ADDENDA

TO

VOLUME II

OF THE

ANNOTATIONS

TO THE

CODE OF IOWA

COMPILED AND EDITED BY
RICHARD REICHMANN
REPORTER OF THE SUPREME COURT
AND EDITOR OF THE CODE

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By RICHARD REICHMANN
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ADDENDA TO VOLUME II OF THE ANNOTATIONS TO THE CODE

The following annotations cover cases which could not appear in this permanent Volume II of the Annotations because these cases either (1) were finally released to the Reporter after the book had gone to press, or (2) were pending on rehearing and could not be finally inserted in a permanent volume, or (3) had been so recently decided by the Supreme Court (August 6, 1940) that their publication in this addenda was the only way they could be distributed at this time.

This addenda makes available through the annotations every recently decided case to the date of publication of this Volume II. Those annotations in this addenda containing a citation such as: 228- ; 292 NW 73, are final and will appear in Volume 228 of the Iowa Reports. Only a negligible portion of the other annotations will be affected by rehearing, but this possibility should be remembered.

When a regular supplement to this Volume II of the Annotations is published, these annotations, after a final check and with the omitted citations added, will be included therein. The policy of this office is to make available to the bench and bar of this state every decision of our Supreme Court at the earliest possible moment.

RICHARD REICHMANN,
Reporter of the Supreme Court and Code Editor

OFFICE OF THE REPORTER OF THE SUPREME COURT AND CODE EDITOR
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ANNOTATIONS TO CONSTITUTION

Art. I, §1

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance utilized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Art. I, §6

Agricultural land credit act—arbitrary classification. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate".

Keefner v Porter. (Filed August 6, 1940)

Art. I, §9

Confession—disputed testimony—not shown to be involuntary. On disputed evidence as to whether a defendant's admission of the acts of the offense charged was made before or after he was advised to tell the truth and promises of leniency were made to him, and when he admitted that there was no loud talk at the time and that no one threatened to strike him, the evidence was not of the undisputed character required to show the confession to be involuntary because induced by promises of leniency and fear of threatened injury, and the securing of the confession was therefore held not to be a violation of the right of due process.

State v Strable. (Filed August 6, 1940)

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage

of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Art. I, §17

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Art. III, 1st §1

Lines of demarcation—overlapping duties. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Acts not amounting to delegation. City commissioner's authority to designate parking meter locations.

Brodkey v Sioux City, - ; 291 NW 171

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City - ; 291 NW 171

Flexibility of rule — determining factors. The constitutional provisions prohibiting the delegation of legislative power are not regarded as denying lawmaking bodies resources that afford flexibility and practicality necessary to effective functioning of the laws they enact, and, while the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

Brodkey v Sioux City, - ; 291 NW 171

Ordinances—traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City, - ; 291 NW 171

Principles established by ordinance—enforcement by city commissioner—nondelegation of power. Under ordinances authorizing public safety commissioner to designate, "as traffic conditions require", spaces for parking meters from locations selected by the city council, the installation of meters at places so designated is not the performance of a legislative function within the constitutional intendment of unlawful delegation of power, for it was the city council that had established the principles and standards of conduct required of the motorist.

Brodkey v Sioux City, - ; 291 NW 171

Art. III, §29

Municipal public utility bond sale—title of act not all-embracing—validity. When statutes

authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Nonreference to separate governmental corporation—legislative intent. Whether park board in city over 125,000 population, created under Ch. 293-D1, C., '35 [Ch. 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, ; 290 NW 680

County engineer's appointment—title of legislative act—constitutionality. The act of the 43d G. A. with reference to the mandatory appointment of a county engineer and to change some of the duties of that office was only amendatory and substitutional, the position of county engineer being continued, and, since the title mentioned provisions concerning powers and duties of officers and employees with reference to secondary road construction, there was a compliance with Const. Art. III, §29, which provides that every act shall embrace but one subject and matters connected therewith.

McKinley v Clarke County. (Filed August 6, 1940)

Art. III, §30

Agricultural land credit act—arbitrary classification. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate".

Keefner v Porter. (Filed August 6, 1940)

Art. IV, §1

Social welfare board — functions. Courts which have had the question of old-age benefits under consideration have determined the duties prescribed and to be performed by the commission are functions of the executive branch of the government.

Schneberger v Board, 228- ; 291 NW 859

Art. XI, §3

Bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Art. XII, §1

Construction—presumption of constitutionality—burden of proof. The supreme court will not declare an act of the legislature unconstitutional unless the act clearly, plainly, palpably, and without doubt infringes the paramount law, and the burden is on the one making the attack to overcome the presumption in favor of the act.

Keefner v Porter. (Filed August 6, 1940)

Parking meters—income exceeding costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

ANNOTATIONS TO STATUTES

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Municipal boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, ; 290 NW 680

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

63

Two statutes affecting controversy — construction. When a court is confronted by two enactments, in each of which the legislature has spoken relative to the subject matter of a controversy, the court has the duty to accord to each enactment, so far as possible, that which the legislature intended.

Durst v Board, 228- ; 292 NW 73

Interpreting legislative language fairly and sensibly—plain meaning. In construing a statute the courts are required to interpret the language used by the legislature fairly and sensibly, in accordance with the plain meaning of the words used.

Green v Brinegar, 228- ; 292 NW 229

Title of act—nonreference to separate governmental corporation—legislative intent. Whether park board in city over 125,000 population, created under Ch. 293-D1, C., '35 [Ch. 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, ; 290 NW 680

Unauthorized investment prior to statute requiring approval—court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Tax-exempt property — strict construction. Principle reaffirmed that statutes passed for the purpose of exempting property from taxa-

tion must be strictly construed, and any doubt upon the question must be resolved against the exemption and in favor of taxation.

Board v Board, 228- ; 293 NW 38

Municipal franchise election — resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Violation of replaced statute. Under the interpretation given subsection 1 of section 63 of the code, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Privileged communication—waiver of right in insurance application. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Liquidating distribution of corporate assets—"capital gains"—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

"Compensable injury"—workmen's compensation. On appeal from order awarding compensation under workmen's compensation statute to claimant-employee, where record shows employee, responding to a call of nature, left his place of work and went over to a point between two lines of railway freight cars, to conceal himself from public gaze, and while so situated a switch engine moved one of the lines of cars, causing one car to strike and injure the employee, these facts warranted the application of the rule that a compensable injury is one arising in the course of the employment and occurring while the employee is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time.

Sachleben v Gjellefald Co., 228- ; 290 NW 48

"Improvidently issued." Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Death "in or caused by any aerial conveyance"—parachute jump. Death caused by the failure of a parachute to open after the insured

had been ordered to jump from an airplane when the gasoline supply was exhausted and the plane could not be landed because of low visibility did result "in or caused by any aerial conveyance" within the terms of an insurance policy, the jump not being the voluntary act of the insured.

Richardson v Trav. Assn., 228- ; 291 NW 408

"Interest in estate". When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

"One dollar and other valuable consideration".

Knabe v Kirchner. (Filed August 6, 1940)

"Special appearance".

Gelvin v Hull. (Filed August 6, 1940)

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Drainage assessments—"when collected".

Hartz v Truckenmiller. (Filed August 6, 1940)

64

Highways established and vacated—procedure—applicability construed. Rules of statutory construction and legislative intent require that the same rule of procedure apply throughout the chapter relating to establishment, alteration, and vacation of highways.

Magdefrau v Washington County. (Filed August 6, 1940)

78

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

149

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

352

Atty. Gen. Opinion. See AG Op June 26, '40

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

353

Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

761

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by sections 6134-d1 to 6134-d7, inclusive, of the 1935 Code of Iowa," such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following section 6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

1022

Atty. Gen. Opinion. See AG Op May 23, '40

1146

Atty. Gen. Opinion. See AG Op June 26, '40

1159

Civil service—applicability. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

Civil service—list of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. A nonsoldier must be better qualified to be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

Eligibility list—preference does not supersede superior merit and fitness. A soldier-veteran is not entitled to a preference in disregard of his position on a list from which appointment is made.

Herman v Sturgeon. (Filed August 6, 1940)

Claim of preference—lack of knowledge by appointing officer—ineffective. A person may not be deprived of his rights under the soldiers preference law because one having power to appoint has no knowledge of that fact.

Herman v Sturgeon. (Filed August 6, 1940)

1161

Municipal employees—fire department—discretionary promotional appointment—mandamus affecting. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even after an investigation under this section, such a discretionary appointment as will bar the court's rights to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

1162

Relief to rightful appointee. A person claiming a soldiers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

1163

School janitor—definite period of employment—removal without hearing. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

Employment of school janitor—definite periods—knowlege imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

1165

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

1171.18

Atty. Gen. Opinion. See AG Op June 26, '40

1172

Atty. Gen. Opinion. See AG Op June 26, '40

Municipal public utility bond sale—title of act not all-embracing—validity. When statutes authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for

failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

1174

Atty. Gen. Opinion. See AG Op June 26, '40

1179.1

Atty. Gen. Opinion. See AG Op June 26, '40

1225.19

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1386

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

1421

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

Finding county engineer not an "official"—conclusion of law. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

County engineer's death—noncompensable. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

Injury "arising out of employment". Industrial commissioner's holding that claimant's injury arose out of his employment is not error for the reason that at the time of the injury claimant was violating a general rule and specific order of employer in failing to disconnect a battery from motor before using a steel

brush to clean the motor after wetting it down with kerosene. Claimant was at the place where he was required to be and doing the work directed and for which he was hired.

Fickbohm v Chev. Co., - ; 292 NW 801

Unchallenged compensation agreement—conclusiveness. In workmen's compensation proceeding where there was a final compensation settlement receipt, which was an acknowledgment and determination of the existence of the relationship of employer and employee, after which claimant died as result of alleged injuries, then, on a petition to reopen the proceedings, the employer is estopped to deny that the injury arose out of and in the course of the employment when the memorandum agreement, not being set aside nor attacked on the ground of mutual mistake or fraud, remains in the record unchallenged as a binding and enforceable agreement.

Fickbohm v Chev. Co., - ; 292 NW 801

Leaving place of work to heed call of nature—compensability. On appeal from order awarding compensation under workmen's compensation statute to claimant-employee, where record shows employee, responding to a call of nature, left his place of work and went over to a point between two lines of railway freight cars to conceal himself from public gaze, and while so situated a switch engine moved one of the lines of cars, causing one car to strike and injure the employee, these facts warranted the application of the rule that a compensable injury is one arising in the course of the employment and occurring while the employee is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time.

Sachleben v Gjellefald Co., 228- ; 290 NW 48

1425

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

Decisions of deputy—delegated powers—nonright of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to reexamine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

1431

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1436

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

Unchallenged agreement—conclusiveness. In workmen's compensation proceeding where there was a final compensation settlement receipt, which was an acknowledgment and determination of the existence of the relationship of employer and employee, after which claimant died as result of alleged injuries, then, on a petition to reopen the proceedings, the employer is estopped to deny that the injury arose out of and in the course of the employment when the memorandum agreement, not being set aside nor attacked on the ground of mutual mistake or fraud, remains in the record unchallenged as a binding and enforceable agreement.

Fickbohm v Chev. Co., - ; 292 NW 801

1447

Decisions of deputy—delegated powers—nonright of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to re-examine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

1449

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

1452

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

Workmen's compensation—finding county engineer not an "official"—conclusion of law. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

1453

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

1457

Decisions of deputy—delegated powers—nonright of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to re-examine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

1551.17

Employee—rescinding order for employment—discharge not illegal. Where the Iowa Un-

employment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1678

Fall in elevator shaft. Whether elevator guard rail was in place and whether lights were burning, held, jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Use of word "rapid". Use of word "rapid" as applied to elevator's descent was not error where elevator had but one speed.

Dean v Koolish, 212-238; 234 NW 179

1703.50

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1828.18

Atty. Gen. Opinion. See AG Op June 6, '40

1828.19

Atty. Gen. Opinion. See AG Op June 6, '40

1831

Apportionment for construction and maintenance — subsequent grantee — enforcement. Where fence viewers have heard a partition line fence controversy between adjoining owners and determined the portion that each adjoining owner should construct and maintain, a subsequent grantee will be required to maintain that portion of the fence allocated to his predecessor in title. Evidence on appeal from fence viewers' decision reviewed and their order to maintain the designated portion of the fence along a private lane affirmed.

Trustees v Harkrader. (Filed August 6, 1940)

1851

Fence viewers' apportionment for construction and maintenance—subsequent grantee—enforcement. Where fence viewers have heard a partition line fence controversy between adjoining owners and determined the portion that each adjoining owner should construct and maintain, a subsequent grantee will be required to maintain that portion of the fence allocated to his predecessor in title. Evidence on appeal from fence viewers' decision reviewed and their order to maintain the designated portion of the fence along a private lane affirmed.

Trustees v Harkrader. (Filed August 6, 1940)

1905.41

Procuring cause—real estate sale by owner. A real estate broker, engaged to procure a buyer for certain property, who presented a prospective purchaser to the property owner and assisted in instituting negotiations which directly led to a sale upon terms satisfactory to the owner, was the efficient and procuring cause of the sale and therefore entitled to a commission.

Tilden v Zanias, 228- ; 292 NW 835

1921.016

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1921.107

Advertising—coupons for free beer illegal. AG Op Aug. 12, '40

2057

Atty. Gen. Opinion. See AG Op June 5, '40

2191

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

2538

Malpractice—root of tooth in lung—proximate cause—directed verdict. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was completely unconscious at time 6 teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—other causes of injury—elimination—evidence. In a malpractice action against dentist for injuries caused by lodging of root of tooth in plaintiff's lung, other possible and reasonable causes of the injury were eliminated on the contentions that the object causing injury was not the root of a human tooth, when 6 laymen testified that it was, even tho there was no expert testimony to this effect; that the object was a calcareous deposit when the defendant, after viewing the object, failed to suggest that it was a calcareous deposit and stated, "We will see you through all this"; that no one saw the root at the time it was expectorated when it would have been impossible to see it in the bloody mass of sputum; and that plaintiff could have unknowingly sucked the root into his lung when such objects do not unknowingly pass into the windpipe.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—fact situations—res ipsa loquitur applicability. It has seldom been questioned that where the act of omission or commission upon the part of a surgeon has been plainly negligent, as where a sponge, gauze, instrument or needle has been left in the body, the rule of res ipsa loquitur applies, and that it is also unnecessary to show by expert testimony that such an act does not comport with the required standards.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—root of tooth in lung—res ipsa loquitur—exception to general rule. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable, under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that 9 months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—res ipsa loquitur generally inapplicable. As a general rule, the doctrine of res ipsa loquitur does not apply in malpractice cases for the reason that the professional man is required to exercise only that degree of care and skill ordinarily exercised by other members of the same profession, in like communities, under similar circumstances; also, the doctor does not have complete and exclusive control over the instrumentality with which he is working.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whetstine v Moravec, 228- ; 291 NW 425

2590

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

2896

County fair board—appointing special police. AG Op Aug. 14, '40

2898

County fair board—appointing special police. AG Op Aug. 14, '40

2979

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did

not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock powder—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Stock powder causing death—warranty—proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

2980

Exposition or fair—unattended horse in aisle of barn. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

2985

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal, and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

3113

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did not err in submitting the question of contributory negligence to jury.

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Miller v Economy Co., 228- ; 293 NW 4

3290

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

3661.009

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

3661.011

Supervisors on social welfare board—dual pay prohibited. AG Op June 27, '40

3661.057

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

3667

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

3786

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3790

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3792

Atty. Gen. Opinion. See AG Op June 25, '40

3796

Penitentiary parolees—expenses at University hospital—transportation, AG Op July 17, '40

3797

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3800

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3805

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3828.003

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative, and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Social welfare board—functions—executive branch of government. Courts which have had the question of old-age benefits under consideration have determined the duties prescribed and to be performed by the commission are functions of the executive branch of the government.

Schneberger v Board, 228- ; 291 NW 859

3828.014

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative, and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Refusal to grant—fraud—abuse of discretion—review. Review by the supreme court on the abstract and transcript of evidence of the action of the state board of social welfare in refusing to reinstate claimants to old-

age assistance relief because of son's ability to support them held not to disclose either fraud or an abuse of discretion.

Schneberger v Board, 228- ; 291 NW 859

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

3828.023

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

3828.039

Old-age assistance head tax—auditor's failure to certify—nonlien on realty. AG Op Aug. 14, '40

3828.067

Atty. Gen. Opinion. See AG Op May 15, '40

3828.068

Atty. Gen. Opinion. See AG Op May 15, '40

3828.071

Atty. Gen. Opinion. See AG Op May 15, '40

Ch 189.4

Atty. Gen. Opinion. See AG Op May 15, '40

3828.088

Atty. Gen. Opinion. See AG Op June 6, '40

Paupers—intention to remain as essential element. An intention to remain in a county without present intention to remove is an essential element of a legal settlement, and evidence that poor persons who were removed to another county on court order intended to reside wherever the litigating counties or the court decided their legal settlement to be does not establish their intent to remain indefinitely in the county to which they were removed.

Audubon County v Vogessor, 228- ; 291 NW 135

Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

Audubon County v Vogessor, 228- ; 291 NW 135

Involuntary removal to another county—no legal settlement acquired. Paupers do not acquire a legal settlement in a county to which they are involuntarily removed. So held where persons were removed to Audubon county from Cass county on order of lower court, which was reversed—the parties in the meantime remaining in Audubon county continuously for a period of one year without being warned to depart.

Audubon County v Vogessor, 228- ; 291 NW 135

3828.092

Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

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Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

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Involuntary removal to another county—no legal settlement acquired. Paupers do not acquire a legal settlement in a county to which

they are involuntarily removed. So held where persons were removed to Audubon county from Cass county on order of lower court, which was reversed—the parties in the meantime remaining in Audubon county continuously for a period of one year without being warned to depart.

Audubon County v Vogessor, 228- ; 291 NW 135

3828.147

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3828.159

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

4123

Boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, riverfront improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Employment of school janitor—definite periods—knowledge imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

School district as trustee—individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

4228

Employment of school janitor—definite periods—knowledge imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

School janitor—definite period of employment—removal without hearing. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

4268

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4269

Application to homestead tax credit. AG Op Aug. 27, '40

4274

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4275

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4283.01

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4560

Vacation—damages to adjoining owners—allowance by county supervisors. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

Vacation—supervisors' denial of damage claim—appeal. An appeal to the district court lies from a refusal of the board of supervisors to allow a claim for damages for vacation of a highway.

