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CHARLOTTE E. SYAS, APPELLEE, V. DONALD W. SYAS, APPELLANT.

34 N. W. 2d 884

Filed December 10, 1948. No. 32489.

1. **Parent and Child.** Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother provided she is a fit and proper person.
2. ———. A decree awarding one parent the custody of a child should, under normal circumstances, include a provision permitting the parent deprived of the custody to visit with the child under such conditions and in such manner as the circumstances may warrant and only under exceptional circumstances should the right be totally denied.
3. **Divorce.** In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child.

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

Bremers & Hunt, for appellant.

Penelope H. Anderson, for appellee.

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

WENKE, J.

This appeal arises out of the provisions in a divorce decree entered by the district court for Douglas County in favor of the plaintiff and appellee, Charlotte E. Syas, as they relate to the minor child, Sharon Kay. His motion for new trial having been overruled the defendant and appellant, Donald W. Syas, has appealed to this court.

No question is raised as to the absolute divorce granted appellee and the evidence is amply sufficient to sustain the granting thereof.

Appellant raises three questions. They are: First,

the awarding of the custody of their minor child, Sharon Kay, to appellee; second, the time allowed appellant to visit the child; and third, allowing the appellee to remove the minor child out of the jurisdiction of the court, that is, to Thermopolis, Wyoming.

As to these features the decree provided as follows:

"* * * custody of the minor child * * *, Sharon Kay Syas, be, and it hereby is granted to the plaintiff.

"* * * that the defendant have the right of visitation with the minor child of the parties hereto, the time of such visitation being hereby fixed as between the hours of One o'clock P. M., and Seven o'clock P. M., once each week on either Saturday or Sunday * * *.

"* * * that the plaintiff be, and she hereby is, granted permission to remove the minor child of the parties hereto from the jurisdiction of this court to Thermopolus, Wyoming, in order to take employment."

The record shows that the parties were married in December 1941. As a result of this marriage there was born a daughter, Sharon Kay, who was six years of age at the time of the trial. Appellee had been previously married and had a child by her first marriage. This child was 12 years of age at the time of the trial.

It does not appear that the married life of these parties proved to be very congenial as they seemed to have had difficulties which began not too long after the marriage. This finally resulted in their separation in June 1946 and appellee filing suit for divorce. A decree in her favor was entered therein on December 6, 1946. However, on December 20, 1947, they were again married. This second marriage was of extremely short duration for on January 21, 1948, this action was filed and the decree was entered on March 10, 1948.

During all of the time since her birth Sharon Kay has been with the appellee. This was true during the 21-month period that appellant was in the armed forces and also after their separation in June 1946.

As to the custody of the minor child this court has

often said that ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother provided she is a fit and proper person. Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907, 133 Am. S. R. 618; Feather v. Feather, 112 Neb. 315, 199 N. W. 533; Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214; Crandall v. Luhnow, 137 Neb. 13, 288 N. W. 29; Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

The evidence shows appellee to be a fit and proper person to have the care of this child. The evidence shows that appellee has always had the child's custody and given her good care and there is nothing in the record that would justify this court in now making a change.

As to the second question raised by the appellant, it can be said that a decree awarding one parent the custody of a child should, under normal circumstances, include a provision permitting the parent deprived of the custody to visit with the child under such conditions and in such manner as the circumstances may warrant and only under exceptional circumstances should that right be totally denied. See, Wilkins v. Wilkins, *supra;* Taminosian v. Taminosian, 117 Neb. 285, 220 N. W. 271; Carlson v. Carlson, *supra;* York v. York, 138 Neb. 224, 292 N. W. 385; Osborn v. Osborn, 143 Neb. 1, 8 N. W. 2d 444; and 27 C. J. S., Divorce, § 312, p. 1177.

We find that under the facts and circumstances disclosed by the record that the time and opportunity allowed the appellant to visit with the minor child is proper. The record would seem to indicate that when appellant did have opportunities to visit the child he used them more to argue with appellee than to visit with the child.

As to the court's permitting appellee to take the child out of the jurisdiction, we think that it is generally the best policy in divorce actions to keep minor children within the jurisdiction of the court. However, the wel-

fare of the child should receive the paramount consideration in the determination of this matter and this policy should yield to the child's best interests. See, Crandall v. Luhnow, *supra;* York v. York, *supra;* Osborn v. Osborn, *supra;* Jensen v. Jensen, 237 Iowa 1323, 25 N. W. 2d 316; Conrad v. Conrad, (Mo. App.) 296 S. W. 196; State v. Hall, (Mo.) 257 S. W. 1047; Stetson v. Stetson, 80 Me. 483, 15 A. 60; Kirby v. Kirby, 126 Wash. 530, 219 P. 27; Bennett v. Bennett, 228 Wis. 401, 280 N. W. 363; and 27 C. J. S., Divorce, § 313, p. 1179.

It would appear that the principal reason for the trial court permitting appellee to remove the minor child from the jurisdiction was to permit her to accept a position at Thermopolis, Wyoming, in civil service. The record indicates that appellee has always had the custody of the minor child and in the last few years has primarily carried the burden of her support. It would appear she was, at the time of trial, employed in Omaha as a secretary and receiving a substantial salary. However, the possible tenure thereof was not shown and based on the past her employment has not been too secure. Her position in civil service at Thermopolis not only gives her a somewhat larger salary but more security in tenure with possible advancement. Since appellee has the primary burden of supporting this child, even though appellant is required to pay $50 per month for support and maintenance, we think this security is all important in order to stabilize a home for the child. We find the child's welfare will be best served by permitting appellee to move the child out of the jurisdiction as authorized in the trial court's decree.

If, as appellant contends, the provisions in the decree as to visitation in the form as therein provided will be, for all practical purposes, ineffective because of the fact that the minor child has been permitted to be taken to Thermopolis, it should be said that the matter is always open for the trial court, on proper showing, to make a modification thereof.

From an examination of the entire record we find the matters complained of by appellant to be without merit and that the record fully supports the provisions of the decree as fixed by the trial court with reference to the minor child's custody. The decree of the trial court is therefore affirmed.

