck & Company in 1952. He had lost no time from work on account of illness since he started to work for the Omaha Production Company. He further testified that he had no occasion to consult a doctor on the condition of his health a year prior to October 18, 1955. Before beginning his employment with Sears Roebuck & Company and the Omaha Production Company, he had

medical examinations by the company doctors, both of which he passed, and was cleared for work. He had no disability and was in good health on August 15, 1955. On August 15, 1955, he made a loan with the Asco Loan Company in the amount of $503.91, and signed a note with the company for the loan. He purchased a policy of credit life, health, and accident insurance which was issued by the defendant. The premium on this policy amounted to $37.91, and was included in the note which he signed for the loan. This insurance policy provided $503.91 life insurance, $31.90 monthly sickness benefits, and a hospital benefit of $5 per day. The term of the policy was the same as the term of the note, and the $31.90 monthly sickness benefit was the same amount as the monthly installments due on the note.

On October 18, 1955, the plaintiff became ill with a severe cold. He went to the University of Nebraska Hospital and was then transferred to the Douglas County Hospital where he remained from October 18, 1955, until November 5, 1955, on which date he was transferred to the Nebraska Hospital for the Tuberculous at Kearney, Nebraska, his illness having been diagnosed at the Douglas County Hospital as tuberculosis. He remained at the Kearney, Nebraska, hospital from November 5, 1955, until November 8, 1956. He was under the care of Dr. William E. Nutzman. He described the medical treatment he received at the hospital and stated that the tests there made were favorable, and he was directed to go back to work, which he did on June 17, 1957. He further testified that he was off work almost 20 months to the day. He made a claim for benefits under the insurance policy, which the company rejected. He further testified that he received no part of the hospital benefits.

On cross-examination the plaintiff testified that he was a patient in the Nebraska Hospital for the Tuberculous from 1948 until 1951. He further testified that he lost 4 or 5 pounds during July and August 1955,

which he attributed to the extremely hot weather; and that before he became ill on October 18, 1955, he had no other symptoms of tuberculosis such as large amounts of sputum, blood in the sputum, or night sweats.

The supervisor of claims for the defendant company testified that he had supervision of the claim involving the plaintiff on the policy in question, and that very likely the claim came from the Asco Loan Company, the date of the claim being November 17, 1955. He further testified that the type of insurance involved was to cover a loan which the plaintiff obtained from the Asco Loan Company, and the defendant covered the payments. This policy is referred to as a credit health insurance, and the defendant makes the contract to make the payments of the borrower in the event he becomes ill. The benefit payments under the policy for disability amounted to $31.90 per month, the same amount that would be due under the loan. When the defendant company received the claim blank, a letter was written to the Asco Loan Company, dated January 3, 1956, in regard to the loan made by the plaintiff with the Asco Loan Company. Prior to the writing of this letter, an investigation was made, and a letter was received from the Nebraska Hospital for the Tuberculous on December 22, 1955. An attempt was made to refund the premium by mailing a check from the defendant insurance company in the amount of $37.91, on January 3, 1956, to the Asco Loan Company. The check bore the words "Premium Refund" which were crossed out by some person unknown. On May 22, 1956, this witness mailed another draft in the amount of $276.48 to the Asco Loan Company which was the first beneficiary under the insurance policy. This remittance, together with the $37.91 previously sent, paid the balance in full on the plaintiff's loan from the Asco Loan Company.

The attorney for the plaintiff, prior to the time of making these payments as heretofore stated, made

claims to the defendant for the plaintiff which were denied in letters dated January 31, 1956, and February 3, 1956.

The manager of the Asco Loan Company testified that the $37.91 payment made by the defendant on January 9, 1956, was not treated as a refund of the insurance premium, but was credited to the plaintiff's loan account. After being thus credited, a balance of $276.48 remained, which was paid by the defendant insurance company on May 23, 1956.

The defendant assigns as error the overruling of its motion for directed verdict at the close of plaintiff's evidence and at the close of all of the evidence; that the trial court erred in sustaining the plaintiff's motion for directed verdict at the close of all of the evidence; and that the trial court erred in overruling the defendant's motion for a new trial.

The policy in question was issued for a term commencing August 15, 1955, and ending 20 months thereafter. The first beneficiary designated was the Asco Loan Company. The second beneficiary was Lena Gallentine.

An exception contained in the policy provided: "(1) If at the time this policy is issued, the Insured is not in good health * * * the accident and sickness insurance under this policy shall not be valid and the premium paid therefor will be refunded." The defendant, in its answer, alleged that the policy contained this provision.

In Weddle v. Prudential Ins. Co., 130 Neb. 744, 266 N. W. 624, the plaintiff, administratrix of her deceased husband's estate, sought to recover upon two policies of industrial insurance issued by the defendant. The trial court directed a verdict for the plaintiff for the amount of the policies and interest. The insurance company appealed. One of the defenses interposed by the insurance company was founded upon the preliminary provision of the policy which provided that the policies

should not take effect if on the date of issuance the insured was not in sound health. It was alleged in the answer that on said date the insured was not in sound health. The court said: "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy." The court went on to say: "Does the burden of proving that the insured was in sound health at the date of the policy rest upon the plaintiff? There are cases which hold that such burden is upon the plaintiff where sound health is a condition precedent to the assumption of risk by the insurance company. However, the delivery of a life policy, and the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy. This presumption is sufficient to sustain the burden of proof resting upon the plaintiff until the insurer introduces evidence to rebut it. * * * This is not in conflict with the rule that the plaintiff has the burden of proving that the insured was in sound health on the date of the policy, where sound health at the time of issuance is a condition precedent to the assumption of liability by the insurer. Fondi v. Boston Mutual Life Ins. Co., *supra* (224 Mass. 6, 112 N. E. 612). This rule is suggested at least by Anders v. Life Insurance Clearing Co., *supra* (62 Neb. 585, 87 N. W. 331)."

Consequently, the defendant could introduce evidence to rebut the evidence introduced by the plaintiff on the question as to whether or not, at the date of the issuance of the policy, the plaintiff was in good health. In the instant case the evidence introduced by the defendant on this issue was wholly insufficient to disprove that the plaintiff was in good health at the date of the issuance of the policy.

The indication that appears in Weddle v. Prudential Ins. Co., *supra,* to the effect that the burden of proof

shifts to the defendant to prove an affirmative defense, that is that the plaintiff was not in good health at the date of the issuance of the policy, is disapproved. The burden at all times, in cases such as the instant case, is upon the plaintiff to prove that he was in good health at the date of the issuance of the policy which is a condition precedent to the policy being in force.