Magdefrau v Washington County. (Filed August 6, 1940)

4586

Vacation—damages to adjoining owners—allowance by county supervisors. In a pro-

ceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

4597

Procedure—statutory applicability construed. Rules of statutory construction and legislative intent require that the same rule of procedure apply throughout the chapter relating to establishment, alteration, and vacation of highways.

Magdefrau v Washington County. (Filed August 6, 1940)

Vacation—supervisors' denial of damage claim. An appeal to the district court lies from a refusal of the board of supervisors to allow a claim for damages for vacation of a highway.

Magdefrau v Washington County. (Filed August 6, 1940)

4644.04

Appeal from exclusion of evidence—other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

4644.17

Title of legislative act constitutional. The act of the 43d G. A. with reference to the mandatory appointment of a county engineer and to change some of the duties of that office was only amendatory and substitutional, the position of county engineer being continued, and, since the title mentioned provisions concerning powers and duties of officers and employees with reference to secondary road construction, there was a compliance with Const. Art. III, §29, which provides that every act shall embrace but one subject and matters connected therewith.

McKinley v Clarke County. (Filed August 6, 1940)

Workmen's compensation—county engineer excluded. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

4644.19

County engineer's death—noncompensable under workmen's compensation. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

4644.21

County engineer's death—noncompensable under workmen's compensation. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

4663

Interstate highway connection—joint construction agreement. AG Op July 5, '40

4755.05

Atty. Gen. Opinion. See AG Op June 20, '40

4755.33

Interstate highway connection—joint construction agreement. AG Op July 5, '40

4833

Tree over transmission line—failure to remove. Where a tree limb on the plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over the defendant's transmission line, and later electricity from the line set the tree on fire and

it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

5000.01

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5000.02

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

5018.01

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City, - ; 291 NW 171

Traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City - ; 291 NW 171

Parking meters—income exceeding enforcement costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

5020.11

Testimony of patrolman—statutes inapplicable. In a prosecution arising from an automobile accident, testimony by a patrolman as to statements made by himself is admissible and not within the purview of statutes pertaining to accident reports and incriminating questions.

State v Weltha, 228- ; 292 NW 148

5022.01

Manslaughter—refreshing memory by grand jury testimony—denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

5022.02

Lack of evidence—instructions on criminal negligence—directed verdict. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he loses his self-restraint, and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

Instructions—use of intoxicants—defendant not intoxicated. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Refreshing witness' memory by grand jury testimony re intoxication—denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

Instructions—dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Violation of replaced statute. Under the interpretation given subsection 1 of section 63 of the code, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automobile accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-

examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

5022.04

Recklessness definition not applicable to manslaughter prosecution. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5026-b1, C., '35] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5023.01

Assured clear distance rule—jury question. In an automobile collision personal injury action, where defendant alleges error on denial of a directed verdict based on insufficiency of the evidence to submit to the jury defendant's violation of the assured clear distance statute, when the defendant-driver gave only evidence as to distance in which car could be stopped, speed, lights, and distance at which objects could be discerned on the highway, defendant further contending that there being nothing to the contrary, such evidence must be taken as a verity, tho the most favorable evidence rule and the circumstances surrounding the accident will be considered. The assured clear distance question was for the jury, and instructions relative thereto were not erroneous.

Janes v Roach, 228- ; 290 NW 87

Assured clear distance statute—sufficiency of pleading. In automobile damage action, a specification of negligence under the assured clear distance statute was sufficient when no one could read the petition and not understand that it charged that the car could not be brought to a stop within the assured clear distance ahead.

Janes v Roach, 228- ; 290 NW 87

Legal excuse—assured clear distance—emergency not fault of defendant. An instruction as to the legal excuse which will excuse the failure to stop within the assured clear distance ahead, which informed the jury that an emergency not of the defendant's own making will constitute such legal excuse, correctly stated the rule that the emergency must not arise from the fault of the defendant.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Quoting speed statute—assured clear distance—failure to divide statute. Instructions which quoted part of a speed statute (§5029, C., '35 [§5023.01, C., '39]) were not erroneous in failing to divide the quotation into two parts and instruct on the first half, as when the instructions are construed as a whole, the jury could not fail to know that the part concerning the duty to stop within the assured clear distance ahead was the part referred to, and when the court specifically pointed out that such was the plaintiff's claimed ground of negligence.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Unpleaded issue submitted—assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

Davis v Hoskinson, 228- ; 290 NW 497

Visibility of parked car at night—lights burning. When the defendant's car came over the crest of a small hill on a dark night after it had been raining, and there was no fog, there was evidence to warrant a finding by the jury that the defendant could have seen another car parked on the right side of the pavement 450 feet away on the downgrade with headlights and tail light lighted.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Vehicle within town limits—no speed sign—speed standard. When the defendant's automobile had just entered the corporate limits of a town, and there was no speed sign at the corporate limit, the only speed standard with which the defendant was required to comply was the assured clear distance statute, defendant not yet having reached a sign indicating a residence zone.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had

approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Intersection collision—car making left turn—jury question. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of speed, (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to so operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with 7 head of cattle, collided with plaintiff's automobile about 6 or 7 feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

Collision at end of bridge—speed—jury questions—improper directed verdict. In automobile damage action on account of a collision between defendant's truck, moving westerly and leaving the westerly end of a bridge, and plaintiff's automobile, moving easterly as it came upon west end of such bridge, causing a sideswiping collision, where the facts and circumstances were such as would not compel the minds of reasonable persons to come to the same conclusion as to whether plaintiff (1) was driving at a careful and prudent speed, and (2) reduced the speed to a reasonable and proper rate while approaching a bridge, the trial court erroneously directed a verdict in favor of defendant, since the questions could have been decided adversely to him by a jury.

Graham v Orr, 228- ; 292 NW 838

Physical facts—effect on testimony as to speed. Decisions defining recklessness reviewed, and held that a jury question arises as to whether or not an automobile was operated recklessly when evidence indicated that car left a narrow dirt road after passing over a somewhat elevated wooden bridge, traveled in a ditch for some distance, and then crashed through a fence into a tree about 300 feet from point where car left the road. Under such circumstances jury would not be bound by driver's testimony that car was only going 35 miles per hour.

Fraser v Brannigan, 228- ; 293 NW 50

5023.04

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

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Graham v Orr, 228- ; 292 NW 838

5023.05

Vehicle within town limits—no speed sign—speed standard. When the defendant's automobile had just entered the corporate limits of a town, and there was no speed sign at the corporate limit, the only speed standard with which the defendant was required to comply was the assured clear distance statute, defendant not yet having reached a sign indicating a residence zone.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5023.11

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5024.03

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

5025.04

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

5026.01

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Directed verdict—contributory negligence at intersection. The defendant was entitled to a directed verdict on the ground that the plaintiff failed to show herself free from contributory negligence when the evidence showed that the plaintiff entered a highway intersection at a speed of about 14 miles an hour, being able to stop in 3 or 4 feet, but, after seeing the defendant approaching from the left 100 feet away at a speed of 65 miles an hour, she attempted to accelerate her speed and cross the highway, and was struck by the defendant.

Davis v Hoskinson, 228- ; 290 NW 497

Unpleaded issue submitted — assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to

find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

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Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with 7 head of cattle, collided with plaintiff's automobile about 6 or 7 feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

5026.02

Contributory negligence—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Intersection collision — negligence — jury question. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of speed (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

5026.03

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5027.04

Pedestrian struck while crossing highway. A jury question as to the negligence of the defendant and the contributory negligence of a pedestrian was presented by evidence that the pedestrian, after looking in both directions, attempted to cross a highway in a city at night and at a well-lighted place near where the street formed a Y in joining the highway, and when about 5 feet from the opposite curb the pedestrian was struck by the defendant's car which was traveling at about 25 or 30 miles per hour after entering the highway from the adjoining street.

Scott v McKelvey, 228- ; 290 NW 729

Custom or usage—crossing street at place of accident. In an action for the death of a pedestrian who was struck by an automobile while she was crossing a highway, it was permissible to allow a witness to testify that he had seen people crossing the highway at the same place on previous occasions.

Scott v McKelvey, 228- ; 290 NW 729

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Care required of person crossing highway. An instruction that if, in the exercise of reasonable care, a pedestrian was required to take any particular precaution while crossing a street, then she was under a duty to have taken such precaution, was not subject to the objection that it left the jury to determine whether the pedestrian was required to take precautions and failed to instruct as to the duty to keep a lookout and yield the right of way.

Scott v McKelvey, 228- ; 290 NW 729

Location of unmarked crosswalk—terminology. An instruction which located an unmarked crosswalk as being "substantially straight south of the intake", rather than definitely and accurately locating the lines of the crosswalk, was proper.

Scott v McKelvey, 228- ; 290 NW 729

"Crosswalks" defined—standards of care under statute. Instructions, defining crosswalks, presenting the question of whether a pedestrian crossing a highway within a city had crossed at an unmarked crosswalk, and setting forth the duties of care of pedestrians and motorists when pedestrians are crossing highways, correctly interpreted the statute with reference to crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

5027.05

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Pedestrian on dirt shoulder of pavement—ordinary care sufficient—jury question. In a damage action for personal injuries resulting from automobile accident where it is shown plaintiff was standing on the dirt shoulder of a paved highway in front of a stalled car, which was parked on the right side of highway with only the left rear wheel on pavement when defendant's car struck the rear of the stalled car and threw it against plaintiff, defendant's contention that plaintiff was guilty of contributory negligence as a matter of law was held without merit since plaintiff was not standing on the traveled portion of the paved highway and was not required to keep a constant lookout for approaching vehicles or anticipate another car would be driven against the stalled car. He was only required to exercise ordinary care and whether or not he did so was a question for jury.

Janes v Roach, 228- ; 290 NW 87

Child running into path of car—care—emergency—instructions considered as whole. In an action for physical injuries to a boy of 11 who was struck when he ran out into the street in front of the defendant's automobile, considering the instructions as a whole, the effect of a proper instruction as to the duties of a driver while approaching children who are near the highway was not nullified by another instruction on the duties of one confronted with a sudden emergency, which instruction could have been omitted as the child was struck at almost the instant he ran in front of the automobile, and anything done by the defendant after the collision had no connection with the injury.

Noland v Kyar, - ; 292 NW 810

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

5029.05

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5029.11

Appeal from exclusion of evidence—other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other

competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5030.01

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5031.03

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

5034.04

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5037.09

Failure to sound horn—not negligence as a matter of law. A motorist failing to sound the horn of an automobile is not guilty of negligence as a matter of law.

Quick v Paulson, 228- ; 292 NW 853

Cutting corner at intersection—jury question. In automobile damage action where plaintiff testified he was driving in northerly direction on the right-hand side of a city street and that defendant in driving his car cut a corner of an intersection, striking plaintiff's car, and where defendant testified he did not cut the corner and that plaintiff was driving on the wrong side of the street, a jury question arises, and a motion for directed verdict was properly overruled.

Quick v Paulson, 228- ; 292 NW 853

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by the defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Directed verdict—contributory negligence at intersection. The defendant was entitled to a directed verdict on the ground that the plaintiff failed to show herself free from contributory negligence when the evidence showed that the plaintiff entered a highway intersection at a speed of about 14 miles an hour, being able to stop in three or four feet, but, after seeing the defendant approaching from the left 100 feet away at a speed of 65 miles an hour, she attempted to accelerate her speed and cross the highway, and was struck by the defendant.

Davis v Hoskinson, 228- ; 290 NW 497

Pedestrian on dirt shoulder of pavement—ordinary care sufficient—jury question. In a damage action for personal injuries resulting from automobile accident where it is shown plaintiff was standing on the dirt shoulder of a paved highway in front of a stalled car, which was parked on the right side of highway with only the left rear wheel on pavement when defendant's car struck the rear of the stalled car and threw it against plaintiff, defendant's contention that plaintiff was guilty of contributory negligence as a matter of law was held without merit since plaintiff was not

standing on the traveled portion of the paved highway and was not required to keep a constant lookout for approaching vehicles or anticipate another car would be driven against the stalled car. He was only required to exercise ordinary care and whether or not he did so was a question for jury.

Janes v Roach, 228- ; 290 NW 87

Pedestrian struck while crossing highway. A jury question as to the negligence of the defendant and the contributory negligence of a pedestrian was presented by evidence that the pedestrian, after looking in both directions, attempted to cross a highway in a city at night and at a well-lighted place near where the street formed a Y in joining the highway, and when about 5 feet from the opposite curb the pedestrian was struck by the defendant's car which was traveling at about 25 or 30 miles per hour after entering the highway from the adjoining street.

Scott v McKelvey, 228- ; 290 NW 729

Contributory negligence—child running into path of car—care—emergency. In an action for physical injuries to a boy of 11 who was struck when he ran out into the street in front of the defendant's automobile, considering the instructions as a whole, the effect of a proper instruction as to the duties of a driver while approaching children who are near the highway was not nullified by another instruction on the duties of one confronted with a sudden emergency, which instruction could have been omitted as the child was struck at almost the instant he ran in front of the automobile, and anything done by the defendant after the collision had no connection with the injury.

Noland v Kyar, - ; 292 NW 810

Jury question—collision at end of bridge—speed. In automobile damage action on account of a collision between defendant's truck, moving westerly and leaving the westerly end of a bridge, and plaintiff's automobile, moving easterly as it came upon west end of such bridge, causing a sideswiping collision, where the facts and circumstances were such as would not compel the minds of reasonable persons to come to the same conclusion as to whether plaintiff (1) was driving at a careful and prudent speed, and (2) reduced the speed to a reasonable and proper rate while approaching a bridge, the trial court erroneously directed a verdict in favor of defendant, since the questions could have been decided adversely to him by a jury.

Graham v Orr, 228- ; 292 NW 838

Legal excuse—assured clear distance—emergency not fault of defendant. An instruction as to the legal excuse which will excuse the failure to stop within the assured clear distance ahead, which informed the jury that an emergency not of the defendant's own making will constitute such legal excuse, correctly stated the rule that the emergency must not arise from the fault of the defendant.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance rule—evidence sufficient for jury question. In an automobile collision personal injury action, where defendant alleges error on denial of a directed verdict based on insufficiency of the evidence to submit to the jury defendant's violation of the assured clear distance statute, when the defendant-driver gave only evidence as to distance in which car could be stopped, speed, lights, and distance at which objects could be discerned on the highway, defendant further contending that there being nothing to the contrary, such evidence must be taken as a verity, tho the most favorable evidence rule and the circumstances surrounding the accident will be considered. The assured clear distance question was for the jury, and instructions relative thereto were not erroneous.

Janes v Roach, 228- ; 290 NW 87

Pleading—sufficiency—assured clear distance statute. In automobile damage action, a specification of negligence under the assured clear distance statute was sufficient when no one could read the petition and not understand that it charged that the car could not be brought to a stop within the assured clear distance ahead.

Janes v Roach, 228- ; 290 NW 87

Evidence—custom or usage—crossing street at place of accident. In an action for the death of a pedestrian who was struck by an automobile while she was crossing a highway, it was permissible to allow a witness to testify that he had seen people crossing the highway at the same place on previous occasions.

Scott v McKelvey, 228- ; 290 NW 729

Visibility of parked car at night—lights burning. When the defendant's car came over the crest of a small hill on a dark night after it had been raining, and there was no fog, there was evidence to warrant a finding by the jury that the defendant could have seen another car parked on the right side of the pavement 450 feet away on the downgrade with headlights and tail light lighted.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Intersection collision—car making left turn. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of

speed, (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

Striking pedestrian after crossing lighted intersection. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—location of unmarked crosswalk—terminology. An instruction which located an unmarked crosswalk as being "substantially straight south of the intake", rather than definitely and accurately locating the lines of the crosswalk, was proper.

Scott v McKelvey, 228- ; 290 NW 729

Instructions—negligence not presumed from accident. The plaintiff having the burden of proving negligence by a preponderance of the evidence, an instruction stating that the mere fact that an accident happened does not show negligence nor raise a presumption of negligence on the part of the defendant was not erroneous in stressing the point that an automobile accident was unavoidable.

Noland v Kyar, - ; 292 NW 810

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Care required of person crossing highway. An instruction that if, in the exercise of reasonable care, a pedestrian was required to take any particular precaution while crossing a street, then she was under a duty to have taken such precaution, was not subject to the objection that it left the jury to determine whether the pedestrian was required to take precautions and failed to instruct as to the duty to keep a lookout and yield the right of way.

Scott v McKelvey, 228- ; 290 NW 729

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erec-

tion is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

"Crosswalks" defined—standards of care under statute. Instructions, defining crosswalks, presenting the question of whether a pedestrian crossing a highway within a city had crossed at an unmarked crosswalk, and setting forth the duties of care of pedestrians and motorists when pedestrians are crossing highways, correctly interpreted the statute with reference to crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

Instructions—quoting speed statute—assured clear distance—failure to divide statute. Instructions which quoted part of a speed statute (§5029, C., '35 [§5023.01, C., '39]) were not erroneous in failing to divide the quotation into two parts and instruct on the first half, as when the instructions are construed as a whole, the jury could not fail to know that the part concerning the duty to stop within the assured clear distance ahead was the part referred to, and when the court specifically pointed out that such was the plaintiff's claimed ground of negligence.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Damages limited to amount proved. Instructions on items of damages must limit the jury to an amount shown by the evidence but not exceeding the amount asked in the petition. In a personal injury action, instructions allowing damages for reasonable expense in the conduct of the injured party's business and for pain and suffering, the amount for both items not to exceed $7,312, were erroneous as the only limitation placed on the damages for the business was the full amount asked, and the evidence showed such damage to be only about $180.

Hinrichs v Mengel. (Filed August 6, 1940)

Unpleaded issue submitted—assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

Davis v Hoskinson, 228- ; 290 NW 497

Nonexcessive verdict—$5,091.26 for serious and painful injuries. In a personal injury action arising out of an automobile accident, a $6,750 verdict reduced by remittitur to $5,091.26 was not excessive where plaintiff, a laborer 37 years of age, received serious and painful injuries necessitating an operation, suffered headaches for a period of years, and incurred doctor and hospital bills in the sum of $591.26.

Janes v Roach, 228- ; 290 NW 87

5037.10

Recklessness definition not applicable to manslaughter prosecution. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5026-b1, C., '35] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Guest statute—recklessness defined—physical facts affecting testimony as to speed. Decisions defining recklessness reviewed, and held that a jury question arises as to whether or not an automobile was operated recklessly when evidence indicated that car left a narrow dirt road after passing over a somewhat elevated wooden bridge, traveled in a ditch for some distance, and then crashed through a fence into a tree about 300 feet from point where car left the road. Under such circumstances jury would not be bound by driver's testimony that car was only going 35 miles per hour.