We also allow appellee an attorney's fee of $150 for services in this court, the same to be taxed as costs against the appellant.

AFFIRMED.

ROY E. WOLFORD ET AL., APPELLEES, v. BENJAMIN G. FREEMAN ET AL., APPELLANTS.
35 N. W. 2d 98

Filed December 22, 1948. No. 32500.

1. **Principal and Agent: Fraud.** A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.
2. **Fraud.** If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth.
3. **Vendor and Purchaser: Fraud.** As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation, and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true

conditions of the property, the vendor is bound to disclose such facts.

4. **Fraud.** A contract procured by the intentional suppression or concealment of material facts touching the very substance of it by one party, which facts, if they had been disclosed, would have prevented the other party from entering into it, may be rescinded by the party deceived, and the guilty party is not entitled to its enforcement.
5. ———. Whenever suppressio veri or suggestio falsi occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance.
6. **Vendor and Purchaser.** Where a contract of purchase of real estate provides that the purchaser acknowledges that he has been advised as to the settling of a structure on the premises purchased and "is buying same as is," the "as is" phrase is limited to the knowledge of the settling of the structure and means that plaintiff purchased with knowledge of its then condition in that regard.
7. ———. Where a contract of purchase of real estate provides that the purchaser acknowledges that he has been advised as to the settling of a structure on the premises purchased and "is buying same as is," the provision does not prevent fraudulent representations relied on by the buyer from invalidating the contract.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Joseph H. McGroarty, for appellants.

Pilcher & Haney and *Donald S. Krause,* for appellees.

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

SIMMONS, C. J.

In this action plaintiffs seek to rescind an executed contract for the purchase of a house and lot because of fraud, and to recover the purchase price. The trial court decreed rescission and entered judgment for the purchase price paid, less the rental value while held by plaintiffs. Defendants appeal. We affirm the judgment of the trial court.

The plaintiffs are husband and wife. Reference herein

to the plaintiff will be to Roy E. Wolford, the husband. Plaintiff is a real-estate agent and had engaged in buying and selling property on his own account. The defendants are husband and wife. Reference herein to the defendant will be to Benjamin G. Freeman, the husband.

The cause is here for trial de novo. The record establishes these facts largely without serious dispute. The defendant and his son were builders on their own account. The defendant purchased the lot involved in the summer of 1944. At that time according to one witness there was a ravine or gully some 6 or 8 feet in depth through the back part of the lot. The defendant describes this as a hole 5 or 6 feet deep and 20 feet in width. The records of the city of Omaha show that there was a fill running from 16 to 20 feet deep in the street in front of the lot. The defendant's son examined this record and advised defendant of it. The son testified that he knew the depression could extend into the lot and might be either shallower or deeper on the lot.

The defendant then had a basement dug on the lot to a depth of 5½ feet. The defendant testified that this basement was dug in solid yellow clay. The contractor who made the excavation said that it was "awful" black earth. A base was dug for the foundation of the house around the outer edge and for a supporting center wall 8 inches deep and 20 inches wide. At intervals of about 8 feet in the trench around the outer edge 8-inch diameter holes were made, 6 feet in depth. These holes were filled with concrete as were the trenches. Reinforcing steel was placed therein. The approved plans referred to later herein show a structure 26 feet by 32 feet in size. The invoice covers 330 linear feet of one-half-inch reinforcing bars. A foundation resting on 6-foot piling was the result. The defendant and his son testified that they stopped digging the holes for the piling at the 6-foot depth because they thought they had reached solid ground.

Defendant testified that he put the piling under the foundation for his own protection. As to the reason for the piling, defendant answered yes to these questions on cross-examination: "Well, then, the fact is that you were suspicious or felt that this house was being built on filled ground, isn't that correct?" and "Well, I will ask you once more, if the contractor is suspicious, and has reason to believe that the house is not on solid ground, then to protect himself, why, he goes ahead and puts down piling, is that what you wish to say?"

On September 25, 1944, the defendant applied to the city of Omaha for a building permit and at the same time submitted plans for the structure which he proposed to build on the premises. The permit was granted and the plans approved on the same day. It appears from the evidence that the basement had been excavated before the application and plans were submitted. Whether or not the foundation had been constructed at that time does not appear, save that the invoice for reinforcing steel is dated August 18, 1944, and includes a charge for delivery.

The building code of the city of Omaha provides in section 223: "Foundations shall not be laid on filled or made ground or on loam, or on any soil containing a mixture of organic matter, and must rest on hard, sound soil. Foundations shall in all cases extend from 2-½ to 4 feet below the finished surface of the ground upon which they are built, depending upon the conditions of the soil, unless footings rest on bed rock."

The plans as to the foundation submitted by the defendant to the city did not indicate that the structure was to be built on filled earth, made no reference to piling that had been or would be placed under the foundation, and were such as only were approved for structures to be built on a footing of sound soil. There is no showing of revised plans being submitted later to the city.

On this foundation the defendant built a basement wall of concrete blocks and on those a one-story house of tile and brick veneer. The house was completed in 1945, and thereafter rented to a tenant.

By contract dated March 27, 1946, and by deed dated May 3, 1946, defendants through an agent sold the property for $9,500 to a Mr. Michael, who went into possession in May 1946. Shortly after the purchase cracks appeared in various parts of the house and later in the foundation. Mr. Michael made test borings and satisfied himself that the house had been built on filled ground. It is not shown that Mr. Michael told defendant of the tests made. However, Mr. Michael in September 1946, tendered the premises back to defendant and demanded a return of his purchase money. By contract dated December 2, 1946, rescission was had. The contract recited in a whereas provision that Mr. Michael demanded rescission because the house was settling and cracking, and was structurally unsound due to the fact that it was erected on filled ground without piling or other sufficient foundation, contrary to the building code. A provision typed into the original agreement and lined out recited that the defect was known to defendants and their agents when the contract was executed. Defendants signed the contract. On the witness stand defendant testified that the Michael transaction was rescinded so far as he knew because Mr. Michael wanted his money back. Mr. Michael vacated the premises in March 1947.