The evidence in the instant case discloses that before applying for the insurance policy in suit, the plaintiff had worked steadily for over 3 years, losing only 2 days of work during that period on account of illness. He passed medical examinations before being employed by Sears Roebuck & Company and the Omaha Production Company. He testified that he felt good when he applied for the insurance policy on August 15, 1955, and had not consulted a doctor for a period of 4 years. The evidence does disclose that the plaintiff had previously had tuberculosis on two or three occasions prior to 1951. When he was released from the hospital in 1951, his case was diagnosed as arrested and inactive. He did not become sick again until October 18, 1955, which was 2 months or more after the policy in suit was issued. There is no evidence in the record that the plaintiff had tuberculosis in an active state on August 15, 1955, when he made application for the insurance policy. The existence of tuberculosis is a matter of medical testimony. There is no evidence in the record that the plaintiff's loss of weight, some of which occurred after August 15, 1955, had any connection with the disease of tuberculosis. There is no evidence that the plaintiff knew or suspected that he had tuberculosis.

The record shows that after the defendant insurance company had been furnished with full information concerning the plaintiff's physical condition and history, and after it had denied liability to the plaintiff on the grounds contained in its answer, the defendant paid to the Asco Loan Company benefits accumulated on the policy in the amount of the total balance of the loan.

The Asco Loan Company was designated as the first beneficiary under the policy. The defendant's evidence that it attempted to refund the premium is not very persuasive. The cancelled check for $37.91 showed the legend "Premium Refund" was crossed out by parties unknown. It is apparent that the defendant's evidence showed that the payment was treated as a payment on the plaintiff's loan account, and when final settlement was made between the defendant and the Asco Loan Company, the $37.91 alleged premium refund was credited as a payment on the defendant's policy liability. In addition, if the premium was refunded, it would have been refunded to the plaintiff direct and not to the loan company. The plaintiff paid the premium by signing a note to the Asco Loan Company which included the premium.

As stated in 45 C. J. S., Insurance, § 743, p. 754: "Generally payment, in full or in part by the insurer, of any loss under the policy, with knowledge of the breach, is a recognition of the validity of the policy and a waiver of the breach.

"Where insurer, with knowledge of the breach of a condition, pays the amount of loss ascertained by appraisers into court on an interpleader, or pays or partially pays any loss under the policy, it recognizes the policy as still in existence and must be considered to have waived its defense, unless the policy is severable so that under the law it would be only forfeitable in part and the payment is made on the nonforfeitable portion." See, also, Midwest Metal Stamping Co. v. Citizens Fund Mut. Fire Ins. Co., 229 Iowa 969, 295 N. W. 444, 133 A. L. R. 779; Hartford Fire Ins. Co. v. Mutual Savings & Loan Co., Inc., 193 Va. 269, 68 S. E. 2d 541, 31 A. L. R. 2d 1191; Pfaffengut v. Export Ins. Co., 55 N. D. 112, 212 N. W. 518; 29 Am. Jur., Insurance, § 876, p. 671.

As held in Weddle v. Prudential Ins. Co., *supra:* "The delivery of a life policy, the acceptance of premiums,

and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy."

In the light of the evidence and the foregoing-cited authorities, we conclude that the trial court was correct in directing the verdict for the plaintiff and in rendering judgment for the unpaid portion of the plaintiff's claim, and allowing an attorney's fee and costs. We conclude further that the plaintiff's attorney shall be allowed a fee of $250 to be taxed as costs, for services rendered the plaintiff on this appeal.

We affirm the judgment of the district court.

AFFIRMED.

WENKE, J., participating on briefs.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. DUANE FURSTENAU, DEFENDANT IN ERROR.

93 N. W. 2d 384

Filed November 5, 1958. No. 34453.

1. **Criminal Law.** The courts of the county where an offense is committed have jurisdiction of the subject matter of the cause and jurisdiction to try the accused for the crime charged.
2. **Criminal Law: Venue.** Unless a change of venue, from the court of the county where the offense was committed, is had in the manner provided by law, the accused cannot be tried lawfully in any other county of the state.
3. **Criminal Law.** The law confers jurisdiction of the subject matter.
4. **Criminal Law: Venue.** An accused cannot waive the venue provided by law, nor select the court where he is to be tried.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Exceptions sustained.*

Clarence S. Beck, Attorney General, and *Betty Peterson Sharp,* for plaintiff in error.

John F. Kerrigan, for defendant in error.

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

SIMMONS, C. J.

This case comes here under the provisions of section 29-2314, R. R. S. 1943, on a bill of exceptions taken by the county attorney of Otoe County. The court appointed John F. Kerrigan to argue the case against the county attorney pursuant to the above statute.

Following a preliminary hearing, the defendant was on October 9, 1957, charged in the district court for Otoe County in that he did "unlawfully, wilfully, maliciously, feloniously and forcibly break and enter into a warehouse occupied by the Gangel Oil Company, with the intent of him the said Duane L. Furstenau, then and there to steal property of value contained in said building."

On November 8, 1957, there was filed in the district court for Dodge County an information charging that defendant did "willfully and maliciously in the night season enter a warehouse building occupied by Gangel Oil Company in Nebraska City, Otoe County, Nebraska, and did then and there steal property of value, to wit: 150 tires, and did then and there forthwith transport said tires into the County of Dodge and State of Nebraska, and did then and there conceal them and convert them to his own use in accordance with a conspiracy entered into with Raymond LeRoy Clark and Jack Smith."

On the same day "In the District Court of Dodge County" according to the journal entry, defendant appeared, "being charged by amended information with the crime of Feloniously Entering Building," and entered a plea of guilty to the amended information and to the crime charged therein. The court found the defendant guilty of the "crime of feloniously entering building, 28-533" and took under advisement the matter of sentence. The defendant, then, in the Otoe County pro-

ceeding, entered a plea in bar wherein he alleged that in Dodge County on November 8, 1957, he "was found guilty on an amended information charging him with violation of Section 28-533 of the Revised Statutes of Nebraska for 1943 as amended as appears in certified copy of said information and journal entry thereon which is attached hereto and made part hereof by reference the same as if fully set forth herein. That the offense with which this defendant is here charged is included within the information of which this defendant has been charged and convicted in Dodge County, Nebraska."

The State answered and, among other allegations, alleged "That the District Court of Dodge County, Nebraska was without jurisdiction to enter such judgment."

The trial court sustained the plea in bar and discharged the defendant.

The State assigns error in the ruling.

We sustain the assignment for the reasons here given.

Defendant admits participating in the planning of the crime; that he secured the truck by which the stolen goods were transported from Otoe County to Dodge County; and that he there assisted in concealing and selling part of the stolen property in Dodge County. He contends, however, that he was not in Otoe County and had no participation in the offense there committed. It is the State's contention the prosecution may be had in Otoe County under the aiding and abetting statute, section 28-201, R. R. S. 1943.

We do not find these contentions material to the decision here, but state them as a background to the question here presented.