Fraser v Brannigan, 228- ; 293 NW 50

Loose steering gear—legal excuse—previous knowledge of condition—effect. Refusal to submit to jury pleaded defense that a loose steering gear was an emergency condition which caused the automobile accident would not be error where evidence shows that both owner and driver knew of steering gear condition two weeks prior to accident.

Fraser v Brannigan, 228- ; 293 NW 50

Test for determining when jury question exists. A jury question is presented when different minds might reasonably reach different conclusions thereon. So held as to question of recklessness in action by automobile guest.

Fraser v Brannigan, 228- ; 293 NW 50

5038.01

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5038.03

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5038.04

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

5038.14

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5093.29

Gasoline for stationary engine used by city in construction work—no refund. AG Op July 18, '40

5100.26

Action against insurer—special appearance—burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

5105.15

Action against insurer—special appearance—burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

5128

Boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, riverfront improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5130

Vacation of highway—allowance of damages to adjoining owners. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute

has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

5180

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

5218

Blood test—specimen taken by coroner from another county. When a coroner from another county, without legal warrant and without express or implied assent, **acted as a volunteer** and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

5238

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5241

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5241.1

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5359

Atty. Gen. Opinion. See AG Op June 17, '40

5362

Atty. Gen. Opinion. See AG Op June 17, '40

5363

Atty. Gen. Opinion. See AG Op June 17, '40

5422

Dog licenses—penalties after April 1st. AG Op July 18, '40

5435

Dog licenses—penalties after April 1st. AG Op July 18, '40

5629

Atty. Gen. Opinion. See AG Op May 23, '40

5639

Mayor's fees—paid to county treasurer. AG Op July 26, '40

5663

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

5670

Mayor's fees—paid to county treasurer. AG Op July 26, '40

5696.1

Soldiers preference applicable. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

5697

Employees—fire department—discretionary promotional appointment—mandamus affecting. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even after an investigation under section 1161, C., '39, such a discretionary appointment as will bar the court's rights to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

List of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. A nonsoldier must be better qualified to be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

Soldiers preference applicable. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

5698

List of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. **A nonsoldier must be better qualified to** be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

5704

Mandamus—soldiers preference law—relief to rightful appointee. A person claiming a sol-

diers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

5711

Mandamus—soldiers preference law—relief to rightful appointee. A person claiming a soldiers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

5714

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance utilized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Ordinances—parking meters—planning commission recommendation unnecessary. Ordinances providing for a parking meter system are not illegal because city council did not obtain the recommendation of the city planning commission pursuant to chapter 294-A1, C., '35 (Ch 294.1, C., '39) when the ordinances pertained to a subject matter unrelated to the provisions and purposes of such statutes.

Brodkey v Sioux City, - ; 291 NW 171

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City, - ; 291 NW 171

Delegation of authority—flexibility—determining factors. The constitutional provisions prohibiting the delegation of legislative power are not regarded as denying lawmaking bodies resources that afford flexibility and practicality necessary to effective functioning of the laws they enact, and, while the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

Brodkey v Sioux City, - ; 291 NW 171

Traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City, - ; 291 NW 171

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Parking meters—income exceeding enforcement costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to

reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

Principles established by ordinance—enforcement by city commissioner—nondelegation of power. Under ordinances authorizing public safety commissioner to designate, "as traffic conditions require", spaces for parking meters from locations selected by the city council, the installation of meters at places so designated is not the performance of a legislative function within the constitutional intendment of unlawful delegation of power, for it was the city council that had established the principles and standards of conduct required of the motorist.

Brodkey v Sioux City, - ; 291 NW 171

5717

Resolution not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

5738

Boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Park board—certiorari—capacity to sue. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Resolution of council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Representations by city employee—knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

Icy street crossing—time to remedy defect not proved. In an action for damages for injuries sustained by a pedestrian in a fall while crossing an icy street intersection, the defendant city was entitled to a directed verdict when it was not shown how long prior to the accident the icy condition existed. Without such showing, in the absence of evidence of actual knowledge by the city of the icy condition, there was no basis for imputing such knowledge, nor for holding that there had been a reasonable opportunity for the city to remedy the situation.

Batie v Humboldt, 228- ; 292 NW 857

5750

Park board—cemetery custodian—authority to hire. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for

the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5798

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5813.2

Title of act—nonreference to separate governmental corporation — legislative intent. Whether park board in city over 125,000 population, created under Ch 293-D1, C., '35 [Ch 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5813.6

Separate governmental corporation — nonreference in title of act—legislative intent. Whether park board in city over 125,000 population, created under Ch 293-D1, C., '35 [Ch 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., 35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Status of board—right to challenge city's conflicting actions. A park board in a city over 125,000 population, created under authority of Ch 293-D1, C., '35 [Ch 293.1, C., '39], is merely an agency or instrumentality of the city without authority to challenge, by certiorari, its parent municipality's actions or decisions.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Certiorari—capacity to sue. In a dispute between the park board and city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5822

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5829.10

Ordinances—parking meters—planning commission recommendation unnecessary. Ordinances providing for a parking meter system are not illegal because city council did not obtain the recommendation of the city planning commission pursuant to chapter 294-A1, C., '35 (Ch 294.1, C., '39) when the ordinances pertained to a subject matter unrelated to the provisions and purposes of such statutes.

Brodkey v Sioux City, - ; 291 NW 171

5836

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5837

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5838

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5874

Degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5889

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5894

Use for travel—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5899.01

Use for travel—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5905

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

5938

Street accepted by general public—nontaxable—title void. In an action to set aside a tax deed to a strip of land allegedly used for a city street according to a filed and recorded plat, and which street, tho not accepted by the municipality but accepted by the public generally, became a public street, the purchaser obtained no title by tax deed since a public street is not taxable.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

Streets—nonconformity to statute—acceptance by public generally—effect. The statutory requirements for the acceptance and confirmation by a municipal corporation of the dedication of a street are inapplicable where a plat is filed with the county auditor and recorded in the county recorder's office showing the various parcels into which such tract of land has been divided and providing for such street—the lots being sold and such street being accepted generally by the public.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

5939

Streets—nonconformity to statute—acceptance by public generally—effect. The statutory requirements for the acceptance and confirmation by a municipal corporation of the

dedication of a street are inapplicable where a plat is filed with the county auditor and recorded in the county recorder's office showing the various parcels into which such tract of land has been divided and providing for such street—the lots being sold and such street being accepted generally by the public.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

Street accepted by general public—nontaxable—title void. In an action to set aside a tax deed to a strip of land allegedly used for a city street according to a filed and recorded plat, and which street, tho not accepted by the municipality but accepted by the public generally, became a public street, the purchaser obtained no title by tax deed since a public street is not taxable.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

6008

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

6037

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

6104

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Resolution not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

6127

Individual water softeners rented to consumers—city ownership. Under a statute authorizing cities to maintain waterworks with necessary filters, a city may purchase individual water softeners and rent them to water consumers upon application, as the softeners are filters within the meaning of the statute and are city property used to furnish water of a necessary quality to the citizens. Altho attached to the consumer's water pipe, the softener does not become the consumer's private plant, but is a substitute for a central filter and is a part of the city waterworks plant.

Leighton Co. v Fort Dodge, - ; 292 NW 848

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance util-

ized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

6131

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

6132

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by sections 6134-d1 to 6134-d7, inclusive, of the 1935 Code of Iowa", such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following section 6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Calling of re-election on franchise. After a municipal election in which a proposal to grant a franchise to an electric utility company was defeated, and the mayor did not call another election on the same proposition altho proper petitions for such election were filed, a petition for a writ of mandamus to compel the mayor to call the election should have been granted unless peculiar facts presented some reason for refusing the writ.

Iowa P. & L. v Hicks, - ; 292 NW 826

Compelling calling of utility election—change of circumstances. The issuance of a writ of mandamus being not a matter of right, but resting in the discretion of the court, a court properly refused to issue a writ to compel a mayor to call an election on the proposition of granting a franchise to a public utility company when a reasonable time had not elapsed since a previous election in which the proposal was defeated, and there was no showing of a change of circumstances to warrant interference by the court.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

6134.01

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Contract for construction of municipal plant—failure to include statutory provisions. A contract let by a town for the erection of a municipal light and power plant was not void for failure to require that ten percent of the contract price be retained to cover possible claims for labor and materials as required by statute, when the statute protects the persons furnishing labor and materials on public contracts without regard for the express provisions of the contract.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Municipal public utility bond sale—title of act not all-embracing—validity. When stat-

utes authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by §6134-d1 to §6134-d7, inclusive, of the 1935 Code of Iowa," such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following §6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction—moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

6134.02

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

6134.09

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

6147

Atty. Gen. Opinion. See AG Op June 26, '40

6149

Atty. Gen. Opinion. See AG Op June 26, '40

6159

Atty. Gen. Opinion. See AG Op June 26, '40

6176

Derivative rights — separate corporation — test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such

authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

6258

Public utility construction enjoined — noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

6261

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

6263

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

6943.026

Use tax — retail sales — stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. **(Filed August 6, 1940)**

6943.034

School tuition offset against homestead tax credit. AG Op Aug. 27, 1940

6943.040

Liquidating distribution of corporate assets —capital gains—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

6943.103

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

6943.109

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.112

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.122

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.156

Constitutionality—arbitrary classification—violative of equal protection clause. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate."

Keefner v Porter. (Filed August 6, 1940)

6944

Tax-exempt property — strict construction. Principle reaffirmed that statutes passed for the purpose of exempting property from taxation must be strictly construed, and any doubt upon the question must be resolved against the exemption and in favor of taxation.

Board v Board, 228- ; 293 NW 38

School district as trustee — individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

6946

Military service—exemptions from property tax—necessity of filing claim each year. Under the statute providing exemptions from property taxation for military service, it is necessary that the beneficiary file a claim for exemption each year, and where a widow of a deceased soldier, remaining unmarried, filed a claim but once (in 1915), and was thereafter allowed exemption each year until 1932, and next applied for exemption in 1931 and not again until 1938, when she received notice of expiration of a tax redemption period, it was her duty to file each year, and while it is unfortunate that she may have been misled by the practice of the taxing authorities in allowing exemption without application, that conduct cannot change the plain meaning of the statute.

Lewis v Vanier, - ; 290 NW 684

6985

Annuity insurance policy taxable as credits. AG Op Aug. 12, '40

7129.1

Atty. Gen. Opinion. See AG Op June 26, '40

7179

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

7193

Delinquent taxes not entered—rights of tax deed purchaser. The failure of a county treasurer to record delinquent taxes opposite the real estate on which the taxes remain unpaid

causes the lien for the taxes to be lost, so that the purchaser of the land at a tax sale acquires only a claim against the owner for the taxes.

Flanders v Ins. Co., - ; 292 NW 795

Tax sale subject to special assessment liens —taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7193.05

Tax sale subject to special assessment liens —taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7203

Old-age assistance head tax—auditor's failure to certify—nonlien on realty. AG Op August 14, 1940

7227

Interest and penalties under redemption from scavenger sale—credited to general fund—apportionment. AG Op July 30, 1940

7244

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7257

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7259

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7265

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7266

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank.

When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7272

Liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7286

Liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

Nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessment. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

Deed not mortgage—no secured debt. A deed given to one who paid delinquent taxes on the property satisfied the debt for the taxes, and no obligation existed under an option to repurchase given the grantor. There being no debt, there was nothing to be secured by the deed, and it could not be construed as a mortgage.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Tax sale subject to special assessment liens—taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7287

Claiming under tax deed—prima facie case. Plaintiff in quiet title action, claiming under tax deed issued by county treasurer, establishes a prima facie case when the tax deed is received in evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

7290

Special assessment lien—defense against tax deed subject to lien. A statute providing that

no person can question the title acquired by a tax deed without first showing that he, or the person under whom he claims title, had title at the time of sale, or that title was acquired from the state or United States after the sale, and that all taxes have been paid, does not preclude one from defending the lien of his special assessment certificate against a quiet title action based on a tax sale which was made subject to the prior lien of the special assessment.

Flanders v Ins. Co., - ; 292 NW 795

7291

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

7292

Nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

7293

Resolution of city council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

7479

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

Hartz v Truckenmiller. (Filed August 6, 1940)

District funds intermingled—deficiency—failure to collect assessments rather than diversion. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land —the original assessment being sufficient to pay the bonds when collected.

Hartz v Truckenmiller. (Filed August 6, 1940)

7481

District funds intermingled—deficiency—failure to collect assessments rather than diversion. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land—the original assessment being sufficient to pay the bonds when collected.

Hartz v Truckenmiller. (Filed August 6, 1940)

7505

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue

is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

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7509

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

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Hartz v Truckenmiller. (Filed August 6, 1940)

7563

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

7564

Action against drainage districts in different counties—where cause of action arose. Where several drainage districts were situated in more than one county, an action to compel them to levy assessments to pay their share of the cost of cleaning a main outlet ditch was properly brought in the county where the outlet ditch was located, such being the place where the work was done and where a commission to apportion the costs was appointed, as this was the county where the cause of action, or some part of it, arose.

Board of Trustees v Board, - ; 291 NW 141

7589

Board of supervisors—purchasing tax title. Where land is sold for taxes upon which drainage district assessments are unpaid and bonds are outstanding, the action of the board of supervisors in securing the tax titles was legal and was indicative of due diligence and good faith, and in compliance with statute.

Hartz v Truckenmiller. (Filed August 6, 1940)

7590

Board of supervisors—purchasing tax title—subject to drainage assessment. Where land is sold for taxes upon which drainage district assessments are unpaid and bonds are outstanding, the action of the board of supervisors in securing the tax titles was legal and was indicative of due diligence and good faith, and in compliance with statute.

Hartz v Truckenmiller. (Filed August 6, 1940)

7866

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

7869

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an

order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

8036

Bridge company not common carrier. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

8323

Tree over transmission line—failure to remove. Where a tree limb on the plaintiffs' land had broken and lodged in the fork of a dead tree and hung 2 or 3 feet over the defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

8338.47

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

8341

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

8357

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was

properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

8378

Liquidating distribution of corporate assets —capital gains—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

8400

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities, - ; 293 NW 66

8420

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do

business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

8433

Oral agreement to repurchase corporate stock —action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

8436

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

8581.22

Unemployment compensation commission employee—rescinding order for employment —discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

8582

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

8613.1

Receiver—who may seek appointment—commissioner as receiver. The appointment of a receiver for an insurance company has been recognized by the legislature as a matter in which the public has an interest, and the procedure for such appointment is prescribed by statute whereby no receiver shall be appointed except upon application of the attorney general. The commissioner of insurance shall act as receiver, without compensation except for expenses. Therefore plaintiffs, as stockholders

of an insurance company, could not obtain the appointment of a receiver for such company.

Walling v Ins. Co., 228- ; 292 NW 157

8637

Receiver—who may seek appointment—commissioner as receiver. The appointment of a receiver for an insurance company has been recognized by the legislature as a matter in which the public has an interest, and the procedure for such appointment is prescribed by statute whereby no receiver shall be appointed except upon application of the attorney general. The commissioner of insurance shall act as receiver, without compensation except for expenses. Therefore plaintiffs, as stockholders of an insurance company, could not obtain the appointment of a receiver for such company.

Walling v Ins. Co., 228- ; 292 NW 157

8757

False statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

8770

Policy provision—examination of insured. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its medical representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Waiver of right of privileged communications. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

8776

Annuity insurance policy taxable as credits. AG Op Aug. 12, '40

Ch 401, Note 1 Life insurance generally.

Waiver of right of privileged communications. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation—nonwaiver by insurance applicant. When it is made to appear to the trial court that the relationship of physician and patient existed, the statutory bar to the admission of privileged communications should be held applicable. Statements made in an application for a life insurance policy that the applicant had consulted no physician and had no ulcer nor stomach trouble did not waive the privilege when the existence of the relationship appeared for the first time from the testimony of a physician appearing as the insurer's witness. Unless the assured had made an express waiver, or opened the door by introducing testimony on the privileged subject matter, the insurer could not enter the field.

Cross v Equitable Life. (Filed August 6, 1940)

New policy substituted for original contract—conclusiveness. Where a life policy is surrendered by insured to insurer, and a new policy issued therefor, the later executed policy is conclusive as to what the contract was, in the absence of mistake or fraud, and the probative force of the prior policy goes no further than the extent to which it may tend to prove there was a mistake.

Knott v Ins. Co., ; 290 NW 91

Reformation of policy. A life policy must be liberally construed in insured's favor and so as to avoid forfeiture, but to entitle a beneficiary of insured to reformation of a life policy so as to show true effective date thereof, it must appear that contract does not express parties' true agreement, and upon failure to establish such fact, contract is controlling. Evidence insufficient to warrant finding of either fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Time of payment—evidence insufficient for reformation. As a general rule, an issued and accepted life policy setting out the annual premium dates determines the date of lapse in the absence of the establishment of grounds for reformation, so where the policy, dated June 14, 1924, was received by agent July 1 or 2,

1924, and delivered to the insured, but not to become effective until the first annual premium was paid, and where the beneficiary claims delivery on or about August 5, 1924, but insured claims delivery about July 1, 1924, and where insured, having paid first year's premium, and such policy containing a 31-day grace period, met accidental death on August 14, 1925, no grounds for reformation were established and the policy by its terms had lapsed.

Wall v Ins. Co., 228- ; 289 NW 901

Evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., ; 290 NW 91

Reformation—mutual mistake and fraud. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Reformation for mistake—insufficiency of showing. In an action on life policy by plaintiff-executors to recover proceeds payable to insured's estate, where insurer seeks to reform the policy, and the evidence shows that, at instance of insurer's agent, insured exchanged a life policy issued when insured was 45 years of age for a policy issued at a time when insured was 59 years of age and that by agreement the insurer issued a standard policy as of age 53 and the second policy contained practically the same guaranteed loan and surrender value as the first policy, evidence did not warrant an inference that insurer erroneously failed to insert a table based on 59 years of age in new policy as set out in the rate book. A reformation of new policy was not warranted.

Knott v Ins. Co., ; 290 NW 91

False statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

Waiver not applicable to create noncontractual liability. In an action for death benefits under a policy of insurance, where the insurer contended that it was not liable because certain provisions of its bylaws exempting it from liability in case death occurred from certain causes were part of the insurance contract, it could not be contended that the insurer waived such exemptions, as the bylaws merely limited the risk, rather than being a forfeiture clause. The doctrine of waiver cannot be made to create a contractual liability not contained in the policy itself.

Richardson v Trav. Assn., 228- ; 291 NW 408

Death from airplane accident—restrictions on air travel. A policy of insurance which did not assume the risk of air travel except for passengers on planes licensed to carry passengers and operating regularly between two or more airports did not cover a passenger on a special trip in an army combat plane, the plane not being licensed to carry passengers and not operating on a regular schedule.