Defendant then had a construction company do some repair work on the cracks in the structure. Black mortar was used. Defendant had another workman remove the black mortar and replace it with a brownish mortar as nearly as possible the color of the original mortar in the structure. He also had the basement walls waterproofed 4 feet down on the outside, and cement structures were put around the foundation to direct water from the house. Defendant testified that he did this

because he presumed the water was getting under the foundation and causing the settling. He also had the cracks on the inside of the house filled with plaster and the entire house redecorated.

In April 1947, defendant listed the house for sale through another agent at an asking price of $11,500. This agent advertised the house in the newspapers on April 20, 1947. The evidence of the defendant is that he told the agent he wanted a prospective purchaser to have notice of the fact that the house had settled and of the cracks. There is no evidence that he told his new agent of the rescission of the Michael contract or the reasons therefor, or of the knowledge which he had of the foundation and the condition of the soil under the house.

Plaintiff saw the advertisement, his wife answered it, and on the afternoon of April 21, 1947, he, his wife, and two others were shown the premises by one of the two agents who handled the sale. The repaired cracks in the walls and foundation were visible. Plaintiff asked the cause and the agent said he did not know. According to the plaintiff, corroborated by another witness, the agent told plaintiff he had been instructed to inform a prospective purchaser that the damage had been corrected and that they need have no fear of further cracking. The agent made an equivocal denial of this statement. However, on direct examination, this evidence was given by the agent: "Did Mr. Wolford ask you the question whether you thought, or whether it would settle in the future? A-Oh, yes." "What was your answer to that? A-I did not."

The next day the plaintiff offered $10,000 for the property and that offer was submitted to the owner and accepted. There is a contention that the reduced price was made because of the condition of the house and the danger of further cracking, and that without the defect the house was worth $12,500. However, the expert evidence of the defendant is that there had been

no material increase in the value of real estate during the preceding year. It is noted that the property was sold the year before for $9,500. Plaintiff testified that the purchase price was not reduced in consideration of possible future damage.

The defendant's agent, when the contract was drawn and without prior mention to the plaintiff, inserted in the contract of purchase this clause: "Purchaser acknowledges that he has been advised as to settling of structure and is buying same as is." Plaintiff testified that he was informed the clause was inserted in the agreement because defendant did not want the agent to sell the house without the purchaser knowing that there were cracks that had been painted over. The agent testified that it was inserted because he wanted to be sure that plaintiff had observed the evidence of the cracking.

The property was sold subject to a mortgage. The net of the purchase price was paid, and the deed delivered April 24, 1947. One of the agents testified that when the contract was being discussed plaintiff said he knew how to take care of the settling. The agent who delivered the deed testified that when the deed was delivered plaintiff told him he had a bid of $400 to repair the footings of the house. Plaintiff denied that he had consulted with a contractor during that period of two days. There is nothing in the evidence that at that time there was any indication of need for work on the foundation.

Plaintiff moved into the premises in May 1947. Shortly thereafter minor cracks appeared in the plaster, then in the outer walls and foundation. These became progressively worse so that by September 1947, there were large and long cracks in the walls, the width of the thickness of a brick, and the house was beyond the stage of economic repair.

Plaintiff had test holes dug at three corners of the house. Evidence of filled earth was found in all the

holes, and evidence of solid ground was not found above a depth of 20 to 22 feet. The center foundation and wall did not settle.

Plaintiff on June 30, 1947, demanded a rescission of the contract, and this action was brought in October 1947.

We determine the disputed questions of fact, as did the trial court, in favor of the plaintiff. It is patent from this record that the house was built on a foundation resting on filled earth, in violation of good building practices and the building code of the city of Omaha; and that the defendant knew all the facts that lead to the ultimate conclusion that the foundation rested on filled earth. His conduct in putting down piling indicates that he had reached that conclusion sufficiently at least to undertake to guard against the result. He did not reveal the condition of the soil to the city when he secured his building permit. It also is patent that defendant knew when he sold the premises to the plaintiff that the foundation was faulty and insufficient; that he undertook to conceal and did conceal those facts from the plaintiff; that he did not reveal them to his agent; and that the condition of the soil and the construction of the foundation were latent defects and material ones. It likewise is evident that it was represented to the plaintiff that the cause of the settling had been corrected and that he need have no concern about it.

The applicable rules of law are these.

" 'A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.' " Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843.

"'If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.'" Linton v. Sheldon, 98 Neb. 834, 154 N. W. 724.

"As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts." O'Shea v. Morris, 112 Neb. 102, 198 N. W. 866. This rule is followed in Clauser v. Taylor, 44 Cal. App. 2d 453, 112 P. 2d 661, and Rothstein v. Janss Investment Corp., 45 Cal. App. 2d 64, 113 P. 2d 465, both of which deal with the sale of land with undisclosed knowledge that depressions had been filled.

"A contract procured by the intentional suppression (sic) or concealment of material facts touching the very substance of it by one party, which facts, if they had been disclosed, would have prevented the other party from entering into it, may be rescinded by the party deceived, and the guilty party is not entitled to its enforcement." Linton v. Sheldon, *supra.*

"It is an ancient and well-established principle, that

whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance." Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42. See, also, Krause v. Stevens, 103 Neb. 463, 172 N. W. 245.

Applying these rules to the facts shown, it is clear that the plaintiff is entitled to prevail in this action unless the defendant is relieved by the inclusion in the contract of the provision that "Purchaser acknowledges that he has been advised as to settling of structure and is buying same as is."

We have held: "A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by any one else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor, or his agent, from responsibility for fraudulent representations, made by vendor's agent, concerning the subject-matter of the contract, for the agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility both upon the principal and the agent." Menking v. Larson, 112 Neb. 479, 199 N. W. 823.

The language refers only to the obvious and admitted fact known to plaintiff that the building had settled. Plaintiff admittedly purchased with that knowledge. The provision discloses knowledge of the result that had then occurred from the undisclosed and concealed cause—to wit, the faulty foundation on filled earth. It does not disclose or suggest the cause.

The "as is" phrase is obviously limited to the knowledge of the settling of the structure and means that plaintiff purchased with knowledge of its then condition in that regard. Williams v. McClain, 180 Miss. 6, 176 So. 717; Johnson v. Waisman Bros., 93 N. H. 133, 36 A.