We think it patent that the finding of guilt entered in the district court for Dodge County was directed to and involved only the offense charged as having occurred in Otoe County. The defendant so construed it in his plea in bar above quoted.

The question then arises: Did the district court for Dodge County have jurisdiction of that offense?

The 1866 Constitution provided for the creation of district courts, and in Article IV, section 3, provided in part: "* * * the supreme and district courts shall have both chancery and common law jurisdiction"; and in section 4, "The jurisdiction of the several courts herein provided for both appellate and original shall be fixed by law: * * *." The present constitutional provision is: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide; * * *." Art. V, § 9, Constitution of Nebraska.

Article I, section 7, of the 1866 Constitution provided in part: "In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; * * *." Article I, section 11, of the 1875 Constitution contained an amended provision that: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

We set out the reasons for this change in State v. Crinklaw, 40 Neb. 759, 59 N. W. 370, wherein we stated: "It is a fact, attested by the judicial history of the state, that citizens were, prior to the adoption of the present constitution, put upon trial before juries of strangers, at distant places, in some instances hundreds of miles from their homes, although within the judicial district where the crimes were supposed to have been committed. That practice appears to have been the particular evil for which the provision before us was designed as a remedy."

It would appear that Dodge v. People, 4 Neb. 220, was such a case for there the defendant was accused of murder in unorganized Chase County and was put to trial in Otoe County.

We now refer to our decisions, bearing in mind that many of them were written by a court cognizant, through its own experiences, with the development of the constitutional and statutory provisions here involved.

In Dodge v. People, *supra,* we held: "At common law in general, offenses could be inquired into as well as tried, only in the county where they were committed. * * * Yet there were many exceptions to the rule. * * * Section four hundred and fifty-five of the criminal code provides, that all offenses shall be tried in the county in which they are committed, unless for cause the venue is changed."

By the Criminal Code enacted in 1873 it was provided: "All criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county." § 455, G. S. 1873.

The above language has remained unchanged in the statutes except for amendments enacted in 1957 which are not material here. See, §§ 29-1301 to 29-1301.03, R. S. Supp., 1957.

We are mindful of the provisions of section 24-302, R. R. S. 1943, that: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

Here we are dealing with a case where jurisdiction is "otherwise provided."

Olive v. State, 11 Neb. 1, 7 N. W. 444, was a case dealing with the jurisdiction of the court. In announcing a conclusion in the course of the opinion we held: "And this is in entire accord with our constitutional system of district courts, *by which one is designed for each organized county having criminal jurisdiction coextensive therewith,* * * *." (Emphasis supplied.)

The syllabus is: "A district court while sitting in one

county has no jurisdiction over crimes committed in other organized counties."

In Ex parte Crawford, 12 Neb. 379, 11 N. W. 494, we had a case where the crime was committed in the unorganized territory of the state lying directly west of Holt County. The unorganized territory involved had been attached to Holt County for "election, judicial, and revenue purposes." Crawford was held by the sheriff of Holt County. He sought release by habeas corpus. We held that: "* * * not only that the district court, when sitting in Holt county, has jurisdiction to try the prisoner for the crime charged, but that, unless through a change of venue made at his request, he can be lawfully tried in no other."

In McCoy v. State, 22 Neb. 418, 35 N. W. 202, we had a case where a person was charged with an offense, with no allegation as to county or state in which the alleged crime was committed. We held: "* * * it is elementary that to confer jurisdiction upon the court for the trial of an offender the information or indictment must allege specifically that the crime was committed within the jurisdiction of the court."

The analysis above made of constitutional provisions, statutes, and decisions demonstrates that the jurisdiction of the offense here involved rests in the district court for Otoe County and can only be removed therefrom by change of venue in the statutory method.

But defendant contends that the rights here involved are privileges personal to him and can be waived. He relies on the rule last stated in Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, which is: "The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure."

The defendant overlooks the fact that we are here dealing with the jurisdiction of the court over the sub-

ject matter. The law alone confers jurisdiction of the subject matter. Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007.

But defendant, contending that the rule of waiver relates to all rights guaranteed by the constitutional provision, relies on some of our decisions which he contends apply the rule of waiver to matters of jurisdiction to try crimes in counties other than the one where the offense was committed. We accordingly review our cases as to that matter.

In Gandy v. State, 27 Neb. 707, 43 N. W. 747, the defendant was accused of a crime in Richardson County. He applied for and secured a change of venue to Pawnee County. In the latter county he sought a change of venue to "another county and a strange place." It was held that such a change was unauthorized. We adopted the language from State v. McGehan, 27 Ohio St. 280, after first pointing out that our statute was identical with that of Ohio, and held: "The statute as to change of venue in criminal cases confers upon the district court in the county where the offense was committed power to order a change of venue to an adjoining county, but such power is confined to the jurisdiction of the county where the offense was committed."

The result of the holding is that the jurisdiction of the subject matter is in the court of the county where the offense was committed. That court has the power to order a change of venue but none other. The effect of the decision is to hold that a defendant cannot waive the venue provided by statute nor select the court where he is to be tried.

In State v. Crinklaw, *supra,* it was held that the right of trial in the county where the offense was committed was a personal privilege and could be waived by the accused and was held to have been waived by an application for a change of venue. It is material to note, however, that in this case the court where the offense was committed had jurisdiction of the subject matter

and the person of the defendant. The waiver was had by a statutory proceeding from the court that had jurisdiction of the subject matter to another court for trial.

In McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540, the defendant was charged in Sarpy County with the commission of a felony. Later he appeared before the district court for Douglas County, in chambers, where he pleaded guilty and was sentenced. The sentencing court proceeded under authority of a statute quoted in the opinion. We held that McCarty had waived the right of trial in Sarpy County where the crime was alleged to have been committed, saying that: "The right of an accused person to be tried by a jury drawn from the county or district in which the prosecution was initiated" is a personal privilege and may be waived. Here again jurisdiction of the subject matter and the accused was first had in the county where the offense was committed.

In Kennison v. State, 80 Neb. 688, 115 N. W. 289, the defendant was found guilty of murder in the second degree in a trial held in Scotts Bluff County, the county where the crime was alleged to have been committed. The judgment was reversed and the cause remanded. In Kennison v. State, 83 Neb. 391, 119 N. W. 768, the cause came on for trial again in Scotts Bluff County and at defendant's request a change of venue was had to Kimball County. Kimball County was not an adjoining county. Defendant first challenged the jurisdiction of the district court for Kimball County in his brief here. We held that he had waived his right of trial to a jury in the county where the crime was committed. Here again it is to be noted that before the change of venue was had the district court for Scotts Bluff County, where the crime was committed, had obtained jurisdiction of the subject matter and the defendant.

The constitutional provisions herein discussed, the statutes, and our decisions, all lead to these conclusions.