Richardson v Trav. Assn., 228- ; 291 NW 408

Parachute jump—airplane short of fuel—cause of death. Death caused by the failure of a parachute to open after the insured had been ordered to jump from an airplane when the gasoline supply was exhausted and the plane could not be landed because of low visibility did result "in or caused by any aerial conveyance" within the terms of an insurance policy, the jump not being the voluntary act of the insured.

Richardson v Trav. Assn., 228- ; 291 NW 408

8940

Policy covering all of insured's property. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mortgaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the

premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds — mortgagee's rights against assignee. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Waiver not applicable to create noncontractual liability. In an action for death benefits under a policy of insurance, where the insurer contended that it was not liable because certain provisions of its bylaws exempting it from liability in case death occurred from certain causes were part of the insurance contract, it could not be contended that the insurer waived such exemptions, as the bylaws merely limited the risk, rather than being a forfeiture clause. The doctrine of waiver cannot be made to create a contractual liability not contained in the policy itself.

Richardson v Trav. Assn., 228- ; 291 NW 408

Indemnity payments—nonadmission of disability. In law action to recover indemnity under an accident policy, where plaintiff complains of the trial court's striking from his reply the allegation that defendant by admitting payment of indemnity up to March 21, 1938, was estopped to make any claim that plaintiff was not totally and continuously disabled up to that time, no error was committed in such ruling where defendant never at any time admitted that plaintiff was ever totally disabled at any time, and the fact indemnity had been paid was not an express or inferential admission of such disability.

Eller v Ins. Co., - ; 291 NW 866

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Examination of injured insured—policy provision—court order unnecessary. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its Medical Representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Instruction as to amount of indemnity—nonerroneous—jury finding no liability. In law action to recover indemnity under an accident policy, where the court instructs the jury that any indemnity allowed for hospitalization should not exceed a certain amount, there was no error even tho the amount was incorrect, since the jury found there was no liability whatsoever.

Eller v Ins. Co., - ; 291 NW 866

Instruction on computation of indemnity—nonerroneous. In law action to recover indemnity under an accident policy, there was no error in court's instruction to the jury that it must determine for what period, if any, between March 21st and August 21st the plaintiff was disabled as alleged, and compute the indemnity for the period so found, but in no event to go beyond August 21, 1938.

Eller v Ins. Co., - ; 291 NW 866

Death from airplane accident—restrictions on air travel. A policy of insurance which did not assume the risk of air travel except for passengers on planes licensed to carry passengers and operating regularly between two or more airports did not cover a passenger on a special trip in an army combat plane, the plane not being licensed to carry passengers and not operating on a regular schedule.

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Richardson v Trav. Assn., 228- ; 291 NW 408

Action against insurer—special appearance —burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

9018

Separate actions on note and mortgage—insurance involved — motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

Deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Policy covering all of insured's property—mere description. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

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Central Natl. Bank v Simmer. (Filed August 6, 1940)

Policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

9169

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and credit-

ing the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Partnership receiver—bank director—defense of suit—nonparticipation in compromise—effect. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

9176

Deposits — misappropriation by officer—liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

9217.3

Deposits — misappropriation by officer — liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

9235

Insolvent bank liquidation without aid of courts. AG Op July 5, '40

9238

Insolvent bank liquidation without aid of courts. AG Op July 5, '40

9239

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Executor—investing estate funds without court order—surety's liability. In a summary proceeding in probate to determine the liability of a surety on the bond of a defaulting executor, wherein it is urged that the transaction between an executor bank and the heirs constituted an investment made in pursuance of statutory requirements for investment of funds, and a default in regard thereto would not make the surety liable, such contention was without merit when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing executor's liability same as bank receivership proceedings. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—interest computed under decree in receivership proceedings. In summary proceeding in probate to determine

liability of a surety on a bond of a defaulting executor bank, wherein the surety complains of the method of computing interest, such complaint was without merit when the interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree being binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

9282

Deposits — misappropriation by officer — liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account, and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

9285

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In a summary proceeding in probate to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

9305.22

Atty. Gen. Opinion. See AG Op June 5, '40

9404

Executor bank defaulting—computation of interest. In summary proceeding in probate to

determine liability of a surety on a bond of a defaulting executor bank, wherein the surety complains of the method of computing interest, such complaint was without merit when the interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree being binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

9441

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Consideration for note—renewal extending time and reducing interest. Where a contract for the sale of land was canceled and the defendant-vendor gave a note to the plaintiff for the amount of payments received, and later gave renewal notes for the unpaid principal and the interest which was subsequently reduced, and, in an action to collect on a renewal note, the defendant alleged that the first note was given as a part of the transaction by which the land was returned to him, this admission indicated a consideration for the original note, and the extension of time and reduced interest when the renewals were made furnished consideration for the renewal notes. So the question of lack of consideration should not have been submitted to the jury.

Hoover v Hoover, - ; 291 NW 154

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Stipulation permitting refusal of loan before finally made—validity. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Ch 420, Note 1 Contracts generally.

Deed as mortgage — presumption — inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Stipulation permitting refusal of loan before finally made—validity—consideration. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to

hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Dead man statute — decedent questioning claimant's wife—admissibility. In equity action for specific performance of alleged oral agreement under which plaintiff upon performance of certain services was to receive a farm of which the other contracting party died seized, and in which action the only evidence as to conversation between the parties was the testimony of plaintiff's wife, the fact that decedent, after the conversation with plaintiff, asked plaintiff's wife if plans discussed were agreeable to her did not constitute a part of the conversation, under the facts, so as to exclude her testimony under the dead man statute.

Williams v Harrison, 228- ; 293 NW 41

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In a summary proceeding in probate to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Refusal of mortgage loan after initial approval—action for damages—incompleted contract. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

Unsigned notice of forfeiture—sufficiency. In a law action to recover rent, an unsigned notice of forfeiture of a written lease was sufficient where the record shows the tenants clearly understood such notice as constituting a forfeiture and surrendered possession of the building—there being no claim of prejudice because of lack of signatures.

Becker v Rute, 228- ; 293 NW 18

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being con-

summated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, ; 292 NW 130

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

Mutual mistake of law—no relief in law action. A court of law properly refused to give relief on a counterclaim for a compromise agreement entered into because of mutual mistake of the law where there was room for differences of legal opinion as to decisions of the supreme court interpreting statutes.

Beh Co. v Des Moines, ; 292 NW 69

Partnership receiver — compromise settlement—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Partnership receiver—defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, ; 292 NW 152

Salary dispute — overdraft by employee—settlement. In an employer's action against an employee to recover alleged overdrafts, where there was a dispute as to the salary and commissions the employee was to receive, and the employer failed to sustain the burden of proving the overdrafts, it was not necessary to decide whether a settlement between them, which the employer had successfully pleaded as a defense to a counterclaim for an accounting by the employee in a previous case, was a good defense in the present case.

Economy Co. v Honett, 228- ; 292 NW 825

Defects in note waived by renewals. One who executes a note and, subsequently, four renewals, and who for 15 years permits the income from a farm to be applied on the note without claiming nonliability, thereby indicates there was value in the original note and that he so understood, and he could not then claim that the original was void and that any defects in it were not waived by the execution of the renewals.

Hoover v Hoover, - ; 291 NW 154

Conditional delivery of note not shown—renewal of note—waiver. In an action on a note given as a renewal of an original note which had been delivered with an agreement that payment be made from a farm income, where part payment had been made from the in-

come, and the maker thereby having treated the note as valid and binding, the question of conditional delivery was properly withheld from the jury. Even assuming that there had been a conditional delivery of the original note, it was waived by the subsequent acts of the maker.

Hoover v Hoover, ; 291 NW 154

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Delivery—testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Delivery of deed—deferred enjoyment—testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Impeachment of delivery of deed—subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Ownership—deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

9451

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

9462

Payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

9467

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

9476

Conditional delivery of note—payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

Conditional delivery not shown—renewal of note—waiver. In an action on a note given as a renewal of an original note which had been delivered with an agreement that payment be made from a farm income, where part payment had been made from the income, and the maker thereby having treated the note as valid and binding, the question of conditional delivery was properly withheld from the jury. Even assuming that there had been a conditional delivery of the original note, it was waived by the subsequent acts of the maker.

Hoover v Hoover, - ; 291 NW 154

9484

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

9485

Renewal extending time and reducing interest. Where a contract for the sale of land was canceled and the defendant-vendor gave a note to the plaintiff for the amount of payments received, and later gave renewal notes for the unpaid principal and the interest which was subsequently reduced, and, in an action to collect on a renewal note, the defendant alleged that the first note was given as a part of the transaction by which the land was returned to him, this admission indicated a consideration for the original note, and the extension of time and reduced interest when the renewals were made furnished consideration for the renewal notes. So the question of lack of consideration should not have been submitted to the jury.

Hoover v Hoover, - ; 291 NW 154

Defects in note waived by renewals. One who executes a note and, subsequently, four renewals, and who for 15 years permits the income from a farm to be applied on the note without claiming nonliability, thereby indicates there was value in the original note and that he so understood, and he could not then claim that the original was void and that any defects in it were not waived by the execution of the renewals.

Hoover v Hoover, - ; 291 NW 154

9511

Fraud in note settlement—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

9523

Oral guaranty—corporate note by individual. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

9580

Conditional delivery — discharge. Principle reaffirmed that parol evidence is admissible to show conditional delivery or discharge of a written instrument.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

9581

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's nonliability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

9940

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the

consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

9941

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Resolution of city council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Representations by city employee — knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

9944

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Goods purchased by description—"merchantable quality"—"particular purpose".

Giant Co. v Yates Co., 111 F 2d, 360

9998

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Stock powder causing death — warranty — proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict

on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock food—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

10002

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyance — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Fraud in conveyance by parents to children —burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

10015

Chattel mortgage clause—not indexed—superior to lease assignment for pre-existing debt. In an action to foreclose a realty mortgage which contained a valid but not indexed chattel mortgage clause covering rents, and where an intervenor in such action, learning that the foreclosure of such mortgage would prevent the completion of a realty transaction in progress covering the same property, takes an assignment of a lease on the property as security for a pre-existing debt, then, even assuming intervenor did not have actual notice of the lien contained in the mortgage, he would not be a subsequent purchaser for value, and plaintiff would have a valid defense to the petition of intervention.

Sykes v Waring, - ; 293 NW 14

Priority of conditional bill of sale over subsequent chattel mortgage. In action commenced by search warrant proceedings to determine the right of possession and ownership of an automobile, wherein it is shown that a purchaser of an automobile under conditional sale contract duly recorded in the county of purchase also executed a chattel mortgage on the same car to secure a loan in another county, and, such chattel mortgage being duly recorded in such county, the holder of the conditional sale contract had prior right to the car, since the chattel mortgagee had no better right than his mortgagor, and a third party purchasing through the holder of the conditional sale contract was rightfully determined to be the owner of said car and entitled to its possession.

State v Doe. (Filed August 6, 1940)

Description of livestock—standard of sufficiency to impart notice. In mortgagee's damage action for conversion of mortgaged livestock purchased by defendant from mortgagor, trial court erred in dismissing plaintiff's petition on theory that the description in the recorded mortgage, to wit: "34 white face steers,

25,070 lbs. . . . now in sale yard of Oswald Strand located in Manly, Iowa, to be removed" to certain described real estate, was insufficient as a matter of law to impart notice to third parties. To impart constructive notice under our recording acts the description of property in a chattel mortgage is sufficient if it is of such character as to enable third persons, aided by inquiries which the instrument suggests, to identify the property.

Strand v Jones County. (Filed August 6, 1940)

Insurance policy—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mortgaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Mortgagee's rights against assignee—proceeds of fire policy. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Fraudulent conveyance — lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Fraud in conveyance by parents to children —burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyance — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

10016

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State v Doe. (Filed August 6, 1940)

10042

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

10049

Trustees' powers to interpret agreement. In equity action to compel the acting trustees of a business trust to recognize the plaintiffs as persons legally elected to fill vacancies on the board of trustees, where the declaration of trust provided (1) that the number of trustees should at all times be not less than five nor more than seven, and (2) that the trustees should have broad powers of interpretation of the trust agreement, the action of the acting trustees in determining there were two vacancies on the board constituted an interpretation of the declaration of trust, and was within their rights.

Lambach v Anderson. (Filed August 6, 1940)

Vacancies on board of trustees—appointment—rights of remaining trustees and unit holders. In equity action to compel the acting trustees of a business trust to recognize plaintiffs as persons legally elected to fill vacancies on the board of trustees, where the declaration of trust provided that in the event the acting trustees failed to fill a vacancy within 60 days the majority of the unit holders could fill such vacancy, it was held under the terms of the trust agreement that the right of such unit holders was concurrent with the trustees, but not exclusive.

Lambach v Anderson. (Filed August 6, 1940)

Vacancy by increasing number of trustees—rights of acting trustees and unit holders. Under a declaration of a business trust which provided for not less than five nor more than seven trustees, and, in event of vacancy, the remaining trustees should fill the vacancy, and which further provided "if within sixty (60) days after the resignation, disability, death, removal or inability to act of any of said trustees, no successor or successors thereto shall be appointed, then, in such event, the holders of certificates of interest representing a majority of outstanding units by a writing or writings may appoint such successor or successors", the action of the trustees in increasing the number of trustees from six to seven did not create such a vacancy which would entitle the unit holders to fill such vacancy.

Lambach v Anderson. (Filed August 6, 1940)

Rights of acting trustees and unit holders. Where, by the terms of a business trust, both the acting trustees and a majority of the unit holders, under certain circumstances, had concurrent authority to fill a vacancy on the board of trustees, an appointment of a trustee by the acting trustees, agreed upon by the exchange of telegrams a few hours before the unit holders advised the trustees of their selection of a trustee and the acceptance of the trust by such trustee, was valid even tho the trustee appointed by the acting trustees did not accept the appointment until subsequent to notification from the unit holders of their trustee appointment. Under the trust agreement, the acting trustees had broad powers and the right of interpretation.

Lambach v Anderson. (Filed August 6, 1940)

School district as trustee—individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

Compromise and settlement of probate loan—sound judicial discretion. In probate pro-

ceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Fee limited by subsequent limitation—nonapplicability of rule. The rule of construction of limitation of a fee by a subsequent provision in a will has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take and in a subsequent clause specifies that the devised property shall be placed in trust.

In re Heckmann, - ; 291 NW 465

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

10054

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Devise of undivided half interest—not joint tenancy. A will devising an estate to two daughters "jointly in equal shares" does not create a joint tenancy when such interpretation would attach no meaning to another part of the provision, "to each an undivided one-half thereof", which explains just what the testator intended when he devised the land, as, by statute, estates vested in two or more persons are deemed tenancies in common unless a different intent is clearly expressed in creating the estate.

In re Heckmann, - ; 291 NW 465

10058

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

10084

Intent to surrender not proved—only one demand made. Intention to surrender possession of a deed was not proved by testimony of a claimant under a subsequent deed that surrender of the deed was not refused when demanded, but only an excuse being given that the deed was at a bank closed for the day, and, no other demand being made indicated that the claimant viewed the refusal as final.

Pickworth v Whitford, 228- ; 293 NW 47

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Fraud in conveyance by parents to children—burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents—it must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

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Fraudulent conveyances — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not

ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Mental incompetency — evidence. In equity action to set aside a deed of conveyance on the ground of mental incompetency, the evidence sustained a decree for defendant where it is shown that while grantor was indeed a sick man, suffering with a heart ailment which made it difficult for him to talk and breathe, yet he understood the nature of business in hand and he was capable of transacting such business at the time the deed was executed.

Keune v McCauley, 228- ; 293 NW 25

Undue influence and fiduciary relationship—insufficient evidence to set aside deed. In equity action to set aside a deed of conveyance on the ground of undue influence or fiduciary relationship, testimony of a bare statement made by grantor that (1) grantee and his wife were his best friends and (2) the fact that grantee on behalf of some of grantor's friends prevailed upon a hospital nurse to grant them admittance into grantor's hospital room falls far short of showing undue influence, neither did the mere fact that grantor and grantee were cousins amount to proof of a fiduciary relationship.

Keune v McCauley, 228- ; 293 NW 25

Testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Deferred enjoyment — testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Action to set aside deed—burden of proving nondelivery. In action by collateral heirs of grantor to set aside on the ground of nondelivery a deed which grantor had deposited in a safety box for transmittal upon his death to the grantee, and which grantee had obtained and recorded immediately after grantor's death, the burden of proving nondelivery was on such collateral heirs.

Smith v Fay. (Filed August 6, 1940)

Deed—delivery—escrow—safety deposit box—reserving no control—sufficiency of delivery. Where a grantor deposits in a safety deposit box in custody of a third person a deed to be transmitted to grantee upon grantor's death, and parts with all dominion and control, there is a sufficient delivery. (Distinguishing Orris v Whipple, 224-1157.)

Smith v Fay. (Filed August 6, 1940)

Impeachment of delivery of deed—subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Nondelivery cannot be raised for first time on appeal. In equity action to set aside a deed, the question of nondelivery of the deed cannot be raised in the brief and argument and considered on appeal when such question is contrary to the trial theory and not in harmony with the pleadings which predicate the right of recovery, not on the theory that the transaction was not completed, but on the theory that grantor was in such condition as to be incompetent to accomplish that which was done.

Keune v McCauley, 228- ; 293 NW 25

Setting aside—opportunity for independent advice. In an action to set aside a deed, where grantor requested grantee to have a lawyer brought out to him, and grantee herself went to the lawyer and had him draw the deed in his office, no opportunity was given grantor for independent advice, and this fact alone has often been held sufficient to set aside deeds and contracts obtained under such conditions.

Sinco v Kirkwood, - ; 291 NW 873

Fictitious person in realty transaction—effect. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel

mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Setting aside—general rule—adopted daughter's sister as confidential relation. Ordinarily in an action to set aside a deed the burden is on plaintiff except where confidential or fiduciary relations are established, and where grantor was an old man, ill, discouraged, and depressed by the recent death of an adopted daughter whom he loved, and had no one to turn to except that daughter's sister who was one of grantees, such confidential relationship existed as placed the burden of proof on defendants to establish the good faith and fairness of the transaction.

Sinco v Kirkwood, - ; 291 NW 873

Good faith — negativing — competency of evidence. In an action to set aside deed given to grantee where grantor expressed a desire that his grandson be taken care of, evidence that grantee had the grandson committed to an institution after grantor's death was admissible to negative the idea of any good-faith agreement to care for the boy after the death of the grandfather.