2d 634; 6 C. J. S., As, p. 781. "A provision that the buyer takes the article in the condition in which it is, or in other words, 'as is,' does not prevent fraudulent representations relied on by the buyer from constituting fraud which invalidates the contract * * *." 46 Am. Jur., Sales, § 319, p. 501. See, also, Annotation 58 A. L. R. 1181, 151 A. L. R. 460; Regula v. Gerber, 34 Ohio O. 206, 70 N. E. 2d 662; The White Co. v. Bacherig, 9 Tenn. App. 501; Distributors Inv. Co. v. Patton, 130 Tex. 449, 110 S. W. 2d 47; Packard-Dallas v. Carle (Tex. Civ. App.), 163 S. W. 2d 735; Smith v. Richards, *supra*.

It follows that the contract provision does not relieve the defendant from the fraud which the evidence established.

The judgment of the district court is affirmed.

AFFIRMED.

GEORGE H. PHELPS, APPELLEE, v. EUGENE BLOME ET AL., APPELLANTS.

35 N. W. 2d 93

Filed December 22, 1948. No. 32499.

1. **Appeal and Error.** An agreement not to appeal a judgment or final order is valid, binding, and enforceable, if the intention to waive the right clearly appears from the terms of the agreement and it is supported by a sufficient consideration.
2. ———. An objection to an appeal upon the ground that the parties agreed not to appeal from the judgment or final order may be made for the first time in the appellate court by a motion to dismiss, and affidavits or other competent evidence dehors the record may be received to establish the facts with relation thereto.

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

Torgeson & Halcomb and *E. E. Carr*, for appellants.

Mothersead & Wright and *Robert G. Simmons, Jr.*, for appellee.

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

CHAPPELL, J.

Plaintiff brought a forcible entry and detainer action against defendants in a justice of the peace court to obtain restitution of described ranch lands in Morrill County.

Upon trial of the issues to a jury, plaintiff recovered a verdict and judgment on March 14, 1947. On March 19, 1947, defendants filed an appeal bond, and on the same date plaintiff filed a bond and obtained an order for restitution, notwithstanding the appeal. On March 26, 1947, defendants were removed from the premises upon a writ of restitution dated March 15, 1947.

The issues in the forcible entry and detainer action itself are not involved in this appeal. After defendants had appealed to the district court, plaintiff filed a motion therein to dismiss the appeal, primarily upon the ground, pleaded specifically and at length, alleging in substance that after trial of the cause upon the merits and a verdict had been rendered in the justice court, plaintiff and defendants entered into an oral agreement for valuable consideration, whereby defendants agreed not to appeal. Plaintiff alleged that he had in all respects complied with the agreement, therefore defendants were precluded from prosecuting the appeal. Defendants filed answer thereto, in substance denying generally, denying plaintiff's right to the remedy sought, pleading estoppel by conduct, and praying for an order overruling the motion. Evidence was adduced by the parties upon the issues thus presented in the district court for Scotts Bluff County, pursuant to agreement of the parties. At the conclusion thereof, the trial court entered its order adjudging and decreeing that plaintiff's motion should be sustained, and dismissing defendants' appeal. Motion for new trial was overruled, and defendants appealed to this court.

The primary questions presented by brief and argument are: (1) Whether or not there was in fact an enforceable agreement with defendants that they would not appeal, as claimed by plaintiff; and (2) if there were such an agreement, whether or not plaintiff's motion to dismiss was a proper remedy for its enforcement. We conclude that both propositions should be answered in the affirmative.

Plaintiff's evidence consisted of the testimony of plaintiff's attorney, who originally represented him in the justice court, whose testimony was verified by the testimony of defendants' attorney, who no longer represented them but was their attorney in the justice court and in the transaction whereby the alleged agreement was perfected. Plaintiff also offered in evidence the writ of restitution and return of the sheriff thereon. Defendants themselves did not testify, and the evidence to sustain their contentions consisted solely of copies of two letters, claimed by plaintiff's attorney to have been written by him to the sheriff, together with an affidavit of the sheriff who eventually executed the writ of restitution.

An examination of the record discloses competent evidence clearly ample and sufficient to sustain a finding that on March 14, 1947, after the verdict of the jury had been returned, it was voluntarily and expressly agreed between plaintiff and defendants that writ of restitution should issue, but should not be executed by the sheriff until March 25, 1947, who was to be so advised by plaintiff, in order to permit defendants to stay in possession until that date and thus give them time and opportunity to sell their cattle, and further that plaintiff would either purchase defendants' personal property, such as fences and corrals then on the premises as thereafter appraised, or if not so purchased, plaintiff would permit defendants to go upon the premises and remove such improvements within a reasonable time after March

25, 1947, in consideration of which defendants promised and agreed not to appeal.

There is competent evidence that plaintiff's attorney wrote the sheriff a letter on March 17, 1947, which letter was offered in evidence by defendants, in which the sheriff was notified in substance that writ of restitution had issued, but that defendants, having agreed not to appeal if they could stay in possession until March 25, 1947, the writ should not be executed by him until that date. There is also competent evidence that after defendants had filed an appeal bond, plaintiff's attorney again wrote the sheriff a letter on March 20, 1947, which letter was also offered in evidence by defendants, in substance advising the sheriff of defendants' appeal, but that plaintiff had provided a bond and obtained an order of court for restitution notwithstanding defendants' appeal, therefore, if defendants did not remove from the premises as agreed, then the writ of restitution was to be fully executed by the sheriff in any event, but not before March 25, 1947.

The return of the sheriff, which appears upon the writ of restitution, dated March 15, 1947, discloses the following:

"State of Nebraska.)
ss
County of Morrill.)

Received this writ March 17, 1947. And as commanded caused the defendants to remove from the said premises on the 26th day of March 1947. Also have collected the above costs in the amount od $10.60 and herewith turn the same over to Mr. J. W. Smith, Justice of the peace.