The provision of section 29-1301, R. R. S. 1943, pro-

viding that "all criminal cases shall be tried in the county where the offense was committed unless * * *" relates to the jurisdiction of the court over the subject matter of the offense.

Before any other district court for any county of the state has jurisdiction to try a criminal case, the court for the county where the offense was committed must first secure jurisdiction of the subject matter by proper charges filed therein. Trial in any other county must have that foundation as a basis of jurisdiction of the cause.

This conclusion is sustained by our holding in Poulsom v. State, 113 Neb. 767, 205 N. W. 252, that "to confer jurisdiction upon the court for the trial of an offender, the indictment or information must allege specifically that the the (sic) crime was committed within the jurisdiction of the court."

It is sustained likewise by the provisions of section 29-1602, R. R. S. 1943, that: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant."

This statute does not authorize an information to be filed in the district court for any county in the state by any county attorney who elects to do so.

Our conclusion is further sustained by the provision of section 23-1201, R. S. Supp., 1957, which makes it the duty of the county attorney to appear, prosecute, or defend, on behalf of the county or state, all suits, applications, or motions, civil or criminal, which may have been transferred by change of venue from his county to any other county in the state.

It is further sustained by the provisions of section 29-1302, R. R. S. 1943, providing that when a change of venue is had, the clerk of the court shall make a certified transcript of the proceedings, which together with the original indictment shall be transmitted to the clerk of the court to which the venue is changed, and the trial

shall be conducted in all respects as if the offender had been indicted in the county to which the venue has been changed.

We had this statute before us in Barr v. State, 45 Neb. 458, 63 N. W. 856, wherein the crime was committed in Stanton County and trial was had on a change of venue to Cuming County. We there held: "* * * it is plain that the district court to which the venue in a criminal prosecution has been changed can acquire jurisdiction of the cause only by the filing in the office of the clerk of said court a certified transcript of the proceedings had in the case in the court ordering a change of the place of trial, together with the original indictment or information. It is obvious that jurisdiction of the offense charged in the information could not be conferred upon the district court of Cuming county in any other mode than that pointed out by statute."

Our conclusion is further sustained by the provision for the payment of costs "by the county in which the indictment was found" as provided in section 29-1302, R. R. S. 1943, and by the provisions in sections 29-1303 and 29-1304, R. R. S. 1943, providing upon a change of venue for the transfer of a prisoner to the jail of the county where he is to be tried and for the recognizance of witnesses to appear before the court in which the prisoner is to be tried.

Section 29-1307, R. R. S. 1943, provides: "Whenever any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted in any county where he received or had such property, notwithstanding the theft was committed in another county."

Obviously this does not authorize the prosecution under section 28-533, R. R. S. 1943, in another county than that where the crime was committed, except on a change of venue.

It follows that the charges in Dodge County of an

offense committed in Otoe County under the circumstances here did not confer jurisdiction on the district court for Dodge County to try the cause here involved.

The exception of the county attorney herein discussed is sustained.

All costs are taxed to Otoe County.

EXCEPTIONS SUSTAINED.

WENKE, J., participating on briefs.

LEON A. WILLIE, APPELLEE, V. CONSTANCE D. WILLIE, APPELLANT.

93 N. W. 2d 501

Filed December 12, 1958. No. 34420.

1. **Divorce.** If requirements for residence within the state have been complied with, then the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, resides.
2. **Domicile.** It is elementary and it is the universal rule that residence in a community is determined by intention of the parties.
3. **Husband and Wife: Domicile.** A wife is not prevented from having a residence separate and apart from that maintained by her husband.
4. **Domicile.** A person does not change his legal residence by removal to a new dwelling place without an intention to make the new dwelling place his home as of the present moment rather than in the future.
5. ———. One's legal residence is where he has his established home, and to which, when absent, he intends to return. To effect a change there must not only be a change of residence, but a present intention to permanently abandon the former residence.
6. ———. The residence of a person in the military service of his country is in no way affected by such service. He does not abandon or lose the residence he had when he entered such service by being required to live at certain army posts in other states or countries.
7. **Divorce.** The petitioner or moving party who seeks to vacate a divorce decree has the burden of proving the grounds charged, including the falsity of allegations of residence within the jurisdiction of the court by a preponderance of evidence, and where

this burden is not sustained, a refusal to vacate the decree is proper.

8. ———. By section 42-340, R. R. S. 1943, either party to a divorce action may, within 6 months of the date of rendition of a decree, make application to have the decree set aside or modified. However, the right to vacate or modify such decree within 6 months is not absolute but must be exercised for good reason within a sound judicial discretion, and such action must not be permitted to produce an unconscionable result, thereby abusing or misusing the judicial process.

9. **Trial.** It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will not ordinarily deny such right except for the fault or gross laches of such party or his authorized attorney.

10. **Divorce.** What constitutes good reason for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case.

11. **Judgments: Appeal and Error.** Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere.

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

Chambers, Holland, Dudgeon & Hastings, for appellant.

Beynon & Hecht, for appellee.

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

CHAPPELL, J.

On December 22, 1956, plaintiff, Leon A. Willie, a major in the United States Army and an alleged resident of Lincoln, Lancaster County, Nebraska, filed a petition for an absolute divorce from defendant, Constance D. Willie. The alleged grounds for such relief were extreme cruelty and misconduct of defendant, which need not be stated here. A summons issued and on January 3, 1957, same was personally served on defendant in El Paso County, Colorado. Answer day was

on or before January 28, 1957. Thereafter, on January 29, 1957, defendant's attorneys entered a written general appearance for defendant, but thereafter filed no other pleading or answer although on February 4, 1957, and again on February 13, 1957, they were duly notified by plaintiff's attorneys that the cause was set for trial on February 20, 1957.

After a hearing on that date whereat evidence was adduced, a decree was rendered which found and adjudged that due and proper service of summons had been made on defendant; that the court had jurisdiction of the parties and cause; that defendant's attorneys had entered their appearance on behalf of defendant and were notified of the hearing but obtained no additional time to plead; and that defendant and her attorneys failed to answer, plead, or otherwise appear, so defendant was in default and same was entered against her. The judgment then found generally for plaintiff and against defendant; that the allegations of plaintiff's petition were true; that defendant had been guilty of extreme cruelty and misconduct as alleged; and that plaintiff was entitled to an absolute divorce from defendant and such a divorce was granted to plaintiff.

Thereafter, on March 5, 1957, the day after plaintiff had left Lincoln for required overseas army duty in Japan, defendant filed a motion to set aside the decree, supported by her affidavit subscribed and sworn to before a notary public in Lancaster County on March 4, 1957. The alleged grounds therefor were that the parties were married in Lincoln on November 21, 1940, but for the last 3 years they had resided in Colorado Springs, Colorado, with the intention of making it their permanent residence, and plaintiff was not a resident of Lincoln. Thus the court was allegedly without jurisdiction to render the decree, and same was a nullity. Defendant also alleged that she had intended to resist the action but had no notice that the same was set for hearing, and plaintiff's divorce was obtained by fraud.