Sinco v Kirkwood, - ; 291 NW 873

Setting aside deed—insufficiency of evidence. In equity action to set aside two deeds from the grantor to her grandson for the benefit of his father (the grantor's son, who was heavily in debt), where plaintiff appeals from decree denying the relief prayed, the trial court's findings were reviewed and found to have ample support in the record, where it is shown that grantor, 88 years of age, looked after her own business affairs and expressed her desire, both before and after the execution of the deeds, to protect her son in this manner—there being no question of a fiduciary or confidential relationship between the parties. Because of the conflicts in the testimony and the interest and attitude of various witnesses, much reliance is placed on the findings of the trial court.

Tessman v Tessman, - ; 291 NW 530

10135

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

Abandonment determined by intent — law favors protection of homestead. On question of whether or not a homestead has been abandoned, it is largely a matter of intent to be determined on the particular facts in each case. The holdings of the supreme court lean strongly to the protection of the homestead estate.

Charter v Thomas, 228- ; 292 NW 842

Rooms leased for temporary period and purpose—nonabandonment of homestead. In action to enjoin the sale under general execution of real estate claimed exempt as a homestead, the evidence supported a decree enjoining such sale where plaintiff proved a definite and good-faith intention and plan to lease certain rooms of a dwelling for a temporary period and purpose only, and thereafter to again occupy such rooms as a part of his homestead.

Charter v Thomas, 228- ; 292 NW 842

10139

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

10159

Rights and liabilities after forfeiture of lease. In law action to recover rent where it is shown the landlords served a notice of forfeiture of a written lease on account of tenants' failure to pay rent according to provisions of such lease, and thereafter tenants surrendered possession of the premises, the tenants had no further rights under the lease, and the landlords were entitled to the rent that had matured at the time of the forfeiture.

Becker v Rute, 228- ; 293 NW 18

Unsigned notice of forfeiture—sufficiency. In a law action to recover rent, an unsigned notice of forfeiture of a written lease was sufficient where the record shows the tenants clearly understood such notice as constituting a forfeiture and surrendered possession of the building—there being no claim of prejudice because of lack of signatures.

Becker v Rute, 228- ; 293 NW 18

"Any provision of this lease"—violations included provision for payment of rent. In law action to recover rent under a written lease which provided for a forfeiture upon a violation of "any provision of this lease", the words "any provision" included all the terms, covenants and conditions in the contract and manifestly included the provision for payment of rent.

Becker v Rute, 228- ; 293 NW 18

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

Fictitious person in realty transaction—effect. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

10163

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Ch 445, Note 1 Gifts.

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

10260.4

Interest and penalties under redemption from scavenger sale—credited to general fund—apportionment. AG Op July 30, 1940

10261

Foreclosure—conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

"Any provision of this lease"—violations included provision for payment of rent. In law action to recover rent under a written lease which provided for a forfeiture upon a violation of "any provision of this lease", the words "any provision" included all the terms, covenants and conditions in the contract and manifestly included the provision for payment of rent.

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Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

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Fictitious person in realty transaction—effect. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The

intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Corporate note by individual for rent payment—oral guaranty. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

Continuous rental — new agreement — noneffect on limitation. In action to recover rent for a period from September 1, 1918, to December 31, 1926, the trial court erred in ruling the statute of limitations barred the claim for rent from September 1, 1918, to September 1, 1920, because on the latter date the defendants, desiring more space, made a new rental agreement, because there was no settlement of accounts and because the occupancy during the entire peroid was with the full understanding that rent was to be paid.

Read v Ferguson. (Filed August 6, 1940)

10264

Lien—foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

10436

Marriage ceremonies—justice of peace—jurisdiction coextensive within county. AG Op Aug. 14, 1940

10474

Cruel and inhuman treatment. Corroboration in a divorce action is required to prevent collusion between the parties. It may be by either direct or circumstantial evidence and need not alone sustain the decree nor support the plaintiff's testimony at all points. Sufficient testimony was produced, including corroboration, to sustain a petition for divorce on the ground of cruel and inhuman treatment, where it was shown that the husband was abusive and mistreated his wife during pregnancy.

Davis v Davis - ; 292 NW 804

10475

Inhuman treatment not proved—cross-petition for adultery. In an action by the wife for divorce on the ground of inhuman treatment, where the record failed to show that her life was endangered or her health impaired, the husband was entitled to the divorce on a cross-petition grounded on adultery where the wife had refused to cease meeting another man and there was much evidence of intimate relations between the two.

Crilley v Crilley, 228- ; 292 NW 67

Corroboration required. Corroboration in a divorce action is required to prevent collusion between the parties. It may be by either direct or circumstantial evidence and need not alone sustain the decree nor support the plaintiff's testimony at all points. Sufficient testimony was produced, including corroboration, to sustain a petition for divorce on the ground of cruel and inhuman treatment, where it was shown that the husband was abusive and mistreated his wife during pregnancy.

Davis v Davis, - ; 292 NW 804

10477

Inhuman treatment not proved—cross-petition for adultery. In an action by the wife

for divorce on the ground of inhuman treatment, where the record failed to show that her life was endangered or her health impaired, the husband was entitled to the divorce on a cross-petition grounded on adultery where the wife had refused to cease meeting another man and there was much evidence of intimate relations between the two.

Crilley v Crilley, 228- ; 292 NW 67

10481

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

10501.1

Inheritance — statutory right — compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

Heirs of predeceased child of intestate—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

10501.2

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

10501.6

Inheritance — statutory right — compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

10502

Marriage ceremonies—justice of peace—jurisdiction coextensive within county. AG Op Aug. 14, 1940

10636

Preliminary hearing as "trial" under subsection 21. AG Op July 16, '40

10761

Special appearance—subject matter of action challenged. The defendant may challenge the jurisdiction of the court over the subject matter of an action by a special appearance.

Schulte v Great Lakes Corp., - ; 291 NW 158

10803

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Extension of redemption period—estoppel to object to decree. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

10837

Estate administered by trustee. AG Op July 25, '40

10922

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

10941

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no

objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Fraud in note settlement—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer - ; 292 NW 789

Objection to decree extending redemption period. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Finding of agreement for equal contribution—estoppel by former admission. A partner who admitted owning half the business and who had previously filed a claim against the partnership asking an allowance for money, materials, and services furnished by himself, stating that there was an agreement that each partner would contribute an equal amount of labor and money, could not complain of a finding by the court that he had agreed to contribute to the partnership capital equally with the other partner.

Tacke v Jennewein, 228- ; 293 NW 23

Mental incompetency—evidence. In equity action to set aside a deed of conveyance on the ground of mental incompetency, the evidence sustained a decree for defendant where it is shown that while grantor was indeed a sick man, suffering with a heart ailment which made it difficult for him to talk and breathe, yet he understood the nature of business in hand and he was capable of transacting such business at the time the deed was executed.

Keune v McCauley, 228- ; 293 NW 25

Undue influence and fiduciary relationship—insufficient evidence to set aside deed. In equity action to set aside a deed of conveyance on the ground of undue influence or fiduciary relationship, testimony of a bare statement made by grantor that (1) grantee and his wife were his best friends and (2) the fact that grantee on behalf of some of grantor's friends prevailed upon a hospital nurse to grant them admittance into grantor's hospital room falls far short of showing undue influence, neither did the mere fact that grantor and grantee

were cousins amount to proof of a fiduciary relationship.

Keune v McCauley, 228- ; 293 NW 25

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

Mutual mistake of law—no relief in law action. A court of law properly refused to give relief on a counterclaim for a compromise agreement entered into because of mutual mistake of the law where there was room for differences of legal opinion as to decisions of the supreme court interpreting statutes.

Beh Co. v Des Moines, - ; 292 NW 69

10944

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

10946

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

10949

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v. Simmer. (Filed August 6, 1940)

Ch 484, Note 1 Negligence liability generally.

Icy street crossing—time to remedy defect not proved. In an action for damages for injuries sustained by a pedestrian in a fall while crossing an icy street intersection, the defendant city was entitled to a directed verdict when it was not shown how long prior to the accident the icy condition existed. Without such showing, in the absence of evidence of actual knowledge by the city of the icy condition, there was no basis for imputing such knowledge, nor for holding that there had been a reasonable opportunity for the city to remedy the situation.

Batie v Humboldt, 228- ; 292 NW 857

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—negligence—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Bridge—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction — slippery when wet — nonnegligence. Where plaintiff, a motorist, attempting

to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded through the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Ch 484, Note 2 Torts generally.

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Lien—foreclosure—conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Animals' death from stock food—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

10960

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

10963

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the

action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

10966

Salary dispute—overdraft by employee—settlement. In an employer's action against an employee to recover alleged overdrafts, where there was a dispute as to the salary and commissions the employee was to receive, and the employer failed to sustain the burden of proving the overdrafts, it was not necessary to decide whether a settlement between them, which the employer had successfully pleaded as a defense to a counterclaim for an accounting by the employee in a previous case, was a good defense in the present case.

Economy Co. v Honett, 228- ; 292 NW 825

Agency—essential elements—acts constituting. In action against an Iowa corporation in county other than its principal place of business the two essential elements for venue were (1) agency of salesman for corporation in such county, and (2) that the transactions in question grew out of or were connected with such agency. So where salesman, on commission basis, sold stock remedies for corporation in certain county, delivered merchandise from own personal supply, or diverted shipments for convenience of customers, and also sent orders to company which were shipped direct to customers, such transactions constituted an agency as contemplated by statute for serving original notices, and a motion for change of venue was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Representations by city employee—knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

10967

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

10969

Construction of will — grantee of devised property as party. One who held a certificate of sale to property at the beginning of an action to construe a will devising the property, and who later acquired a trustee's deed, had a direct interest in the litigation and was entitled to join in the action.

In re Heckmann, - ; 291 NW 465

10972

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys

from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

10975

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's non-liability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

10981

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

10983

Finding of agreement for equal contribution—estoppel by former admission. A partner who admitted owning half the business and who had previously filed a claim against the partnership asking an allowance for money, materials, and services furnished by himself, stating that there was an agreement that each partner would contribute an equal amount of labor and money, could not complain of a finding by the court that he had agreed to contribute to the partnership capital equally with the other partner.

Tacke v Jennewein, 228- ; 293 NW 23

Excess contribution as partnership debt—repayment priority. In an accounting upon dissolution of a partnership in which profits and losses are shared equally, the amount contributed by one partner in excess of the contribution of the other should be treated as a partnership debt and repaid first.

Tacke v Jennewein, 228- ; 293 NW 23

True party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

Set-off or counterclaim—partnership or individual interests. In action to recover for rent and heat furnished, which action by agreement was tried to the court as an equity case, the court properly overruled an objection to a counterclaim or offset of defendants on the theory that, if such a claim existed, it was the property of a law partnership rather than a claim of the individual lawyers who were defendants.

Read v Ferguson. (Filed August 6, 1940)

Receiver—defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on

notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

11007

Debt outlawed—remedy on mortgage also barred. When a debt is barred by the statute of limitations, the remedy upon the mortgage is also barred.

Monast v Manley, 228- ; 293 NW 12

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Extension of maturity date also extends statutory period of limitation. A written acknowledgment of an existing debt and a new promise to pay, resulting in extending the time of maturity of a debt due under a written instrument, likewise extends the period in which an action would be barred by statute of limitations.

Hootman v Beatty, 228- ; 293 NW 32

Tolling statute—partial payments—checks—oral promises. Partial payments and oral promises will not toll the statute of limitations. Neither will the giving of checks as payment of principal or interest amount to an acknowledgment of a continuing unpaid indebtedness nor constitute an admission in writing or a new promise to pay.

Hootman v Beatty, 228- ; 293 NW 32

Note filed as probate claim—commencement of action tolling statute of limitations. In probate proceedings the filing of a note as a claim against an estate is the commencement of an action, and, as such, tolls the statute of limitations. It is not material that notice of hearing upon the claim is not given until the note has run more than ten years after maturity.

In re Fuller, 228- ; 293 NW 55

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's nonliability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

Pleading of statute—sufficiency. In equity action to foreclose a real estate mortgage, where defendant refers to the statute in his answer, and the facts upon which the plea of the statute was based were undisputed and fully set out by plaintiff's petition, the statute of limitations is properly pleaded, because there could be no doubt in the minds of either the court or the parties that defendant relied

upon that part of the statute referring to actions upon written contracts.

Monast v Manley, 228- ; 293 NW 12

Erroneous conclusions of law or fact—no assumption of truth. A demurrer or motion to dismiss admits only the well pleaded facts and does not admit erroneous conclusions of law or facts. So in a real estate foreclosure action under a plea of fraud to prevent the instruments being barred by statute of limitations, where the allegations of the petition were insufficient, the motion to dismiss by defendant did not admit the conclusion of the pleader that defendants perpetrated a fraud on plaintiff.

Hootman v Beatty, 228- ; 293 NW 32

Failure of evidence in avoidance of statute. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for 3 years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Continuous rental — new agreement — noneffect on limitation. In action to recover rent for a period from September 1, 1918, to December 31, 1926, the trial court erred in ruling the statute of limitations barred the claim for rent from September 1, 1918, to September 1, 1920, because on the latter date the defendants, desiring more space, made a new rental agreement, because there was no settlement of accounts, and because the occupancy during the entire period was with the full understanding that rent was to be paid.

Read v Ferguson. (Filed August 6, 1940)

Injunction against suit on notes—modification pending submission of appeal. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, - ; 289 NW 900

11010

Fraud—insufficient evidence to prevent instruments being barred. In equity action to foreclose a real estate mortgage, a motion to dismiss petition because barred by statute of limitations was properly sustained, since the allegations of plaintiff's petition, that mortgagor's son told the holders of note and mortgage that he would pay the instruments and that they relied on such statements, were not a sufficient plea of fraud to prevent the instruments being barred by statute. The essential elements of fraud are (1) false representations, (2) materiality, (3) scienter, (4) intent to deceive, (5) reliance, and (6) damage.

Hootman v Beatty, 228- ; 293 NW 32

11018

Tolling statute—partial payments—checks—oral promises. Partial payments and oral promises will not toll the statute of limitations. Neither will the giving of checks as payment of principal or interest amount to an acknowledgment of a continuing unpaid indebtedness nor constitute an admission in writing or a new promise to pay.

Hootman v Beatty, 228- ; 293 NW 32

Extension of maturity date also extends statutory period of limitation. A written acknowledgment of an existing debt and a new promise to pay, resulting in extending the time of maturity of a debt due under a written instrument, likewise extends the period in which an action would be barred by statute of limitations.

Hootman v Beatty, 228- ; 293 NW 32

11028

Statute of limitations on ancient mortgages construed. The statute of limitations relating to foreclosure of ancient mortgages was enacted for the purpose of avoiding the prosecution of stale claims and cannot be invoked to the exclusion of the 10-year statute of limitations on written contracts.

Monast v Manley, 228- ; 293 NW 12

Ancient mortgages — recorded assignment not within exception. In equity action to foreclose a real estate mortgage, a motion to dismiss petition because barred by the statute of limitations was properly sustained, since a recorded assignment of a note and mortgage is not sufficient compliance with the exception provided in the statute for the foreclosure of ancient mortgages.

Hootman v Beatty, 228- ; 293 NW 32

11036

Action against drainage districts in different counties—where cause of action arose.

Where several drainage districts were situated in more than one county, an action to compel them to levy assessments to pay their share of the cost of cleaning a main outlet ditch was properly brought in the county where the outlet ditch was located, such being the place where the work was done and where a commission to apportion the costs was appointed, as this was the county where the cause of action, or some part of it, arose.

Board of Trustees v Board, - ; 291 NW 141

11041

A bridge company is not a common carrier.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

11046

Agency—essential elements—acts constituting. In action against an Iowa corporation in county other than its principal place of business the two essential elements for venue were (1) agency of salesman for corporation in such county, and (2) that the transactions in question grew out of or were connected with such agency. So where salesman, on commission basis, sold stock remedies for corporation in certain county, delivered merchandise from own personal supply, or diverted shipments for convenience of customers, and also sent orders to company which were shipped direct to customers, such transactions constituted an agency as contemplated by statute for serving original notices, and a motion for change of venue was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

11056.1

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed Inc. (Filed August 6, 1940)

11088

Subject matter of action challenged. The defendant may challenge the jurisdiction of the court over the subject matter of an action by a special appearance.

Schulte v Great Lakes Corp., - ; 291 NW 158

Action against insurer—burden of proving jurisdiction. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed Inc. (Filed August 6, 1940)

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

11111

Lien—foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Creditor's bill—fraudulent conveyance—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing

plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

11114

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

11127

More specific statement—substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

11130

Erroneous conclusions of law or fact—no assumption of truth. A demurrer or motion to dismiss admits only the well pleaded facts and does not admit erroneous conclusions of law or facts. So in a real estate foreclosure action, under a plea of fraud to prevent the instruments being barred by statute of limitations, where the allegations of the petition were insufficient, the motion to dismiss by defendant did not admit the conclusion of the pleader that defendants perpetrated a fraud on plaintiff.

Hootman v Beatty, 228- ; 293 NW 32

11131

Setting aside ruling on disposal of points of law — nonerroneous. Where the trial court ruled on an application to determine the law in advance of trial, on November 10, 1937, and granted appellees an exception and time within which to plead further, move for new trial, or move to set aside and vacate or modify the ruling, and within such time appellees filed a motion to vacate the ruling, to which appellants filed resistance and the court ordered the motion submitted with the case and reserved it's ruling until after hearing, it was not error for the court to sustain appellees' motion and vacate the ruling on the 30th day of July, 1938, since the court had retained jurisdiction to decide the matter.

In re Tabasinsky. (Filed August 6, 1940)

11141

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

11151

Partnership or individual interests. In action to recover for rent and heat furnished, which action by agreement was tried to the court as an equity case, the court properly overruled an objection to a counterclaim or offset of defendants on the theory that, if such a claim existed, it was the property of a law partnership rather than a claim of the individual lawyers who were defendants.

Read v Ferguson. (Filed August 6, 1940)

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

11155

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

11174

Default judgment—improper when answer on file. A judgment should not be entered by default while an answer is on file, so in replevin action in which a petition of intervention was filed and to which plaintiff filed a reply by way of general denial, the trial court erred in granting a motion for default against plaintiff, since the intervenor's relief depended upon her assertion of ownership, and this, being denied, raised an issue of fact.