Fees Execution ---------- $1.00

M. E. Devore
Sheriff"

The substance of the sheriff's affidavit, offered in evidence by defendants, was at variance in some respects not only with the writ itself, but his own return appearing thereon, both of which import verity. For

example, the affidavit stated that the writ of restitution was dated March 14, 1947, in which the sheriff was clearly mistaken. He said that he received it on March 15, 1947, contrary to the statement made in his return, and that he immediately advised defendants that he "had the writ and that they would have to vacate said property; * * *." It will be noted the sheriff did not say that he executed the writ at that time. He did not state in the affidavit just when that was done. The return affirmatively disclosed that the writ was not executed until March 26, 1947, which would be in conformity with plaintiff's contentions. He did not say in words, but intimated the fact that he did not receive the letters of plaintiff's attorney written on March 17, 1947, and March 20, 1947, respectively, by saying that "I never received any directions from any one to hold up serving the writ * * *."

It is well established in this jurisdiction that a sheriff's return upon a judicial process is prima facie proof of the service therein indicated, and that the return of such an officer cannot be impeached except by clear and convincing evidence. De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498. The rule has application in the case at bar.

The record discloses that plaintiff did not purchase defendants' improvements, such as fences and corrals then on the premises, after appraisal thereof, but there is competent undisputed evidence in the record that they were never removed by defendants or the sheriff, but were purchased by the new owner in possession of the realty at some time after the termination of defendants' tenancy. We conclude that there was ample evidence to sustain a finding that the agreement was performed by plaintiff but breached by defendants, and that plaintiff was not estopped by his conduct from enforcing the agreement.

We come then to the question of whether or not the agreement was legally enforceable, and if so, whether

or not plaintiff pursued the proper remedy. In that connection, we find the following authoritative statement in 2 Am. Jur., Appeal and Error, § 204, p. 971: "Though there are a few cases to the contrary the rule prevailing in the great majority of the jurisdictions is that an agreement, based on a sufficient consideration, not to appeal or take a writ of error, or a release of errors, is valid and binding and, when properly pleaded, will constitute a bar to proceedings taken in violation of the agreement. * * *

"An objection that the parties agreed not to appeal from the judgment may be made for the first time in the appellate court where the agreement was not filed in the trial court and the appeal was allowed by that court in ignorance of the agreement."

Also, as stated in 2 Am. Jur., Appeal and Error, § 205, p. 971: "To establish the fact that, since a judgment was rendered or a decree given, the party appealing therefrom has so dealt with the subject-matter of the suit or action as to preclude him from further asserting his alleged right on appeal, evidence dehors the record is, it would seem, admissible."

In 4 C. J. S., Appeal and Error, § 210b, p. 393, appears the statement that: "If a party, after judgment, or even after praying or taking an appeal, agrees to waive his right of appeal, or to withdraw the appeal and not thereafter to appeal, such an agreement is binding and will be enforced by the appellate tribunal by dismissing the appeal, as where the case is, by stipulation of the parties, subsequently dismissed."

In 4 C. J. S., Appeal and Error, § 210c, p. 394, it is said: "An agreement or stipulation waiving the right to appeal or bring error, or releasing errors, whether made before or after judgment, is generally regarded as valid and binding, and is upheld on the ground of public policy to encourage litigants to accept as final the decisions of courts of original jurisdiction. Nevertheless such a right will be held to have been waived only

where the intention to waive or release clearly appears from the terms of the agreement or stipulation, and where it is entered into by competent parties, and is supported by a sufficient consideration; * * *." See, also, 3 C. J., Appeal and Error, § 534, p. 663.

As stated in 3 C. J., Appeal and Error, § 535, p. 665: "Affidavits and other competent evidence dehors the record may be received to establish the fact that appellant or plaintiff in error has, since the judgment, order, or decree complained of, abandoned or waived the right to prosecute the appeal or proceeding in error."

In Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N. W. 66, this court said: "The general rule cannot be gainsaid that, pending appeal, an event may occur which renders a decree unnecessary, in which case the appeal will be dismissed. Such a condition may arise by act of the appellant or plaintiff in error himself, or of the appellee or defendant in error, as where, pending appeal, he does or relinquishes the right to do some act in respect to which the appeal is taken. 3 C. J. 360, *et seq.*"

In United States Consol. Seeded Raisin Co. v. Chaddock & Co., 173 F. 577, a motion was filed to dismiss the appeal upon the ground that after the cause had been argued and submitted, the parties had entered into an agreement to relinquish the right to appeal from the judgment. In the opinion sustaining the motion it was said: "* * * it seems to be universally held that, where such an agreement is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court, and the appeal, if taken, will be dismissed (citing many authorities) * * *. The appellant makes the point that the objection to taking the appeal should have been presented in the court below, and that it comes too late when presented for the first time in this court. We find no substantial ground for so holding. The agreement was not on file in the court below, and the order allowing the appeal was made by

the court apparently in ignorance of its existence. * * * The objection to the jurisdiction of the appellate court to entertain an appeal in such a case is properly addressed to that court."

Speeth v. Fields, 47 Ohio Abs. 47, 71 N. E. 2d 149, is in law almost squarely upon all-fours with the case at bar. Therein it was agreed that defendants would waive the right of appeal. The consideration therefor was an extension of time in which a writ of restitution should be issued beyond the time ordinarily granted by the court. Defendants appealed and plaintiff filed motion to dismiss the appeal. In the opinion it was said: "Under these undisputed set of facts the proper remedy to procure the dismissal of an appeal filed in violation of such an agreement, is by motion."

The opinion, in sustaining plaintiff's motion to dismiss, cited with approval and relied upon Southern Indiana Power Co. v. Cook, 182 Ind. 505, 107 N. E. 12, wherein it was said: "The rule which obtains in a majority of jurisdictions is that a stipulation waiving the right to appeal is valid and binding and bars an appeal taken in violation of its terms. An objection to the appeal may properly be taken in the appellate court by a motion to dismiss based on the agreement. (Citing many authorities)."

The opinion also cited as authority Harmina v. Shay, 101 N. J. Eq. 273, 137 A. 558, wherein it was held: "Such agreements (referring to agreements to waive the right to appeal) are upheld on the ground of public policy in encouraging litigants to accept as final decisions of courts of original jurisdictions."