After a hearing on defendant's motion, whereat evidence was adduced by the parties, her motion was overruled, and she appealed, assigning that: (1) The trial court erred in finding that plaintiff was a resident of the State of Nebraska and that the court had jurisdiction to grant plaintiff a divorce; and (2) in any event the trial court erred in refusing to set aside the decree of divorce and grant defendant an opportunity to defend and have a hearing on the merits. We do not sustain the assignments.

At the outset it should be said that the bill of exceptions presented here contains not only the evidence, in affidavit and exhibit form, adduced by the parties on defendant's motion to set aside the decree, but also all the evidence orally adduced by plaintiff at the hearing on February 20, 1957, which was offered in evidence, and disclosed the basis upon which plaintiff was granted an absolute divorce. In that connection, the latter evidence, properly corroborated, was amply sufficient to sustain a conclusion that plaintiff had continuously been a legal resident of Lincoln since he entered military service in 1940; that, holding the rank of major, he was still in that service; and that defendant had been guilty of extreme cruelty and misconduct during the last 10 years, which destroyed the objects of matrimony, impaired plaintiff's health, three times imperiled his career as an army officer, and entitled him to a divorce. It also disclosed that the parties had no children; that since the marriage they had accumulated some expensive household furniture and equipment, a car, and an equity of about five thousand dollars in a house in Colorado Springs; that defendant was able-bodied and able to work; that she owned 180 acres of land in northeastern Colorado, and was living with her mother in Colorado Springs; and that defendant was an only child whose widowed mother had personal assets worth between three hundred and five hundred thousand dollars, plus real property in Colorado and Nebraska. Also, plain-

tiff and defendant had a joint bank account from which plaintiff had removed his name but had withdrawn none of the account, which account, at the hearing on defendant's motion, was shown to have contained six hundred to eight hundred dollars. Such record also shows that plaintiff offered to pay all costs including fees for defendant's attorney; to turn over his interest in the house to plaintiff and her mother, who had some money invested in it; and to give defendant all the household furniture and equipment, but plaintiff desired to keep only his personal effects, the car, and a tape recorder used in his business.

At the hearing on defendant's motion, she offered her own second affidavit, sworn to and acknowledged before a notary public in Lancaster County on March 8, 1957. Therein, so far as important here, she deposed substantially as follows: That she was 35 years old and presently a resident at 618 Salano Drive in Colorado Springs, Colorado; that she was married to plaintiff in Lincoln on November 21, 1940, but shortly thereafter plaintiff went on active duty in the National Guard and was stationed at various places in the United States until sent overseas in 1944; and that upon his return in 1945 he was stationed at various places during which time defendant accompanied and lived with plaintiff where opportunity presented, but that since September 1954, plaintiff had been stationed at Fort Carson, Colorado, and the parties resided in Colorado Springs. Defendant deposed that in the spring of 1956 the parties decided and plaintiff determined *"that they would make their permanent home or residence in Colorado Springs upon plaintiff's release from the service and retirement in 1960"*; that accordingly, in May 1956, they started the construction of a residence at 618 Salano Drive in Colorado Springs and moved into it in September 1956, intending to make their permanent residence there, where plaintiff lived about 1½ months until in October 1956, when he was ordered to temporary duty in Washington,

D. C.; and that since that time defendant had not seen plaintiff and had heard from him but twice. (Italics supplied.) Defendant also deposed that plaintiff had not actually lived in Lincoln since 1940 except for occasional visits with relatives there; that the parties had made their home in rented properties wherever plaintiff was stationed until the decision was made to make Colorado Springs their home as aforesaid; and that on December 22, 1956, plaintiff was a resident of Colorado Springs. She also deposed that by the first part of January 1957, their joint bank account was exhausted and plaintiff had refused to contribute to her support, and she had no other source of income. Thus, she was unable to make payments on their home, and was unable to sell or mortgage same because title thereto was in both parties and such property, as well as some mortgaged household furniture and equipment, was subject to foreclosure and loss. She further deposed that the parties owned a 1956 Ford station wagon which plaintiff had taken and retained, leaving defendant without any means of transportation. Defendant then denied that she had been guilty of extreme cruelty or misconduct; and deposed that when summons was served upon her she immediately consulted with her named attorneys in Colorado Springs and instructed them to resist the action, but they did not inform her and she had no knowledge that the action was to be heard February 20, 1957, or that plaintiff had been granted a divorce until she read about it in a Lincoln paper about February 28, 1957, and that upon advising her attorneys of that fact, they disclaimed any knowledge of it and advised her to come to Lincoln immediately and obtain local counsel.

In that connection, plaintiff offered an affidavit of one of his attorneys which deposed that his other attorney appeared on February 4, 1957, and set the case for trial February 20, 1957. Immediately on February 4, 1957, that attorney called one of defendant's attorneys by long distance telephone, discussed the case with him in

the presence of affiant, and told defendant's attorney that the case had been set for trial on February 20, 1957. A memorandum of the Lincoln Telephone & Telegraph Co., dated February 4, 1957, and marked exhibit A, was attached to the affidavit and made a part thereof, which verified that such a call had been made. Also, on February 4, 1957, that attorney for plaintiff wrote defendant's attorneys a letter. A copy thereof, marked exhibit B, was attached to and made a part of the affidavit. That letter also informed them that the case had been set for trial February 20, 1957, at 9 a. m. Therein plaintiff also offered to pay all costs, including all attorneys' fees of defendant's attorneys; to turn over to defendant and her mother the house they were living in; and to give defendant all of their furniture and equipment and only retain the car, a tape recorder, and plaintiff's personal effects. It informed them that defendant had access to between six hundred and eight hundred dollars in their joint bank account from which plaintiff had withdrawn only his name. Also, the affiant aforesaid deposed that, having received no reply to the letter to defendant's attorneys of February 4, 1957, one of them was again called by long distance telephone on February 13, 1957, whereat defendant's attorney acknowledged receiving the letter of February 4, 1957, and was again informed that the case was set for trial February 20, 1957. He was then asked whether defendant intended to make further appearance, and defendant's attorney said that he did not know, but if such further appearance was contemplated either defendant or local attorneys employed by defendant would confer with affiant on or before the following Monday, February 18, 1957. However, plaintiff's attorneys received no further communication from defendant or any person in her behalf prior to February 20, 1957, so they proceeded to trial on default. A memorandum of the Lincoln Telephone & Telegraph Co., marked exhibit C, and attached to and made a part of the affidavit, also veri-

fied that such a call had been made by plaintiff's attorney. We also deem it passing strange and important that defendant was in Lincoln prior to March 4, 1957, where her motion and affidavit were prepared on that date seeking to set aside the decree, but same were not filed until after plaintiff left for required overseas army duty in Japan.