Jasper Co. v Stergios, 228- ; 292 NW 855

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervenor's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one-third to widow, two-thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as

to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940.)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one-third to widow and two-thirds to children, and where an intervenor claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by the executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

11177

False pretenses—indictment charging property obtained from owner—proof shows from agent. Where a defendant obtains cattle by false pretenses, an indictment for cheating by false pretenses is not defective because it alleges the property was obtained from the owner, tho in fact the property was obtained from the owner's agent. Such facts do not create a fatal variance between the indictment and the proof, and a directed verdict based thereon is properly overruled.

State v Neuhart, - ; 292 NW 791

11194

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

11197

Motion sustained generally—necessity of successfully challenging each ground on appeal. Where a motion to strike a reply was sustained generally, and on all grounds, the appellant on appeal to the supreme court cannot prevail unless each ground of the motion is successfully challenged.

Walling v Ins. Co., 228- ; 292 NW 157

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

11209

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for 3 years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate

has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

Statute of limitations—sufficiently pleaded. In equity action to foreclose a real estate mortgage, where defendant refers to the statute in his answer, and the facts upon which the plea of the statute was based were undisputed and fully set out by plaintiff's petition, the statute of limitations is properly pleaded, because there could be no doubt in the minds of either the court or the parties that defendant relied upon that part of the statute referring to actions upon written contracts.

Monast v Manley, 228- ; 293 NW 12

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

11210

Degree of care in maintenance of bridge. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

11211

Financial crises. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Shrinkage in land values—judicial notice.

Hartz v Truckenmiller. (Filed August 6, 1940)

11226

Court's discretion. In a mortgage foreclosure action involving 160 acres of a 360-acre farm, an intervenor's motion to consolidate such action with another foreclosure action involving the other 200 acres, based on an alleged interest in both actions, was properly overruled since the consolidation of actions is discretionary with the court and the record shows no abuse of such discretion in the refusal to consolidate.

Sykes v Waring, - ; 293 NW 14

11229

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another

motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

Judgment on pleadings—no statutory provision. The statutes of procedure in this state do not contemplate a motion for judgment on the pleadings.

Jasper Co. v Stergios, 228- ; 292 NW 855

More specific statement—substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

Separate actions on note and mortgage—insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

11254

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities Co., ; 293 NW 66

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Dead man statute—applicability to defendant-surety. In law action upon a purported promissory note payable to plaintiff's decedent, where defendant answered by general denial and affirmative defenses of fraud in the inception of the instrument, in that delivery of note to plaintiff's decedent was in violation of the terms and conditions upon which defendant had signed the same, in that defendant signed the instrument as surety only, and in that such signing by him was wholly without consideration, the plaintiff's objections to the testimony of the defendant under the dead man statute were properly sustained where it is shown that the decedent and principal were present when defendant signed the note as surety, and all three took part in the negotiations concerning the circumstances under which the note was executed.

Enabnit v Hanson, 228- ; 292 NW 181

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Deed as mortgage—presumption—inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed consti-

tutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Good faith—negativing—competency of evidence. In an action to set aside deed given to grantee where grantor expressed a desire that his grandson be taken care of, evidence that grantee had the grandson committed to an institution after grantor's death was admissible to negative the idea of any good-faith agreement to care for the boy after the death of the grandfather.

Sinco v Kirkwood, - ; 291 NW 873

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, **the court erred (1)** in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Action against insurer—jurisdiction. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Delivery of deed—deferred enjoyment—testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Impeachment of delivery of deed — subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to

go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Policy provision—court order unnecessary. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its Medical Representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Physician—testimony that patient had been attended—improper exclusion. Testimony by a physician that he had attended a patient on certain dates and had taken him to a hospital where he spent the night did not disclose any information obtained professionally, and for the court to sustain an objection to this testimony as being privileged was prejudicial error.

Cross v Equitable Life. (Filed August 6, 1940)

Insurance—false statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

Blood test—specimen taken by coroner from another county. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

Conditional delivery of note—payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

Ambiguity in will. The interpretation which a court is bound to give to a will is that which appears to have been the intent of the testator, and altho in some cases extrinsic circumstances are permitted in evidence to clear up ambiguity, or to identify subject matter, the court cannot make a new will.

In re Heckmann, - ; 291 NW 465

Conditional delivery — discharge. Principle reaffirmed that parol evidence is admissible to show conditional delivery or discharge of a written instrument.

Kruse v Wickham, - ; NW (Filed June 18, 1940)

Delivery—testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Party first offering—estoppel to object to like testimony. Where plaintiff introduced expert opinion testimony, over objection, he cannot object to an offer of like testimony on the ground that it invaded the province of the jury. Once having opened the door to admit his testimony, he cannot be permitted to close it to the entrance of like testimony offered by defendant.

Eller v Ins. Co., - ; 291 NW 866

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

11255

Supported findings of fact in law actions—conclusiveness on appeal. In a law appeal the supreme court is not privileged to pass upon the credibility of witnesses nor to find the facts, but it is to determine from the record what the jury was warranted in finding the facts to be, considering the facts in the most favorable light for the defendant.

Ross v Ins. Co., 228- ; 292 NW 813

Nonright to impeach but right to contradict one's own witness. In an action to set aside as fraudulent a conveyance made by decedent to grandson wherein grandson as a witness for plaintiff directly and definitely denied plaintiff's contention that transfer had been agreed upon to defeat creditor's claim, held that plaintiff vouched for this witness in making him his own, and that since plaintiff did not exercise right to dispute the grandson's testimony with testimony of other witnesses, the testimony of the grandson stood uncontradicted.

Healey v Allen, - ; 290 NW 71

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

Impeachment by other witness—foundation laid in cross-examination. Where proper foundation was laid in the cross-examination of the defendant's wife, it was not error to admit, solely for purposes of impeachment, testimony of a sheriff regarding statements made by the wife.

State v Strable. (Filed August 6, 1940)

11257

Dead man statute—construction. The dead man statute does not relate to competency of evidence; it merely prohibits certain witnesses from giving evidence. Communications and transactions between a decedent and an adverse party, when pertinent to the issues, may be proved. The provisions of the statute go no further than to declare that to make such proof, certain witnesses are incompetent.

Enabnit v Hanson, 228- ; 292 NW 181

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

Decedent questioning claimant's wife—admissibility. In equity action for specific performance of alleged oral agreement under which plaintiff upon performance of certain services was to receive a farm of which the other contracting party died seized, and in which action the only evidence as to conversation between the parties was the testimony of plaintiff's wife, the fact that decedent, after the conversation with plaintiff, asked plaintiff's wife if plans discussed were agreeable to her did not constitute a part of the conversation, under the facts, so as to exclude her testimony under the dead man statute.

Williams v Harrison, 228- ; 293 NW 41

Dead man statute—applicability to defendant-surety. In law action upon a purported promissory note payable to plaintiff's decedent, where defendant answered by general denial and affirmative defenses of fraud in the inception of the instrument, in that delivery of note to plaintiff's decedent was in violation of the terms and conditions upon which defendant had signed the same, in that defendant signed the instrument as surety only, and in that such signing by him was wholly without consideration, the plaintiff's objections to the testimony of the defendant under the dead man statute were properly sustained where it is shown that the decedent and principal were present when defendant signed the note as surety, and all three took part in the negotiations concerning the circumstances under which the note was executed.

Enabnit v Hanson, 228- ; 292 NW 181

11263

Waiver of right—insurance application. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation—nonwaiver by insurance applicant. When it is made to appear to the trial court that the relationship of physician and patient existed, the statutory

bar to the admission of privileged communications should be held applicable. Statements made in an application for a life insurance policy that the applicant had consulted no physician and had no ulcer nor stomach trouble did not waive the privilege when the existence of the relationship appeared for the first time from the testimony of a physician appearing as the insurer's witness. Unless the assured had made an express waiver, or opened the door by introducing testimony on the privileged subject matter, the insurer could not enter the field.

Cross v Equitable Life. (Filed August 6, 1940)

Physician—testimony that patient had been attended—improper exclusion. Testimony by a physician that he had attended a patient on certain dates and had taken him to a hospital where he spent the night did not disclose any information obtained professionally, and for the court to sustain an objection to this testimony as being privileged was prejudicial error.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation ends at death of patient—autopsy. The physician-patient relationship ends at the death of the patient. Testimony by a physician present at an autopsy, based solely on what he observed at the autopsy, is not privileged.

Cross v Equitable Life. (Filed August 6, 1940)

11281

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

11285

Corporate note by individual for rent—oral guaranty. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

11329

Instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury—such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Party first offering—estoppel to object to like testimony. Where plaintiff introduced expert opinion testimony, over objection, he cannot object to an offer of like testimony on the ground that it invaded the province of the jury. Once having opened the door to admit his testimony, he cannot be permitted to close it to the entrance of like testimony offered by defendant.

Eller v Ins. Co., ; 291 NW 866

11426

Certiorari—quashing writ—use of terms unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

11429

Motion by both parties for directed verdict—nonwaiver of jury without express or implied consent. In a damage action where, at the close of the testimony, defendant made a motion for a directed verdict and plaintiffs' coun-

sel immediately remarked, "Now, the plaintiffs agree with the defendant that the matter is a question of law for the Court, and we want to make a motion for a directed verdict too", the court, in overruling the defendant's motion and finding for the plaintiffs, thereby erred. The rule in this state is that, without an express or implied consent, a motion by both parties for a directed verdict is not a waiver of jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Supported findings of fact in law actions—conclusiveness on appeal. In a law appeal the supreme court is not privileged to pass upon the credibility of witnesses nor to find the facts, but it is to determine from the record what the jury was warranted in finding the facts to be, considering the facts in the most favorable light for the defendant.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership—deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Test for determining when jury question exists. A jury question is presented when different minds might reasonably reach different conclusions thereon. So held as to question of recklessness in action by automobile guest.

Fraser v Brannigan, 228- ; 293 NW 50

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Stock feed sales—evidence of warranty. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock food. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Sheep kept under contract—proper care. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

Animals' death from stock powder. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court

did not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Agency (?) or independent dealer (?). In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Disputed venue. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

Foreign corporation's stock repurchase agreement—impairment of capital. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

11433

Trial de novo — incomplete record — effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

11435

Effect of jury verdict—most favorable evidence rule. In an action at law tried to the court, the finding of the court has the effect of a verdict of a jury, and upon appeal the evidence will be considered in the light most favorable to the appellee.

Tilden v Zanias, 228- ; 292 NW 835

Trial court's decision in equity—conclusiveness. On appeal the decision of a trial court in an equity case will not be molested to determine close questions where the trial court had the advantage of seeing and hearing the witnesses, unless such decision is contrary to the law and evidence.

Keune v McCauley, 228- ; 293 NW 25

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Summary proceedings—executor's failure to pay—findings conclusive. In a summary proceeding in probate to fix the liability of a surety on the bond of a defaulting executor, tried to the court without a jury but not in equity, it is neither the privilege nor the duty of the supreme court, on appeal, to find the facts, but merely to determine from the evidence if the findings of the trial court were supported by substantial, competent evidence. If so, such findings are conclusive. The appellant recognized as much when it asked for and secured findings of fact and conclusions of law pursuant to statute.

In re Tabasinsky. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed Inc. (Filed August 6, 1940)

11441

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant

the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11443

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11456

Appeal—trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by this section. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

11485

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

11487

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Standing objection to remarks to jury—side agreement of counsel—unfair and unwarranted. A side agreement of opposing counsel as to a standing objection to remarks made in argument to a jury is unfair to the trial court, also an unwarranted and improper interference with orderly trial procedure and contrary to the best interests of the public and of the litigants. Objections should be made at such times as will permit the court to most effectively remedy any harm done.

Eller v. Ins. Co., - ; 291 NW 866

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Action to set aside deed—burden of proving nondelivery. In action by collateral heirs of grantor to set aside on the ground of nondelivery a deed which grantor had deposited in a safety box for transmittal upon his death to the grantee, **and which grantee had obtained and recorded immediately after grantor's death, the burden of proving nondelivery was on such** collateral heirs.

Smith v Fay. (Filed August 6, 1940)

Common disaster—particular order of death—failure of proof—effect. There is no common-law presumption as to order of deaths in a common disaster, and the party having the burden of proving the particular order of death, in order to be preferred over his adversary, will fail where survivorship cannot be ascertained from the evidence.

In re Evans, - ; 291 NW 460

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Creditor's bill—fraudulent conveyance—lack of consideration. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Deed as mortgage—presumption—inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

11493

Instruction on computation of indemnity—nonerroneous. In law action to recover indemnity under an accident policy, there was no error in court's instruction to the jury that it must determine for what period, if any, between March 21st and August 21st the plaintiff was disabled as alleged, and compute the indemnity for the period so found, but in no event to go beyond August 21, 1938.

Eller v Ins. Co., - ; 291 NW 866

Instruction as to amount of indemnity—nonerroneous—jury finding no liability. In law action to recover indemnity under an accident policy, where the court instructs the jury that any indemnity allowed for hospitalization should not exceed a certain amount, there was no error even tho the amount was incorrect, since the jury found there was no liability whatsoever.

Eller v Ins. Co., - ; 291 NW 866

Ownership denied in instructions—admitted in pleadings and evidence. In a replevin action to recover sheep which the defendant's pleadings and evidence admitted belonged to the plaintiff, it was error to give an instruction stating that the defendant denied ownership in the plaintiff, as it allowed the jury to speculate on the ownership of the sheep.

Mead v Palmer, 228- ; 292 NW 821

Jury admonition—assumption that jury obeyed admonition. In a damage action to recover for personal injuries where the court erred in admitting into evidence a previous written statement of a witness for purpose of impeachment and instructed the jury that such statement was for the purpose of impeachment only, it will be assumed (1) that the jury followed the admonition in the absence of any basis for a contrary assumption, and (2) that the jury disregarded the statement since there was no substantial variance between the testimony and previous written statement of the witness.

Ceretti v Railway, 228- ; 293 NW 45

Stock powder causing death—warranty—proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Instructions—construction as a whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

Ross v Ins. Co., 228- ; 292 NW 813

Abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertain-

ing to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Animals killed or injured—measure of damage—instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction was erroneous which stated the measure of damages would be (1) the fair market value of such sheep as died at the time of feeding said powder to them, plus (2) the prospective and ascertainable loss of future profits upon the sheep so dying—the instruction being erroneous in that no allowance was made for the carcasses of such sheep, amounting to $435, and also in that plaintiff was not entitled to future profits which might have been made. The usual measure of damages from injury to an animal is the difference in value before and after injury.

Miller v Economy Co., 228- ; 293 NW 4

11508

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral guaranty of rent—corporate note by individual in payment. In law action to recover rent against an individual, who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation, of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

Mortgagee's rights against assignee — proceeds of fire policy. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Action for damages—incompleted contract for mortgage loan. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction — slippery when wet — nonnegligence. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded through the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

Motion by both parties for directed verdict—nonwaiver of jury without express or implied consent. In a damage action where, at the close of the testimony, defendant made a motion for a directed verdict and plaintiffs' counsel immediately remarked, "Now, the plaintiffs agree with the defendant that the matter is a question of law for the Court, and we want to make a motion for a directed verdict too", the court, in overruling the defendant's motion and finding for the plaintiffs, thereby erred. The rule in this state is that, without an express or implied consent, a motion by both

parties for a directed verdict is not a waiver of jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Rule 30—omnibus assignment for directed verdict. An assignment of error that the court erred in directing a verdict for the plaintiffs at the end of all the testimony, and referring to the motion, is an omnibus assignment not complying with Rule 30 and will not be considered, especially when the plaintiffs' testimony was not controverted and under the record a verdict against the plaintiffs could not possibly stand.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

11515

Highway—vacation—damages to adjoining owners. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

Motor vehicle collision—damages limited to amount proved. Instructions on items of damages must limit the jury to an amount shown by the evidence but not exceeding the amount asked in the petition. In a personal injury action, instructions allowing damages for reasonable expense in the conduct of the injured party's business and for pain and suffering, the amount for both items not to exceed $7,312, were erroneous as the only limitation placed on the damages for the business was the full amount asked, and the evidence showed such damage to be only about $180.

Hinrichs v Mengel. (Filed August 6, 1940)

Animals killed or injured—measure of damage—instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction was erroneous which stated the measure of damages would be (1) the fair market value of such sheep as died at the time of feeding said powder to them, plus (2) the prospective and ascertainable loss of future profits upon the sheep so dying—the instruction being erroneous in that no allowance was made for the carcasses of such sheep, amounting to $435, and also in that plaintiff was not entitled to future profits which might have been made. The usual measure of damages from injury to an animal is the difference in value before and after injury.

Miller v Economy Co., 228- ; 293 NW 4

11548

Jury admonition — assumption that jury obeyed admonition. In a damage action to recover for personal injuries where the court erred in admitting into evidence a previous written statement of a witness for purpose of impeachment and instructed the jury that such statement was for the purpose of impeachment only, it will be assumed (1) that the jury followed the admonition in the absence of any basis for a contrary assumption, and (2) that the jury disregarded the statement since there was no substantial variance between the testimony and previous written statement of the witness.

Ceretti v Railway, 228- ; 293 NW 45

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

11562

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief

had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11567

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

Judgment on pleadings—no statutory provision. The statutes of procedure in this state do not contemplate a motion for judgment on the pleadings.

Jasper Co. v Stergios, 228- ; 292 NW 855

Probate allowance of mortgage indebtedness—res adjudicata in subsequent foreclosure action. In action to foreclose a real estate mortgage where plaintiff seeks to recover for amount advanced for fire insurance policy and it is shown mortgagee filed a claim in probate proceedings of deceased mortgagor in which the amount of principal and interest were established but claim for amount advanced for insurance was denied and no appeal therefrom was taken, the mortgagee is bound by the result in probate proceedings and is estopped from making such claim in a subsequent foreclosure action.

First JSL Bk. v Parker, 228- ; 292 NW 833

Decree in conflict with separate findings or opinion—decree prevails. Where trial court ordered an opinion to be filed but not to be recorded, and where decree subsequently entered makes reference to the opinion, any conflict between the two must be resolved in favor of the decree which is the final order of the court and determines the rights of the parties.