The court in the opinion also referred to and approved the holding in United States Consol. Seeded Raisin Co. v. Chaddock & Co., *supra,* to the effect that: "A stipulation by the parties to a suit that no appeal shall be taken from the decree of the trial court, if based on a valid and legal consideration, will be enforced by the appellate court, and an appeal, if taken, dismissed."

See, also, McKain v. Mullen, 65 W. Va. 558, 64 S. E. 829, 29 L. R. A. N. S. 1; Worthington v. Osborne, 140 Ark. 215, 215 S. W. 700.

There is presented then the question of whether or not the agreement involved in the case at bar was based on a sufficient consideration. As stated in 17 C. J. S., Contracts, § 74, p. 425: "There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor." The foregoing statement is supported by many authorities appearing in the notes, including United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430, and Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226.

In 2 Am. Jur., Appeal and Error, § 204, p. 971, appears the statement that: "The forbearance of the plaintiff to enforce his judgment is as valuable a consideration for the release of errors by the defendant, as forbearance to sue is to support a promise founded thereon." See, also, 17 C. J. S., Contracts, § 103, p. 456.

As provided by section 27-1414, R. S. 1943, in referring to a writ of restitution: "The officer shall, within ten days after receiving the writ, execute the same by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs, and make return as upon other executions. * * *."

In Ehlers v. Gallagher, 147 Neb. 97, 22 N. W. 2d 396, this court said: "It was, of course, within the power of the appellant to control the enforcement of his judgment and, after execution had been issued, to withhold the levy thereof." The opinion also quoted with approval a statement appearing in Peck v. City Nat. Bank of

Grand Rapids, 51 Mich. 353, 16 N. W. 681, 47 Am. R. 577, that: "Judgments are under the control of the parties recovering them, or of their attorneys, and they may restrain the sheriff from proceeding to collect them."

Since the agreement was made, and plaintiff performed the same, then we conclude that plaintiff's promise to delay execution of the writ of restitution was a sufficient consideration to support defendants' promise to forego the right to appeal. Likewise, plaintiff's promise to permit defendants to enter upon the premises and remove their improvements after expiration of their tenancy, if not purchased by plaintiff, was also a sufficient consideration to support defendants' promise to forego the right to appeal, since it is generally the rule that the right to remove such improvements expires with the tenancy, in the absence of a contract with or consent of the owner to do otherwise. See, Stevens v. Burnham, 62 Neb. 672, 87 N. W. 546, and Runner v. Pierson, 144 Neb. 847, 14 N. W. 2d 847.

For the reasons heretofore stated, we conclude that the trial court correctly adjudged that there was existent between the parties a valid, binding, and enforceable agreement that defendants would not appeal, and that plaintiff's motion to dismiss was a proper remedy for its enforcement. A fortiori, the judgment should be and hereby is affirmed.

AFFIRMED.

REINHOLD MAYER, APPELLEE, V. THE HOMESTEAD FIRE INSURANCE COMPANY OF BALTIMORE, MARYLAND, A STOCK CORPORATION, APPELLANT.

35 N. W. 2d 413

Filed December 29, 1948. No. 32422.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all

material and relevant evidence submitted on behalf of the party against whom the motion is directed.

2. **Fraud.** To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied on and acted upon it, and was thereby injured.
3. ———. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it, and upon failure to so prove the party alleging fraud fails.
4. ———. Fraud will not be imputed where circumstances and facts upon which it is based may be consistent with honesty of purpose.
5. ———. In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest.
6. **Appeal and Error.** The theory adopted at the trial by the parties and the court, as to the issues, will be followed on appeal.

APPEAL from the district court for Boyd County: DAYTON R. MOUNTS, JUDGE. *Reversed and dismissed.*

Einar Viren and *Julius D. Cronin,* for appellant.

W. L. Brennan, Parnell J. Donohue, and *T. F. Nolan,* for appellee.

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

MESSMORE, J.

This is an action at law to set aside a release and satisfaction of a settlement made for the loss of plaintiff's crops due to a hailstorm under the terms of an insurance policy plaintiff carried with defendant company, on the grounds of fraud and misrepresentation, and to recover on the policy.

On June 21, 1945, the plaintiff and defendant entered into the insurance contract to insure plaintiff's grow-

ing crops against loss or damage that might be caused by hailstorms. The premium was paid. On July 4, 1945, crops belonging to the plaintiff and insured under the policy were damaged by hail. The defendant was notified of a loss to plaintiff's crops. Pursuant to the notice and report of loss, an adjuster for the defendant company contacted the plaintiff for the purpose of adjusting the loss. An adjustment was made and the damage to crops fixed at $843. Proof of loss or release was signed by the plaintiff. A check in accordance therewith was remitted to a bank having a business interest in the matter. The check was not accepted by the plaintiff.

The amended petition of the plaintiff alleged the false and fraudulent representations to be in substance as follows: That the adjuster stated and repeated to the plaintiff that he would see that the plaintiff secured the amount he desired under the insurance policy if the plaintiff would sign certain papers in satisfaction of the loss claimed; that he would see that plaintiff would get the full amount which he claimed, instead of $843; and that by reason of such false, willful, and fraudulent representation on the part of defendant's agent, the plaintiff was induced to sign the proof of loss or release.

The defendant's answer denied fraud or that any false representation was made by its agent to the plaintiff to induce him to sign the proof of loss or release; and that plaintiff voluntarily, of his own free will, without duress, fraud, or promise, executed the proof of loss of the adjustment made with him by the defendant's agent.

The case was submitted to a jury, resulting in a verdict in favor of the plaintiff in the amount of $1,439, the amount prayed for. Upon the overruling of the motion for new trial, defendant appeals.

For convenience, the appellant will be referred to as the defendant, the appellee as the plaintiff.

The defendant predicates error upon the trial court's

not directing a verdict in its favor and submitting the case to the jury. This requires an analysis of the record to ascertain whether or not the trial court was in error, as contended for by defendant.