The affidavit of only one attorney for defendant was offered by her. He deposed that defendant brought the summons served upon her to his office and that he discussed the matter with defendant and with plaintiff's attorneys, and knew that the cause had been set for hearing, but at that time defendant could not afford to travel to Nebraska and be present at the hearing or employ local counsel, so he requested additional time for her to do so. He stated that due to inadvertence of their office, defendant was not advised of the hearing, but several days thereafter defendant journeyed to Nebraska and requested that the default should be set aside. However, he stated that throughout the course of negotiations, the attorneys for plaintiff did not at any time deceive or attempt to deceive affiant as to dates and times of hearing, and that he advised defendant that it would be impossible for his office to represent her in Nebraska, but defendant was attempting to employ local counsel, and he advised plaintiff's attorneys that the matter of jurisdiction was going to be contested and *to the best of his knowledge* informed them of defendant's financial circumstances. (Italics supplied.)

The affidavit of defendant's mother, offered by defendant, was similar in material respects with that made by defendant. She also deposed that she was a widow; that defendant was her only child; and that she had sufficient funds and income to support herself but was unable to assume the obligation and support of defendant, who had not been supported by plaintiff since the divorce action was filed. She also said that defendant had been a good, dutiful wife, and was not guilty

of misconduct as claimed by plaintiff, but that there was evidence that plaintiff had been guilty of misconduct.

An affidavit of an army officer offered by defendant deposed that he met plaintiff in May 1956, whereat plaintiff indicated that he intended to settle in Colorado Springs *"after retirement."* (Italics supplied.) In another affidavit, offered by defendant, the affiant refers to "Major Leon A. Willie claiming Colorado Springs, Colorado *as his retirement town."* Affiant then deposes and says: "During an interview to establish the qualifications of Major Willie and family for a real estate loan I was told that he was making Colorado Springs his permanent home." (Italics supplied.) That statement also could as well refer to the future, and was purely hearsay without disclosing who gave him the information.

In another affidavit offered by defendant, the affiant, an army officer, deposed that he was a fellow officer with plaintiff at Fort Carson, Colorado, in 1954 and 1955, where plaintiff had indicated a *"personal desire to locate his permanent residency"* in Colorado Springs. (Italics supplied.) Affiant also deposed that while he was acting in a civilian capacity as a realty salesman, he had sold a residence known as 618 Salano Drive in Colorado Springs to plaintiff and defendant, which was contrary to statements made by defendant and her mother that they had constructed the residence.

Defendant offered a letter dated April 8, 1957, and sent to defendant's local attorneys by an army officer, which said that a review of the army personnel records of plaintiff failed to indicate further information than that indicated in his certificate of March 19, 1957; that change of address cards were not filed in the personnel file of an officer; and that he recommended that further correspondence be directed to "The Adjutant General, Department of the Army, Washington 25, D. C." In that connection, the record does not disclose that any such further correspondence had been had by defendant or her attorneys. Be that as it may, the aforesaid

certificate of that same army officer, dated March 19, 1957, and offered by plaintiff, certified that he had custody of plaintiff's personnel records and had examined his official file, which revealed that plaintiff entered federal service from Nebraska, and his permanent home address was indicated as 2535 Washington Street, Lincoln, Nebraska.

In that respect, the affidavit of plaintiff's sister, who lives at 2535 Washington Street in Lincoln, was offered by plaintiff. She deposed that plaintiff entered the army in 1941 while a resident of Lincoln; that he had been in such service continuously since that time at various stations in this and foreign countries; and that plaintiff had advised her that he intended to make the army his life career. She deposed, and it is not disputed, that during such period he frequently had mail delivered to him, including correspondence from military authorities, at 2535 Washington Street in Lincoln; that plaintiff always kept her advised of his whereabouts and instructed her to forward all such mail to him; that during such period plaintiff had clothing and personal effects at her home aforesaid as his residence; and that he never informed her or indicated any intention to change his residence. In that connection, it will also be remembered that defendant never contended otherwise until 1956, and then that plaintiff's intention was not to change his residence until his release and retirement in 1960.

In another affidavit offered by defendant, the affiant deposed that she had known plaintiff and defendant personally and socially for 20 years, and that during the early summer of 1956, while their home was under construction in Colorado Springs, plaintiff stated that he had definitely decided to make his permanent home there *"upon his retirement from the Army in 1960,"* and that he had no desire or intention to ever return to Nebraska to live. (Italics supplied.)

Plaintiff's affidavit, made in Oakland, California, on

March 20, 1957, and offered by him, deposed that in 1934, he and his family returned to Lincoln for business reasons, where he remained until he entered the service of the National Guard December 23, 1940; and that he was married to defendant in Lincoln on November 21, 1940. During his service he was stationed in various states and countries, but always listed Lincoln as his legal address, and his military records so listed that address. In 1956, while stationed at Fort Carson, he received orders transferring him to an overseas station, and because defendant could not accompany him, they purchased a home in Colorado Springs where defendant could live during his overseas tour of duty. He is tentatively scheduled to retire from army service January 31, 1961, and had discussed many areas that appealed to him for future residence, among which was Colorado, depending on where he could find employment. However, he had no offers of employment except by Standard Oil of New Jersey, which offered him a position in Turkey, but he had not committed himself at this time. Since his mother and two sisters also resided in Lincoln and he had numerous acquaintances there, he intended to return there upon retiring if he could obtain employment.

Another affidavit of a man who had known plaintiff for over 25 years was offered by plaintiff. He deposed that plaintiff had made his home in Lincoln for several years before he entered the army, and had since returned many times when duty permitted; and that while doing so, plaintiff expressed his happiness at being able to return to what he termed " 'my home' " and expressed an intention to return to Lincoln to live upon his discharge from the United States Army.

Another affidavit of a man who had known plaintiff for over 20 years and was a close personal friend, was offered by plaintiff. Such affiant deposed that since plaintiff entered the army, he had returned to Lincoln on leave from time to time, and on such occasions had

indicated that he considered Lincoln his permanent home and intended to return there to live and work when discharged from the army.

In Burns v. Burns, 145 Neb. 213, 15 N. W. 2d 753, referring to residence requirements in divorce cases, we held: "If requirements for residence within the state have been complied with, then the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside.

"It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties."

Also, as held in Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228: "A wife is not prevented from having a residence separate and apart from that maintained by her husband."

In Means v. Means, 145 Neb. 441, 17 N. W. 2d 1, we held: "A person does not change his legal residence by removal to a new dwelling place without an intention to make the new dwelling place his home.

"One's legal residence is where he has his established home, and to which, when absent, he intends to return. To effect a change there must not only be a change of residence, but an intention to permanently abandon the former residence.