In re Evans, - ; 291 NW 460

Lien — foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—full faith and credit denied. In law action to recover balance of commissions due plaintiff, wherein defendant by way of answer claimed the matter had been adjudicated in an Illinois court and demanded judgment by way of counterclaim in the sum of $250 as adjudicated in Illinois, and where evidence shows that plaintiff was invited into the state of Illinois for the purpose of adjusting the account, and while there was served with notice of suit, it was properly held that such judgment was void, since the jurisdiction in Illinois was obtained by fraud, and the judgment was not entitled to full faith and credit.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

11573

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon

the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

11577

Fraud of principal in obtaining bond—nonduty of obligee. In summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, surety's contention that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which made them parties to the fraud, was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing executor's liability same as bank receivership proceedings—effect on surety. In probate proceeding to determine liability of a surety on a bond of a defaulting executor bank, no prejudice to the surety resulted from the entering of an order fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest—surety's liability. In probate proceeding to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed, such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond—liability for prior wrongful acts. In probate proceeding to determine liability of surety on the bond of a defaulting executor, wherein surety posted a new bond for the executor, as provided by statute, surety was released from liability for devastavits, misappropriations, or wrongful acts occurring prior to the filing, since the bond of an executor or administrator is an obligation to make a full and final accounting. So, where executor failed to perform such duty, the surety was liable for the default.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In probate proceeding to determine liability of surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of an executor bank fixing the liability of the bank to the heirs is binding upon the surety for such bank.

In re Tabasinsky. (Filed August 6, 1940)

Executor—investing estate funds without court order—surety's liability. In a probate proceeding to determine liability of surety on the bond of a defaulting executor, held that the transaction between the executor bank and the heirs, without approval of the court, did not constitute an investment made in pursuance of statutory requirements for investment of funds, and therefore, the surety was liable on the default.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In probate proceeding to determine liability of a surety on the bond of a defaulting executor, held that the transaction between the executor bank and heirs of the estate did not constitute a termination of the bank's functions as executor or a novation or pro tanto assignment, and was not equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Summary proceeding against executor's surety—probate jurisdiction. In a summary proceeding to determine liability of a surety on a bond of a defaulting executor, the probate court had jurisdiction of the subject matter of a claim against the surety as authorized by §§11984, 11985, C., '39, and especially so where a surety, after first raising the question by special appearance, which was abandoned, eventually filed an answer and went to trial thereon.

In re Tabasinsky. (Filed August 6, 1940)

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor,

the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time as discharge—paid surety must show prejudice. An extension of time granted a bank as executor of an estate to settle the interests of the heirs was not such an extension as would release the surety on the bond, since, in order for such extension to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Compromise and settlement—surrender of stock to obtain release as surety—nonbreach of receiver's duty. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

11581

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Court findings—effect of jury verdict—most favorable evidence rule. In an action at law tried to the court, the finding of the court has the effect of a verdict of jury, and upon appeal the evidence will be considered in the light most favorable to the appellee.

Tilden v Zanias, 228- ; 292 NW 835

Foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

11587

Default judgment—improper when answer on file. A judgment should not be entered by default while an answer is on file, so in replevin action in which a petition of intervention was filed and to which plaintiff filed a reply by way of general denial, the trial court erred in granting a motion for default against plaintiff, since the intervener's relief depended upon her assertion of ownership, and this, being denied, raised an issue of fact.

Jasper Co. v Stergios, 228- ; 292 NW 855

11602

Alimony and support awards — lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

11646

Absence of affidavit—erroneous allowance. In equity action for an accounting in which the defendants prayed for the foreclosure of a chattel mortgage, which was granted, the taxation of attorney fees, in the absence of an affidavit as required by statute, was erroneous.

Holden v Voelker, 228- ; 293 NW 32

11760

Law favors protection of homestead. On question of whether or not a homestead has been abandoned, it is largely a matter of intent to be determined on the particular facts in each case. The holdings of the supreme court lean strongly to the protection of the homestead estate.

Charter v Thomas, 228- ; 292 NW 842

Rooms leased for temporary period and purpose—nonabandonment of homestead. In action to enjoin the sale under general execution

of real estate claimed exempt as a homestead, the evidence supported a decree enjoining such sale where plaintiff proved a definite and good-faith intention and plan to lease certain rooms of a dwelling for a temporary period and purpose only, and thereafter to again occupy such rooms as a part of his homestead.

Charter v Thomas, 228- ; 292 NW 842

11815

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Fictitious person in mortgage assignment. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Setting aside deed—burden of proof. Ordinarily in an action to set aside a deed the burden is on plaintiff except where confidential or fiduciary relations are established, and where grantor was an old man, ill, discouraged and depressed by the recent death of an adopted daughter whom he loved, and had no one to turn to except that daughter's sister who was one of grantees, such confidential relationship existed as placed the burden of proof on defendants to establish the good faith and fairness of the transaction.

Sinco v Kirkwood, - ; 291 NW 873

Fraud of principal in obtaining bond—nonduty of obligee. In a summary proceeding in probate to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Creditor's bill—fraudulent conveyance—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Creditor's suit—fraud in conveyance by parents to children. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

Creditor's suit—fraudulent conveyances—relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Compromise and settlement—partnership receivership—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Partnership receiver—defense of suit—nonparticipation in compromise. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

Nonright to impeach but right to contradict one's own witness. In an action to set aside as fraudulent a conveyance made by decedent to grandson wherein grandson as a witness for plaintiff directly and definitely denied plaintiff's contention that transfer had been agreed upon to defeat creditor's claim, held that plaintiff vouched for this witness in making him his own, and that since plaintiff did not exercise right to dispute the grandson's testimony with testimony of other witnesses, the testimony of the grandson stood uncontradicted.

Healey v Allen, - ; 290 NW 71

11846

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

Grantee of devised property as party. One who held a certificate of sale to property at the beginning of an action to construe a will devising the property, and who later acquired a trustee's deed, had a direct interest in the litigation and was entitled to join in the action.

In re Heckmann, - ; 291 NW 465

Precatory request for guardianship in will. A provision in a will giving the residue to two daughters in equal shares and asking that one be appointed guardian over the other with full charge over her affairs and that she care for her during her lifetime referred only to the property taken under the will and gave half to the guardian-daughter and the other half to the sister for support during her life, the provision for the guardianship not being a condition attached to the devise, but merely precatory.

In re Heckmann, - ; 291 NW 465

Ambiguity in will—intent. The interpretation which a court is bound to give to a will is that which appears to have been the intent of the testator, and altho in some cases extrinsic circumstances are permitted in evidence to clear up ambiguity, or to identify subject matter, the court cannot make a new will.

In re Heckmann, - ; 291 NW 465

Fee limited by subsequent limitation—nonapplicability of rule. The rule of construction of limitation of a fee by a subsequent provision in a will has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take and in a subsequent clause specifies that the devised property shall be placed in trust.

In re Heckmann, - ; 291 NW 465

Devise of undivided half interest—not joint tenancy. A will devising an estate to two daughters "jointly in equal shares" does not create a joint tenancy when such interpretation would attach no meaning to another part of the provision, "to each an undivided one-half thereof", which explains just what the testator intended when he devised the land, as, by statute, estates vested in two or more persons are deemed tenancies in common unless a different intent is clearly expressed in creating the estate.

In re Heckmann, - ; 291 NW 465

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment of claims—mandatory by statute—provision in will meaningless—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

Reciprocal wills—no evidence of contract—wife predeceasing husband. When a husband made a will giving his wife all his estate, and the wife made a will nine years later, giving the husband one half the remainder after making specific legacies, the wills were not reciprocal wills in the absence of evidence that they were executed pursuant to a contract that they be mutual and reciprocal, and the devise to the wife could be given effect altho she did not survive the husband.

In re Schroeder. (Filed August 6, 1940)

Predeceased spouse as devisee—clear intent—effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

Widow taking under will—nonwaiver of exemptions. In probate proceedings a widow, the sole beneficiary, by taking under a will, does not waive any exemption.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

Lienholders must exhaust nonexempt property first. In probate proceeding a court order correctly required the nonexempt property be exhausted by the lienholders before proceeding against any of the exempt property.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11847

Widow taking under will—nonwaiver of exemptions. In probate proceedings a widow, the sole beneficiary, by taking under a will, does not waive any exemption.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11852

Reciprocal wills—no evidence of contract—wife predeceasing husband. When a husband made a will giving his wife all his estate, and the wife made a will nine years later, giving the husband one half the remainder after making specific legacies, the wills were not reciprocal wills in the absence of evidence that they were executed pursuant to a contract that they be mutual and reciprocal, and the devise to the wife could be given effect altho she did not survive the husband.

In re Schroeder. (Filed August 6, 1940)

11861

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

Common disaster—particular order of death—failure of proof—effect. There is no common-law presumption as to order of deaths in a common disaster, and the party having the

burden of proving the particular order of death, in order to be preferred over his adversary, will fail where survivorship cannot be ascertained from the evidence.

In re Evans, - ; 291 NW 460

Predeceased spouse as devisee—clear intent —effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

11863

Predeceased spouse as devisee—clear intent —effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

11876

Estate administered by trustee. AG Op July 25, '40

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

11887

Executor's failure to pay—summary proceedings on bond—findings conclusive. On appeal from a proceeding to fix the liability of a surety on the bond of a defaulting executor, tried to the court without a jury but not in equity, the supreme court is not to find the facts, but merely to determine if the findings of the trial court were supported by substantial, competent evidence. If so, such findings are conclusive. The appellant recognized as much when it asked for and secured findings of fact and conclusions of law pursuant to statute.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest. In proceedings to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Investing estate funds without court order —surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs did not constitute an investment made in pursuance of statutory requirements for investment of funds, and the surety was liable upon the executor's bond when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In proceedings in probate to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which was also the executor of the

estate, and thereafter a stipulation approved by the court was entered into to pay the funds of the estate to the heirs, such transaction did not constitute the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In proceedings to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of the bank fixing the liability of the bank to the heirs was not binding upon the surety for the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing liability same as bank receivership proceedings—effect on surety. In a proceeding to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Fraud of principal in obtaining bond—nonduty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment making them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time as discharge—paid surety must show prejudice. In a proceeding to determine the liability of a surety on a bond of a defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond — liability for prior wrongful acts. The bond of an executor or administrator is an obligation to make a full and final accounting, so where executor failed to perform such duty, the surety was liable for the default and cannot avoid liability for prior acts of the executor by filing a new bond.

In re Tabasinsky. (Filed August 6, 1940)

Probate jurisdiction—summary proceeding against executor's surety. The probate court has jurisdiction of the subject matter of a claim against the surety as authorized by §§11984, 11985, C., '39, where a surety, after first raising the question by special appearance, eventually filed an answer and went to trial.

In re Tabasinsky. (Filed August 6, 1940)

11918

Lienholders must exhaust nonexempt property first. In probate proceeding a court order correctly required the nonexempt property be exhausted by the lienholders before proceeding against any of the exempt property.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11933

Realty conversion denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where

the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Equitable conversion — claims — payment mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11952

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by this section.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment of claims—mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11955

Realty conversion denied under will. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Equitable conversion — claims — payment mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11957

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his brothers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stock worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

11961

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

11962

Note given for indebtedness — presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

11963

Note given for indebtedness—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his broth-

ers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Probate allowance of mortgage indebtedness—res adjudicata in subsequent foreclosure action. In action to foreclose a real estate mortgage where plaintiff seeks to recover for amount advanced for fire insurance policy and it is shown mortgagee filed a claim in probate proceedings of deceased mortgagor in which the amount of principal and interest were established but claim for amount advanced for insurance was denied and no appeal therefrom was taken, the mortgagee is bound by the result in probate proceedings and is estopped from making such claim in a subsequent foreclosure action.

First JSL Bk. v Parker, 228- ; 292 NW 833

11970

Realty conversion denied under will—claims—executors' duty. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Claims—payment mandatory by statute—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11972

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his brothers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

11973

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment mandatory by statute—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor

conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11984

Probate order fixing liability same as bank receivership proceedings—effect on surety. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Investing estate funds without court order—surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs constituted an investment made in pursuance of statutory requirements for investment of funds, and a default in regard thereto would not make the surety liable, such contention was without merit when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nondischarge of surety. In a proceeding to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nonratification of maladministration — surety's liability. In a proceeding to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of an executor bank fixing the liability of the bank to the heirs was binding upon the surety for the bank.

In re Tabasinsky. (Filed August 6, 1940)

Fraud of principal in obtaining executor's bond—nonduty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time to executor as discharge—paid surety must show prejudice. In a proceeding to determine the liability of a surety on a bond of defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond—liability for prior wrongful acts. The bond of an executor or administrator is an obligation to make a full and final accounting, so, where executor failed to perform such duty, the surety is liable for the default and cannot avoid liability for prior acts of the executor by filing a new bond.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest. In proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed, such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

11985

Probate jurisdiction — summary proceeding against executor's surety. In a summary proceeding in probate to determine liability of a

surety on a bond of a defaulting executor, the probate court has jurisdiction of the subject matter of a claim against the surety as authorized by §11984, and this section, C., '39, where a surety, after first raising the question by special appearance, eventually filed an answer and went to trial thereon.

In re Tabasinsky. (Filed August 6, 1940)

11990

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

12006

Predeceased spouse—failure to elect—effect of anti-lapse statute. This section, stating "The survivor's share cannot be affected by any will of the spouse unless consent thereto is given as hereinafter provided", followed by statutes prescribing the surviving spouse's method of election between the will and the statutory distributive share, could not apply when a wife died before her husband, whose will devised her all his property. As she did not survive, there was no right to a distributive share, and, as there was no alternative upon which an election could be made, the failure of the heirs to make an election could not be prejudicial, and they could take only under the devise.

In re Schroeder. (Filed August 6, 1940)

12007

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

Predeceased spouse—failure to elect—effect of anti-lapse statute. Section 12006, C., '35, stating "The survivor's share cannot be affected by any will of the spouse unless consent thereto is given as hereinafter provided", followed by statutes prescribing the surviving spouse's method of election between the will and the statutory distributive share, could not apply when a wife died before her husband, whose will devised her all his property. As she did not survive, there was no right to a distributive share, and, as there was no alternative upon which an election could be made, the failure of the heirs to make an election could not be prejudicial, and they could take only under the devise.

In re Schroeder. (Filed August 6, 1940)

12016

Inheritance by adopted child—compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

12017

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

12027

Inheritance—compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

12050

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound

judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Fraud of principal in obtaining bond—nonduty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time to executor as discharge—paid surety must show prejudice. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Compromise and settlement — partnership receivership—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

12059

Compromise and settlement of probate loan—sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

12177

Ownership denied in instructions—admitted in pleadings and evidence. In a replevin action to recover sheep which the defendant's pleadings and evidence admitted belonged to the plaintiff, it was error to give an instruction stating that the defendant denied ownership in the plaintiff, as it allowed the jury to speculate on the ownership of the sheep.

Mead v Palmer, 228- ; 292 NW 821

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

12285

Special assessment lien—defense against tax deed subject to lien. A statute providing that no person can question the title acquired by a tax deed without first showing that he, or the person under whom he claims title, had title at the time of sale, or that title was acquired from the state or United States after the sale, and that all taxes have been paid, does not preclude one from defending the lien of his special assessment certificate against a quiet title action based on a tax sale which was made subject to the prior lien of the special assessment.

Flanders v Ins. Co., - ; 292 NW 795

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not

quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

12306

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

12310

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12325

Final decree confirming shares. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12334

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12352

Attorney fees—absence of affidavit—erroneous allowance. In equity action for an accounting in which the defendants prayed for the foreclosure of a chattel mortgage, which was granted, the taxation of attorney fees, in the absence of an affidavit as required by statute, was erroneous.

Holden v Voelker, 228- ; 293 NW 32

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

12372

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

Deed as mortgage — presumption — inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that

gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Deed not mortgage—no secured debt. A deed given to one who paid delinquent taxes on the property satisfied the debt for the taxes, and no obligation existed under an option to repurchase given the grantor. There being no debt, there was nothing to be secured by the deed, and it could not be construed as a mortgage.

Ross v Ins. Co., 228- ; 292 NW 813

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Fictitious person in assignment. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Estoppel to object to extension decree. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

Stipulation permitting refusal of loan before finally made—validity—consideration. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Refusal of loan after initial approval—action for damages — incompleted contract. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Insurance proceeds — rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mort-

gaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

12375

Insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

12376

Separate actions on note and mortgage—insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

12384

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

12417

Equity action to set aside transfer of corporate assets—quo warranto issues in reply improper. In an equity action to set aside a transfer and merger of assets of an insurance company and asking for appointment of receiver, and where plaintiffs, in an allegation in their reply, put in issue the validity of the dissolution of the insurance corporation, a motion to strike the reply was properly sustained on the theory that a quo warranto proceeding is the proper remedy to determine the validity of the dissolution of a corporation, as against the theory plaintiffs had a private right which could be maintained in equity.

Walling v Ins. Co., 228- ; 292 NW 157

Validity tested by quo warranto—exclusive remedy. The exclusive procedure for testing the validity of a corporate organization, merger or consolidation of corporations is by the statutory quo warranto proceeding, and such validity cannot be challenged in an equitable action, and especially not collaterally in a reply in such action.

Walling v Ins. Co., 228- ; 292 NW 157

12429

Equity action to set aside transfer of corporate assets—quo warranto issues in reply improper. In an equity action to set aside a transfer and merger of assets of an insurance company and asking for appointment of receiver, and where plaintiffs, in an allegation in their reply, put in issue the validity of the dissolution of the insurance corporation, a motion to strike the reply was properly sustained on the theory that a quo warranto proceeding is the proper remedy to determine the validity of the dissolution of a corporation, as against the theory plaintiffs had a private right which could be maintained in equity.

Walling v Ins. Co., 228- ; 292 NW 157

Extent of power under statutory proceedings. Quo warranto proceedings relating to corporations are not limited to the forfeiture of rights and privileges, but may provide judgment in certain other matters as circumstances may require.

Walling v Ins. Co., 228- ; 292 NW 157

12440

Compelling calling of utility election—change of circumstances. The issuance of a writ of mandamus being not a matter of right, but resting in the discretion of the court, a court properly refused to issue a writ to compel a mayor to call an election on the proposition of granting a franchise to a public utility company when a reasonable time had not elapsed

since a previous election in which the proposal was defeated, and there was no showing of a change of circumstances to warrant interference by the court.

Iowa P. & L. v Hicks, - ; 292 NW 826

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

Calling of re-election on municipal franchise. After a municipal election in which a proposal to grant a franchise to an electric utility company was defeated, and the mayor did not call another election on the same proposition altho proper petitions for such election were filed, a petition for a writ of mandamus to compel the mayor to call the election should have been granted unless peculiar facts presented some reason for refusing the writ.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

School district as trustee — individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Drainage assessment—additional levy. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

Hartz v Truckenmiller. (Filed August 6, 1940)

District funds intermingled—drainage fund deficiency—additional levy. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land—the original assessment being sufficient to pay the bonds when collected.