It appears from the record that the plaintiff is a man of advanced years, has engaged in farming for a period of 30 years, owns and farms a half section, and farms a rented quarter section of land. He has a second-grade education, can read a little, is not able to write much, but can sign his name. His son Clarence, 25 years of age, assists him in his farming and in the transaction of business. The plaintiff has been acquainted with a neighbor by the name of Bentzen for 25 years or more, with whom he has transacted business and upon whom he has relied to write letters for him and transact some business for him.

On Sunday morning July 29, 1945, about 9:30 a. m., defendant's adjuster by the name of Williams, accompanied by another adjuster named Meyer, came to the plaintiff's home for the purpose of adjusting the loss to his crops caused by hail. The plaintiff had no objection to making the adjustment and started with the adjusters in the company car to inspect and look over the damage to the crops. Before starting, the plaintiff requested his son Clarence to go over to Bentzen's place and have him come to plaintiff's farm. The plaintiff accompanied by the adjusters first went to an oatfield consisting of 40 acres southwest of the house, where they drove across the field. Then they went through a pasture to a barley and rye field which they observed for about five minutes. The adjusters said they would allow a loss of 96 percent on the oats and 87 percent on the rye and barley. They then proceeded north to a cornfield of 35 acres where the adjusters went through the field for a short period of time, examining ten rows of corn. The adjusters told the plaintiff the damage to the corn was not sufficient to warrant an allowance. After that the plaintiff and the adjusters returned to

the plaintiff's home to go to the east field, or where there were two cornfields consisting of 81 acres. They stopped at one and walked into the field, and the plaintiff's son and Bentzen arrived. The adjusters examined this corn and estimated that the damage was not sufficient to warrant an allowance to be made. The plaintiff and adjusters then proceeded to the rented land, passed a cornfield, and the adjusters would make no allowance for this corn. They then went to an oatfield of 40 acres, with the plaintiff's son and Bentzen following in another car. After that the plaintiff and the adjusters drove to the north side of the cornfield. The adjusters informed the plaintiff that they would allow 6 percent for the oats, and plaintiff said that was not enough. Bentzen came up with some kernels of oats which he had picked up, and wanted to show them to the adjuster Williams who would not look at them. The adjuster at that time was making a survey of the loss. Bentzen told the plaintiff that if he accepted such a settlement for the loss of the oats he was foolish, and not to sign the paper. The plaintiff's son also told him not to sign the paper. The adjuster got mad and started swearing after Bentzen had asked the adjuster if he was going to pay the plaintiff or cheat him. The adjuster then slammed the door of the car and drove off to the section road where the plaintiff signed the proof of loss or release.

The plaintiff testified the adjuster, Williams, told him that if he would sign the release "that wouldn't be the final end, that the company would make it right with me." He also testified that he did not at any time inform the adjusters that Mr. Bentzen had an interest in the crops or was looking after the matter for him, and that the argument occurred with the adjuster Williams when Bentzen told him not to sign. The plaintiff never asked the adjusters at any time to talk to his son or Bentzen about the adjustment. After he had signed the release, the adjusters told him he would not get any more money than he had signed for. The plaintiff

at no time told the adjusters that he was not satisfied, or that the deal was off, or not to send the money, and the conversation that he seemed to have with reference to not receiving enough money for the loss was after the adjustment was made and was with his son Clarence and Bentzen. At plaintiff's request he was furnished a copy of the percentage of loss showing the adjustment on the crops.

Bentzen testified that the plaintiff introduced him to Williams and told Williams that he was to help adjust the loss, to which Williams assented; that an argument did occur when he wanted Williams to look at some oats, and when he made a statement to Williams to the effect of asking him if he was going to cheat the plaintiff. Williams then got mad and said no one could call him a cheat, and his fists went up. There is no evidence of any blows being struck, and no evidence of anything further in this respect, except that Williams slammed the door of the car and, with the plaintiff, went out on the section road and consummated the settlement. Bentzen wanted to talk to the plaintiff and Williams told him he could talk to him in the road, and then it developed again that the adjuster told him he was taking the plaintiff home and he could talk to him at the house.

Bentzen further testified that the adjuster told him that he was not the person designated as the insured. Bentzen agreed to that, and by his testimony indicated that he had no particular interest in the matter, did not participate in the adjustment in any manner, and had no conversation with reference to the amount of the loss except as heretofore indicated.

The adjuster Williams testified that he had been adjusting insurance for 26 years; and that Bentzen insisted on confusing him when he was figuring out the work sheet while sitting in the company car. He told Bentzen that his name was not on the policy; that the man whose name was on the policy was sitting beside him and he started to make up the work sheet; and

that the plaintiff never told him, or Bentzen, that Bentzen was to help make the adjustment. He asked Bentzen to refrain from interfering. Bentzen said he had a right to, so Williams closed the door of the car and drove out to the highway. Bentzen told Williams he wanted to see the plaintiff. He told him he could see him out at the road, or he could see him at home, because he was going to take him home. He further testified that no complaint was made by the plaintiff with reference to the adjustment at any time after he had signed the proof of loss or release, and that he did not make any statement to the plaintiff that he would get more money if he would sign such papers.

The testimony of the adjuster was substantially corroborated by the other adjuster who accompanied him.

There is some intimation that the adjusters were in a hurry and did not make a proper inspection of the damage to the crops. There is much detailed evidence in the record with reference to the manner of inspecting, and the qualifications of the adjusters to inspect damage to crops.

The plaintiff and those testifying in his behalf were, at most, guessing at the damage to the crops and expressing an opinion as to what they thought the damage should be, without very much investigation or inspection. The plaintiff thought that he had 100 percent damage to his crops.

The adjuster Meyer was examined in detail as to the manner in which inspection of crops is made and what should be taken into consideration with reference thereto in assessing the loss.

There is some intimation in the record that the plaintiff, on the morning prior to the arrival of the adjusters, consumed some intoxicating liquor. However, there is nothing in the record to disclose that when he was transacting business with the adjusters he was under the influence of intoxicating liquor in any degree.

The foregoing is a résumé of the evidence upon which the court submitted the case to the jury.