"The residence of a person in the military service of his country is in no way affected by such service. He does not abandon or lose the residence he had when he entered such service by being required to live at certain army posts in other states or countries."

In 17 Am. Jur., Divorce and Separation, § 286, p. 461, citing numerous authorities, it is said: "A change of residence for divorce purposes is not effected merely by going to live in another place; an essential element of a change of residence is intention, * * * which has been variously defined as the intent to reside in the new place permanently or indefinitely, or to make the new place

one's permanent home, or as the absence of an intention to live elsewhere. * * * The intent must be to 'do it now'; there must be an intent, while residing in a new place, to make such place one's home as of the present moment rather than in the future." See, also, Restatement, Conflict of Laws, § 18, p. 36, § 19, p. 38, § 20, p. 39.

Also, in 17 Am. Jur., Divorce and Separation, § 298, p. 472, dealing with the acquisition of a new residence by members of the armed forces, and citing numerous authorities, it is said: "The intent must be a present intent; the mere intention to take up residence within the state upon being released from the service will not suffice."

Also, in 17 Am. Jur., Divorce and Separation, § 489, p. 590, citing numerous authorities, it is said: "In an action to set aside a divorce decree, the party attacking the decree should, in his pleadings, set forth the particular grounds upon which the decree is assailed and not attack it by broad, general, and indiscriminate charges. A general allegation that the party complaining did not have an opportunity to meet the case made by the adversary is not sufficient. The burden of proving the ground for vacating a divorce decree rests upon the one who seeks such relief. Thus, the petitioner or moving party has the burden of proving the fraud charged, including the falsity of allegations of domicil within the divorce state * * *."

Further, as said in Annotation, 6 A. L. R. 2d 611, citing numerous authorities: "In any event, in cases in which a default divorce decree is sought to be vacated on the ground of a false allegation of the plaintiff's domicil or residence in the state, the presumption is in favor of the existence of every essential fact necessary for the rendition of the decree, and of the jurisdiction of a court of general jurisdiction, and the applicant for vacation of the divorce decree bears the burden of proving the falseness of the allegation of domicil or

residence clearly and affirmatively by a preponderance of the evidence, or by evidence sufficient to satisfy the court that a fraud has been perpetrated, and where this burden is not sustained, a refusal to vacate the decree is proper."

In the light of the foregoing rules and evidence, we are convinced, as was the trial court, that plaintiff's legal residence was in Lincoln, Lancaster County, Nebraska, at all times here involved. Therefore, the trial court was right when it concluded that it had jurisdiction to hear the cause and award plaintiff an absolute divorce.

We are confronted then with the question of whether or not the trial court erred in refusing to set aside the decree of divorce upon other grounds. We conclude that it did not.

With regard thereto, section 42-340, R. R. S. 1943, provides in part that: "If no such proceedings (upon appeal) have been instituted, the district court may, at any time within said six months, (after trial and decision) vacate or modify its decree * * *."

In that connection, we held in Colick v. Colick, 148 Neb. 201, 26 N. W. 2d 820, citing and relying upon Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737, that: "During that period, the control of such a decree is within the sound judicial discretion of the trial court, but good reason must be shown for setting it aside, and such action must not be permitted to produce an unconscionable result, thereby abusing or misusing the judicial process.

"What constitutes good reason for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case."

Also, in Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175, citing and relying upon Reeker v. Reeker, 152 Neb. 390, 41 N. W. 2d 231, and Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790, we held: "Where a default

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

"It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney.

"By section 42-340, R. R. S. 1943, either party to a divorce action may within 6 months of the date of entry of decree make application to have the decree set aside or modified.

"The right to vacate or modify a decree of divorce within 6 months is not absolute but must be exercised within a sound judicial discretion." See, also, Arent v. Arent, 159 Neb. 347, 66 N. W. 2d 813.

Such rules control disposition of defendant's second assignment of error. In that connection it was admitted that defendant was personally served with summons and immediately consulted and employed attorneys who entered a written general appearance for her. Admittedly, they were fully, fairly, and timely advised by plaintiff's attorneys upon more than one occasion both orally and in writing that the case was set for trial February 20, 1957, yet they failed and neglected to further plead or answer, and it cannot be logically said that defendant had no knowledge of that fact or was financially unable or did not have ample opportunity to have avoided a default. Her attorneys were advised that defendant had sole access to their joint bank account of from six hundred to eight hundred dollars in Colorado Springs. They were advised, and it was not disputed, that the parties had accumulated an equity of about five thousand dollars in a house in Colorado Springs, some valuable household furniture and equipment, and a car and tape recorder used by plaintiff in

his business. They were advised that plaintiff was willing to pay all costs, including the fees of defendant's attorneys, and turn over all their property to defendant except the car in plaintiff's name, the tape recorder, and plaintiff's personal effects. Also, plaintiff has at all times tendered such performance. In that situation, defendant defaulted and plaintiff was granted an absolute divorce without any fraudulent procurement.

Without dispute, defendant was a young, able-bodied woman, who was able to work. She had no children and was an only child of a widow living in the same city who owned very valuable personal property and lands in Colorado and Nebraska. Defendant came to Lincoln and employed local attorneys who prepared her motion to set aside the decree, supported by defendant's affidavit dated March 4, 1957, yet she did not file same until plaintiff had left Lincoln for an assignment to overseas military duty in Japan, which would delay any hearing in the cause on the merits until his uncertain return, and permit defendant in the meantime to profit by his absence and cause plaintiff endless trouble and embarrassment, without opportunity to properly defend his interlocutory or final rights. To set the decree aside would produce an unconscionable result by giving defendant an undue advantage because of circumstances caused by her own willful design, or the fault or gross laches of herself and her attorneys in Colorado Springs, and permit an abuse or misuse of the judicial process. Further, the evidence adduced by plaintiff at the hearing on February 20, 1957, which was amply corroborated and offered in evidence here, discloses without question that defendant was guilty of extreme cruelty and misconduct over a period of years, which impaired plaintiff's health, three times imperiled his career as an army officer, and destroyed the objects of matrimony. Whether defendant had any defense would be merely in the realm of conjecture and a speculative conclusion without any factual foundation. We

conclude that the trial court did not abuse its discretion in refusing to set aside the decree.

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

AFFIRMED.

WENKE, J., participating on briefs.

JACOB M. VERMAAS ET AL., APPELLEES, V. W. ARTHUR FAGAN, ADMINISTRATOR OF THE ESTATE OF HARRY E. FAGAN, DECEASED, ET AL., APPELLANTS.
93 N. W. 2d 381

Filed December 12, 1958. No. 34460.