Hartz v Truckenmiller. (Filed August 6, 1940)

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

12441

City fire department — employees — promotional appointment. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even

after an investigation under §1161, C., '39, such a discretionary appointment as will bar the court's right to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

12442

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

12448

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

12450

Misjoinder of county treasurer—drainage district action. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

12456

Quashing writ—use of term "improvidently issued" unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Permanent park board—capacity to sue. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

12464

Quashing writ—use of term "improvidently issued" unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

12512

Suit on notes — injunction — modification pending submission of appeal—statute of limitations. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, - ; 289 NW 900

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000

was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

City renting water filters to consumers. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval, was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed, the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction — moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

Use tax—retail sales from stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Use tax—mail order sales outside state—*board enjoined from canceling corporation permit.* A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

12575

Precatory request for guardianship in will. A provision in a will giving the residue to two daughters in equal shares and asking that one be appointed guardian over the other with full charge over her affairs and that she care for her during her lifetime referred only to the property taken under the will and gave half to the guardian-daughter and the other half to the sister for support during her life, the provision for the guardianship not being a condition attached to the devise, but merely precatory.

In re Heckmann, - ; 291 NW 465

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

12581

Partition—life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

Unauthorized investment prior to statute requiring approval — court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Investments in property outside jurisdiction of the court. Investments of guardianship funds in property beyond the jurisdiction of the court are not recommended. No guardian should assume to make such loan without a full and exact report of its nature so that he may have in advance the court's advice as to its advisability.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation—refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

12584

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In re Morris, 228- ; 292 NW 836

12587

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12597

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation—refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

12713

Partition—life estate involved—decree delaying partition. Courts hestitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of prop-

erty and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12716

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Compromise and settlement—charge of surrender of stock to obtain release as surety—no breach of duty. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

12724

Insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy covering all of insured's property—mere description. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds — mortgagee's rights against assignee. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

12772

Investments in property outside jurisdiction of the court. Investments of guardianship funds in property beyond the jurisdiction of the court are not recommended. No guardian should assume to make such loan without a full and exact report of its nature so that he may have in advance the court's advice as to its advisability.

In re Morris, 228- ; 292 NW 836

Unauthorized investment prior to statute requiring approval—court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation — refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer

should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Executor—investing estate funds without court order—surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs did not constitute an investment made in pursuance of statutory requirements for investment of funds, and the surety was liable for the executor's default when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

12787

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Foreign judgment obtained—full faith and credit denied. In action to recover balance of commissions due plaintiff, wherein defendant by way of answer claimed the matter had been adjudicated in an Illinois court and demanded judgment by way of counterclaim in the sum of $250 as adjudicated in Illinois, and where evidence shows that plaintiff was invited into the state of Illinois for the purpose of adjusting the account, and while there was served with notice of suit, it was properly held that such judgment was void, since the jurisdiction in Illinois was obtained by fraud, and the judgment was not entitled to full faith and credit.

Miller v Acme Feed, Inc. (Filed *August* 6, 1940)

12802

Appeal — assignment of error — failure to comply with rules—effect. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. Rule 30 requires that complaints against the rulings of the trial court must be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

12822

Partition—decree confirming partition shares final and appealable. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

12823

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

More specific statement — substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

Motion sustained generally—necessity of successfully challenging each ground on appeal. Where a motion to strike a reply was sustained generally, and on all grounds, the appellant on appeal to the supreme court cannot prevail unless each ground of the motion is successfully challenged.

Walling v Ins. Co., 228- ; 292 NW 157

Ordinance — excessive penalty — imposition necessary to question validity. Question of

whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Partition — decree confirming partition shares. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

Injunction against suit on notes—modification pending submission of appeal—statute of limitations. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, ; 289 NW 900

12827

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Question first raised on appeal—not following trial theory—nonreviewability. In equity action to set aside a deed, the question of nondelivery of the deed cannot be raised in the brief and argument and considered on appeal when such question is contrary to the trial theory and not in harmony with the pleadings which predicate the right of recovery, not on the theory that the transaction was not completed, but on the theory that grantor was in such condition as to be incompetent to accomplish that which was done.

Keune v McCauley, 228- ; 293 NW 25

Competency of testimony—first challenged on appeal. The competency of testimony cannot be challenged for the first time on appeal when no objection was made at the trial.

State v Strable. (Filed August 6, 1940)

Search warrant proceedings—question first presented on appeal—no review. In an action commenced by search warrant proceedings to recover possession of an automobile, wherein both plaintiff and defendant alleged the right to possession and ownership of the car, and the record shows the action was tried, both in municipal court and on appeal therefrom to the district court, on the sole issue as to the rights of the parties to such possession or ownership, the questions as to the proper issuance of the search warrant and as to the form of the proceedings cannot be raised for the first time on appeal to the supreme court.

State v Doe. (Filed August 6, 1940)

12845

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Assigning error in instruction — abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertaining to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Presumption as to contents of abstract—when inapplicable. The presumption authorized by §12845.1, C., '39, that the abstract contains the record, cannot be expected to apply when such record shows on its face that it does not contain all evidence or matters before the court of which complaint is made.

Enslow v Miner. (Filed August 6, 1940)

12845.1

Contents of abstract—when presumption inapplicable. The presumption authorized by

this section, that the abstract contains the record, cannot be expected to apply when such record shows on its face that it does not contain all evidence or matters before the court of which complaint is made.

Enslow v Miner. (Filed August 6, 1940)

12845.2

Denial of abstract to be specific—requirements of Rule 17. Under Rule 17 a denial of abstract should be specific and should point to those parts of the abstract complained of, and should further point out and specify, by page or otherwise, the parts of the record or transcript which support the denial or complaint. The only object of the certification of the record is to settle the specific dispute raised by a denial. The burden should not be placed on the court to read the abstracts, the amendments, the entire transcript, and other certified records.

Tessman v Tessman, - ; 291 NW 530

12847

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

12858

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed, the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

12860

Injunction against suit on notes—modification pending submission of appeal. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, ; 289 NW 900

12869

Directed verdict — omnibus assignment of error. An assignment of error that "the court erred to the prejudice of the defendant in directing a verdict * * *" is an omnibus assignment and will not be considered on appeal.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

Failure to comply with rules—effect—Rule 30. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. Rule 30 requires that complaints against the rulings of the trial court must be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

12870

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

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Dallas Real Estate Co. v Groves, ; 289 NW 900

12871

Belated filing of briefs—privilege to file reply. Where appellant filed a motion to strike

appellee's additional brief containing additional authorities which in no material way aid the appellee, and when striking it would in no way aid appellant, the motion was overruled. If appellant cared to file anything further in reply he could have asked for that privilege, as the court is liberal in granting such a privilege in such cases.

Eller v Ins. Co., - ; 291 NW 866

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

Appellee's supplemental brief and argument—filing disapproved. The filing of a supplemental brief and argument contrary to the rules of the supreme court is disapproved.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

12886

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

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Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction — moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

12919

Refreshing witness' memory by grand jury testimony re intoxication — denial — instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Driving while intoxicated—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

12966

Prosecutrix's declarations to others — use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

13045

Introducing one person as another—nonexistent bank. False statements that a person named Van Carter was "Charles Miller" and that a check drawn by "Charles Miller" was good when in fact the bank named thereon did not exist are such false pretenses as may be the basis for a charge of cheating by false pretenses.

State v Neuhart, - ; 292 NW 791

False pretenses—indictment charging property obtained from owner—proof shows from

agent—no variance. Where a defendant obtains cattle by false pretenses, an indictment for cheating by false pretenses is not defective because it alleges the property was obtained from the owner, tho in fact the property was obtained from the owner's agent. Such facts do not create a fatal variance between the indictment and the proof, and a directed verdict based thereon is properly overruled.

State v Neuhart, - ; 292 NW 791

Instructions—construction as whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

State v Neuhart, - ; 292 NW 791

Sufficiency of evidence to sustain verdict. In prosecution for obtaining money by false pretenses, there was ample evidence to support the verdict of the jury, and no error resulted from overruling defendant's motion for directed verdict.

State v Peck, - ; 291 NW 439

Incompetent testimony admitted but later stricken and jury admonished—nonerroneous. In prosecution for obtaining money by false pretenses, where secretary of alleged defrauded finance company testified that defendant told him there would be no bad paper, and that he relied on this statement, there was no error where defendant's objection was overruled but later, on defendant's motion, such testimony was stricken from the record and jury admonished.

State v Peck, - ; 291 NW 439

False automobile financing—prior conversation as to handling—admissibility. In prosecution for obtaining money by false pretenses, testimony of the secretary of the finance company, to whom alleged false automobile financing papers were sent by mail, was competent and material to show that he relied upon the papers being genuine, as on their face they purported to be, and that they complied with understanding and conversations with defendant as to handling such business.

State v Peck, - ; 291 NW 439

Bank records of defendant's transactions—admissibility. In prosecution for obtaining money by false pretenses from an automobile finance company, which transactions were handled by mail and drafts through banks, the testimony of assistant cashier of a bank, where defendant had an account, and certain bank records covering transactions were clearly admissible.

State v Peck, - ; 291 NW 439

13139

Disputed venue—jury question. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

Forgeries—other checks admissible. In criminal prosecution for forgery evidence of other forged checks is admissible.

State v Gibson, 228- ; 292 NW 786

Defendant's exhibit of similar instrument—no foundation—exclusion. In criminal prosecution for forgery, an offer by defendant of an exhibit was properly refused when such exhibit was only a bare similarity in words and figures to the forged checks and no evidence or foundation was laid which would justify its admission.

State v Gibson, 228- ; 292 NW 786

Expert testimony—instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury—such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Instruction as to venue in forgery prosecution. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

13441.03

Right of possession and ownership of automobile. In action commenced by search warrant proceedings to determine the right of possession and ownership of an automobile, where purchaser of an automobile under conditional sale contract duly recorded in the county of purchase also executed a chattel mortgage on the same car to secure a loan in another county, and, such chattel mortgage being duly recorded in such county, the holder of the conditional sale contract had prior right to the car, since the chattel mortgagee had no better right than his mortgagor, and a third party purchasing through the holder of the conditional sale contract was rightfully determined to be the owner of said car and entitled to its possession.

State v Doe. (Filed August 6, 1940)

13441.06

Issuance—form of proceedings—questions first raised on appeal—no review. In an action commenced by search warrant proceedings to recover possession of an automobile, wherein both plaintiff and defendant alleged the right to possession and ownership of the car, and the record shows the action was tried, both in municipal court and on appeal therefrom to the district court, on the sole issue as to the rights of the parties to such possession or ownership, the questions as to the proper issuance of the search warrant and as to the form

of the proceedings cannot be raised for the first time on appeal to the supreme court.

State v Doe. (Filed August 6, 1940)

13449

Instruction as to venue in forgery prosecution. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

Disputed venue—jury question. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

13729

Refreshing memory by grand jury testimony —denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

13774

Board's authority to pay one attorney. AG Op June 20, '40

13876

Defendant as witness— nonerroneous. In criminal prosecution where, regarding the credibility of defendant as a witness, the court instructed, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true, as made in good faith, or only for the purpose of avoiding conviction", such portion of the instruction, tho it may well have been omitted, nevertheless was not error.

State v Gibson, 228- ; 292 NW 786

Expert testimony—instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury —such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Venue in forgery prosecution proper. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

Instructions—construction as whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

State v Neuhart, - ; 292 NW 791

Refreshing memory by grand jury testimony —denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—evidence. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

13878

Part of testimony read to jury during deliberations. When the jury, during its deliberations, requested that the testimony of a sheriff, his deputy, and the defendant be read to them and, after the request was modified and only the testimony of the sheriff was read, the foreman said he believed that it was sufficient, there was no error in denying the request of counsel made after the jury had again retired that the other testimony also be read.

State v Strable. (Filed August 6, 1940)

13890

Instruction on defendant as witness—nonerroneous. In criminal prosecution where, regarding the credibility of defendant as a witness, the court instructed, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true, as made in good faith,

or only for the purpose of avoiding conviction", *such portion of the instruction, tho it may well* have been omitted, nevertheless was not error.

State v Gibson, 228- ; 292 NW 786

13892

Impeachment by other witness—foundation laid in cross-examination. Where proper foundation was laid in the cross-examination of the defendant's wife, it was not error to admit, solely for purposes of impeachment, testimony of a sheriff regarding statements made by the wife.

State v Strable. (Filed August 6, 1940)

13897

Forgeries—other checks admissible. In criminal prosecution for forgery evidence of other forged checks is admissible.

State v Gibson, 228- ; 292 NW 786

Rape—prosecutrix's declarations to others—use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—*evidence—instructions.* *Testimony by persons* who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

Refreshing memory by grand jury testimony —denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Incompetent testimony admitted but later *stricken and jury admonished*—nonerroneous. In prosecution for obtaining money by false pretenses, where secretary of alleged defrauded finance company testified that defendant told him there would be no bad paper, and that he relied on this statement, there was no error where defendant's objection was overruled but later, on defendant's motion, such testimony was stricken from the record and jury admonished.

State v Peck, - ; 291 NW 439

False automobile financing—prior conversation as to handling—admissibility. In prosecution for obtaining money by false pretenses, testimony of the secretary of the finance company, to whom alleged false automobile financing papers were sent by mail, was competent and material to show that he relied upon the papers being genuine, as on their face they purported to be, and that they complied with understanding and conversations with defendant as to handling such business.

State v Peck, - ; 291 NW 439

Bank records of defendant's transactions—admissibility In prosecution for obtaining money by false pretenses from an automobile finance company, which transactions were handled by mail and drafts through banks, the testimony of assistant cashier of a bank, where defendant had an account, and certain bank records covering transactions were clearly admissible.

State v Peck, - ; 291 NW 439

13900

Prosecutrix's declarations to others—use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

Rape—admission by defendant to officers. In a prosecution for statutory rape, testimony by the sheriff and his deputy as to admissions of the acts of intercourse, made to them by the defendant, is sufficient corroboration of the testimony of the prosecutrix to warrant submission of case to the jury.

State v Strable. (Filed August 6, 1940)

13903

Rape—corroboration—admission by defendant to officers. In a prosecution for statutory rape, testimony by the sheriff and his deputy as to admissions of the acts of intercourse, made to them by the defendant, is sufficient corroboration of the testimony of the prosecutrix to warrant submission of case to the jury.

State v Strable. (Filed August 6, 1940)

Warning that statements may be used on trial—finding on special interrogatory. When a defendant made statements confessing his guilt to a sheriff and county attorney, the question as to whether the confession was freely and voluntarily made, being disputed, was properly a jury question, and when the jury, in answer to a special interrogatory, found that it was voluntary, the testimony of the sheriff and county attorney was admissible altho the defendant was not warned that his statements might be used against him.

State v Strable. (Filed August 6, 1940)

Disputed testimony—not shown to be involuntary. On disputed evidence as to whether a defendant's admission of the acts of the offense charged was made before or after he was advised to tell the truth and promises of leniency were made to him, and when he admitted that there was no loud talk at the time and that no one threatened to strike him, the evidence was not of the undisputed character required to show the confession to be involuntary because induced by promises of leniency and fear of threatened injury, and the securing of the confession was therefore held not to be a violation of the right of due process.

State v Strable. (Filed August 6, 1940)

13911

Part of testimony read to jury during deliberations. When the jury, during its deliberations, requested that the testimony of a sheriff, his deputy, and the defendant be read to them and, after the request was modified and only the testimony of the sheriff was read, the foreman said he believed that it was sufficient, there was no error in denying the request of counsel made after the jury had again retired that the other testimony also be read.

State v Strable. (Filed August 6, 1940)

13915

Obtaining money by false pretenses—ample evidence to sustain verdict. In prosecution for obtaining money by false pretenses, there was ample evidence to support the verdict of the jury, and no error resulted from overruling defendant's motion for directed verdict.

State v Peck, - ; 291 NW 439

13916

Warning that statements may be used on trial—confession—finding on special interrogatory. When a defendant made statements confessing his guilt to a sheriff and county attorney, the question as to whether the confession was freely and voluntarily made, being disputed, was properly a jury question, and when the jury, in answer to a special interrogatory, found that it was voluntary, the testimony of the sheriff and county attorney was admissible altho the defendant was not warned that his statements might be used against him.

State v Strable. (Filed August 6, 1940)

13917

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13944

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13951

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13959

Atty. Gen. Opinion. See AG Op June 25, '40

13994

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

14010

Competency of testimony—first challenged on appeal. The competency of testimony cannot be challenged for the first time on appeal when no objection was made at the trial.

State v Strable. (Filed August 6, 1940)

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

Technicalities disregarded—lawbreakers not aided. In criminal cases the courts should not reverse where no substantial right has been affected and where technical errors do not affect the result.

State v Neuhart, - ; 292 NW 791

14027

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

ANNOTATIONS TO SUPREME COURT RULES

Rule 17

Denial of abstract to be specific—requirements of Rule 17. Under Rule 17 a denial of abstract should be specific and should point to those parts of the abstract complained of, and should further point out and specify, by page or otherwise, the parts of the record or transcript which support the denial or complaint. The only object of the certification of the record is to settle the specific dispute raised by a denial. The burden should not be placed on the court to read the abstracts, the amendments, the entire transcript, and other certified records.

Tessman v Tessman, - ; 291 NW 530

Rule 19

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Rule 24

Belated filing of briefs—privilege to file reply. Where appellant filed a motion to strike appellee's additional brief containing additional authorities which in no material way aided the appellee, and when striking it would in no way aid appellant, the motion was overruled. If appellant cared to file anything further in reply he could have asked for that privilege, as the court is liberal in granting such a privilege in such cases.

Eller v. Ins. Co., - ; 291 NW 866

Appellee's supplemental brief and argument—filing disapproved. The filing of a supplemental brief and argument contrary to the rules of the supreme court is disapproved.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Rule 30

Directed verdict—omnibus assignment of error. An assignment of error that "the court erred to the prejudice of the defendant in directing a verdict * * *" is an omnibus assignment and will not be considered on appeal.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Omnibus assignment for directed verdict. An assignment of error that the court erred in directing a verdict for the plaintiffs at the end of all the testimony, and referring to the motion, is an omnibus assignment not complying with Rule 30 and will not be considered, especially when the plaintiffs' testimony was not controverted and under the record a verdict against the plaintiffs could not possibly stand.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Assignment of error—failure to comply with rules—effect. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. This rule requires complaints against the rulings of the trial court to be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

Substantial compliance. On appeal where appellee asserts noncompliance with Rule 30, regarding assignments of error, and the record shows that both appellee and appellant agreed that only one question is involved, and where failure to comply with the rule has in no way burdened either the court or counsel, there was substantial compliance with Rule 30—the purpose of the rule being to facilitate procedure.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Assigning error in instruction — abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertaining to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Rule 31-b

Trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Rule 32

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of the printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106