1. **Specific Performance.** Performance of an oral contract to transfer specific property in consideration of personal care of the owner during the remainder of his life may be decreed by a court of equity when the existence and performance of it is established by clear, convincing, and satisfactory evidence.
2. **Frauds, Statute of.** Such oral agreements are ordinarily not enforcible under the statute of frauds because not made in writing. Even if proved they are not enforcible unless there has been such performance as the law requires.
3. **Specific Performance: Frauds, Statute of.** The things done which are claimed to constitute performance must be such as are referable solely to the oral agreement sought to be enforced, and not from some other relation.
4. ———: ———. Nothing will be considered as performance which does not put the party asserting it in a situation amounting to a fraud upon him unless the oral agreement is fully performed. Equity interferes in such cases only to prevent fraud or unconscionable advantage.
5. **Evidence.** Declarations against interest cannot be annulled or explained away by counter declarations.

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

Healey, Davies, Wilson & Barlow, for appellants.

Marti, O'Gara, Dalton & Sheldon and *John E. Sullivan,* for appellees.

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

CARTER, J.

The plaintiffs commenced this suit in the district court for Lancaster County to obtain a decree requiring the specific performance of an oral agreement which they allege was entered into between them and Harry E. Fagan, since deceased, and to have the title to certain real and personal property described in the petition quieted in them. The defendants answered and entered a general denial. The trial court found for the plaintiffs and the defendants have appealed.

The plaintiffs are husband and wife, and for more than 18 years had resided in Cheney, Lancaster County, Nebraska. Harry E. Fagan and Agnes Fagan were husband and wife and had resided in Cheney longer than the plaintiffs. Agnes Fagan died on August 19, 1955, at the age of 80 years. Harry E. Fagan died on October 23, 1955, at the age of 87 years. The Fagans had one child, Nellie Fagan, who passed away on March 19, 1935, at the age of 24 years. Harry E. Fagan died intestate.

Many witnesses were called to testify. One or more witnesses testified to each of the facts herein recited. During their childhood Mary Vermaas, then Mary Sullivan, and Nellie Fagan were close friends. They visited each other's homes continuously. They dressed alike and had similar interests. Upon the death of Nellie Fagan, Harry and Agnes Fagan began treating Mary Vermaas more and more as a daughter. When Mary Vermaas was married she took up residence with her husband in Bennet. The Vermaas family and the Fagans continued their close relationship. In 1937 the Fagans asked Mary and Jacob Vermaas to move to Cheney to assist in caring for the Fagans. Harry Fagan told a disinterested witness if the Vermaases cared for them they would get the farm. Jacob Vermaas was

working as a road maintainer for the county, and the move was made without interference with his work. They moved within a block of the Fagans and resided there until after the death of Agnes and Harry Fagan.

The evidence shows that Mary Vermaas continuously looked after the welfare of Agnes Fagan. She furnished her with milk, canned meat, fresh bread, and other articles of food over the years. She did her washing and ironing, carrying it back and forth from her home. She scrubbed floors, cleaned house, and did many other menial duties for Agnes Fagan. When Agnes Fagan was ill Mary Vermaas looked after her constantly. She prepared and served her food, gave her medicine, and gave her daily enemas prescribed by the physician.

The evidence shows that Jacob Vermaas attended to the wants of the Fagans. He stopped in every morning before going to work. He carried in fuel. He kept the Fagan automobile in running order. He mowed the lawn, clipped the hedge, repaired the buildings, and attended their needs generally. The Vermaases are not related to the Fagans. The evidence clearly shows that the Vermaases performed services in excess of mere neighborly acts; in fact, it shows that they did more in caring for these elderly people than most close relatives would have done.

There is evidence by several disinterested persons who testified to statements made by Harry Fagan to the effect that the Vermaases had been very good to them and that the Vermaases would get his property. On one occasion Harry Fagan became very ill. He said afterwards in the presence of witnesses that he was so sick he almost had to make out his will, and that he guessed he had better do so in order that Jake would get his property. The evidence shows also that Jacob did work on the Fagan farm, fixing and building fences, boring wells, and leveling the land. He planted crops to enrich the land and as a part of a conservation program. Harry Fagan permitted Jacob to pay for a part of

this expense. He told one witness that Jacob could pay for it as it was to be his anyhow. He built a corn crib and a granary for Fagan, and paid for most of the materials himself.

After the death of Agnes Fagan a purported and unenforcible will was found among her effects which directed that Mary Vermaas be the recipient of all her property.

It is clear from all the evidence that Mary and Jacob Vermaas performed services which greatly exceeded any moral obligation they owed to the Fagans. It indicates that the services performed for these elderly people were in reliance upon an agreement that the Vermaases would be left the property after the death of the Fagans. It is amply adequate to sustain an oral agreement and the performance thereof on the part of Jacob and Mary Vermaas to take it outside of the provisions of the statute of frauds.

The law controlling the enforcement of oral contracts of this character is well established. Such agreements are ordinarily unenforcible under the statute of frauds unless made in writing. Equity will, however, grant specific performance of a parol agreement to leave property to another, if it is proved by clear, convincing, and satisfactory evidence, if it has been performed by one party, and if its nonperformance by the other would amount to a fraud upon him. An oral agreement to transfer property to another in consideration of personal care of the owner during the remainder of his life may afford a basis for a decree of specific performance when the evidence supports a finding that such an agreement existed and that it has been performed by the person seeking equitable relief. The things done which are alleged to constitute performance must be such as are referable solely to the oral agreement sought to be enforced, and not from some other relation. Egan v. Hall, 159 Neb. 537, 68 N. W. 2d 147;

Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793; Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912.

There is nothing to indicate that the services rendered Harry and Agnes were gratuitous. There is no claim advanced that plaintiffs were paid any amount by the deceased for their services and expenditures. Plaintiffs were not related to the Fagans, and there is no evidence that they were obligated to them in any way. Plaintiffs had no obligation, legal or moral, to care for the Fagans or to attend their general welfare. The contract is a reasonable and fair one. Where the acts performed by the plaintiffs tend to show not only that there was an agreement, but also throw light on its nature, the evidence cannot be said to rest wholly in parol. The parol evidence in such a situation is auxiliary to the proof afforded by the circumstances of the case itself. A reading of the record convinces us that the agreement was made as alleged and that there has been complete performance on the part of the plaintiffs. The plaintiffs having fully performed their part of the agreement it would be inequitable and unjust not to require the defendants to comply with the agreement.

The defendants offered the evidence of Jack Engel, a nephew of Harry E. Fagan, to the effect that Fagan made the following statement to him 2 weeks before his death: "Jack, I don't know what in thunder to do with my property. * * * There are so many of them." Objection was duly made to the offer of this evidence. The evidence is not admissible. Declarations against interest cannot be annulled or explained away by counter declarations. Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042; Cahill v. Mockett, 143 Neb. 730, 10 N. W. 2d 679.

The judgment of the district court being in conformity with this opinion is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.