The defendant moved for a directed verdict at the close of the plaintiff's evidence and at the close of all of the evidence. "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed." Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

This court is committed to the following rule in cases such as the case at bar, with reference to fraud and false representation and the proof required.

"To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied on and acted upon it, and was thereby injured." Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427. See, also, Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572, and cases too numerous to cite.

"Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it, and upon failure to so prove the party alleging fraud fails." Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118. See, also, Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N. W. 2d 748; Foley v. Holtry, 43 Neb. 133, 61 N. W. 120; Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403; Saffer v. Saffer, 133 Neb. 528, 274 N. W. 479.

It is true, as stated in Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556: "'The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which

may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. In fact, many of the elements of fraud are such as not to be susceptible of proof by direct testimony. Fraud in its nature is not a thing susceptible of ocular observation or readily demonstrable physically; it must, of necessity, be proved in many cases by inferences from the circumstances shown to have been involved in the transaction in question.' 24 Am. Jur. 89, sec. 257." See, also, Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

In addition to the foregoing cited cases and considering fraud and false representation, the following authorities are applicable to the case at bar, in the light of the evidence.

"* * * fraud will not be imputed where circumstances and facts upon which it is based may be consistent with honesty of purpose." In re Estate of Sheerer, 137 Neb. 374, 289 N. W. 529.

"Evidence simply justifying a suspicion is not sufficient. * * * In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest." Bank of Commerce of Grand Island v. Schlotfeldt, 40 Neb. 212, 58 N. W. 727. See, also, Long Bros. v. West & Co., 31 Kan. 298, 1 P. 545.

We find that in the instant case there are no suspicious circumstances which indicate that the adjustment made by defendant's agents was false or fraudulent. The witness Bentzen was not known to the adjusters to be an authorized agent of the plaintiff to participate in determining the loss in plaintiff's behalf, and in fact did not so participate in such manner.

It is apparent from what has been previously set out

that the parties proceeded to trial and tried the case on the theory as disclosed by the pleadings. In this connection, the parties will be restricted in this court to the same theory upon which the case was prosecuted or defended in the trial court. See Bronnenkant v. Kucera, 141 Neb. 408, 3 N. W. 2d 913. Also, it is said in Kimball v. Lincoln Theatre Corporation, 129 Neb. 446, 261 N. W. 842: "The theory adopted at the trial by the parties and the court, as to the issues, will be followed on appeal."

We conclude that for the reasons heretofore given, the trial court should have sustained the defendant's motion for directed verdict, and dismissed the plaintiff's amended petition. In view of our holding, other errors claimed by the defendant need not be considered.

REVERSED AND DISMISSED.

EBERHARD HARTMAN, APPELLEE, V. LUISE C. HARTMANN ET AL., APPELLANTS.
35 N. W. 2d 482

Filed December 29, 1948. No. 32492.

Appeal and Error. Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.

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

H. A. Bryant and *Charles H. Slama,* for appellants.

E. S. Schiefelbein and *Joseph L. Pallat,* for appellee.

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

YEAGER, J.

This action as originally instituted was by Eberhard Hartman, plaintiff, against Luise C. Hartmann and unknown persons having or claiming an interest in 200 described acres of land in Saunders County, Nebraska, and the land itself, as defendants. The object and purpose of the action was to set aside a deed which purported to convey title to the land from Eberhard Hartman to Luise C. Hartmann and to also set aside a contract between the two named parties relating thereto.

The petition charged in substance that on or about September 21, 1943, appellee was induced by fraud to execute a deed of conveyance to the land in question to appellant and also to enter into a contemporaneous contract relating to the use of the land during appellee's life and burdens against it after his death, the details of which need not be set out herein. The fraud was denied.

The case was tried to the court and the relief prayed was granted by decree of the district court. A motion for new trial was filed by Luise C. Hartmann and duly overruled.

From the decree and the order overruling the motion for new trial Luise C. Hartmann has appealed. She is appellant and Eberhard Hartman is appellee.

In what manner the appellant challenges the decree or the order overruling the motion for new trial is not made clear by the brief. It is devoid of notation of assignment or assignments of error. Also disregarding formality, there is nothing so specifically challenging to any point or proposition as to permit this court to regard it as an assignment of error.

The statute controlling such situations is as follows: "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final

order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court, may, however, at its option, consider a plain error not specified in appellant's brief." § 25-1919, R. S. 1943.

The rule promulgated pursuant to this provision is the following: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned." Revised Rules of the Supreme Court, Rule 8 a2(4).

This court, without regard to any statute or promulgated rule of court, in the early cases wherein it was confronted with the question, held to the proposition that errors not assigned would not be considered on review. Richardson & Boynton Co. v. Winter, 38 Neb. 288, 56 N. W. 886; Haverly v. Elliott, 39 Neb. 201, 57 N. W. 1010; Erck v. Omaha Nat. Bank, 43 Neb. 613, 62 N. W. 67; Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N. W. 298; Vix v. Whyman, 58 Neb. 190, 78 N. W. 497.

Since the enactment of the statute in question this court without regard to any rule of court held as follows: "If appellant's brief fails to set out particularly errors asserted and intended to be urged for a reversal, vacation or modification of the judgment, final order or decree alleged to be erroneous, such alleged errors will not be reviewed on appeal." Packard v. De Voe, 94 Neb. 740, 144 N. W. 813.

In the case of Gorton v. Goodman, 107 Neb. 671, 187 N. W. 45, the court had for consideration a case wherein there were no assignments of error. At that time there had been promulgated a rule containing a provision for assignment of error similar to the provision of the present rule. In disposing of the question and of the case the court said: "There is no assignment of errors, and

no attempt is made to comply with the statute or with the rule of the court, and the judgment is, therefore, AFFIRMED."

In Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403, wherein the rule of court now in force was considered, it was said: "Under our rules consideration of the cause is limited to errors assigned and discussed, save where we, at our option, note a plain error not assigned."

It appears therefore that under the statute and the rule of this court the decree of the district court should be affirmed for want of assignment of error unless from examination of the record and briefs there is plain error which if regarded would necessitate a reversal and if disregarded would impose unjust results or consequences.

Plain error is not apparent from an examination of the record. The argument in the brief, fairly analyzed, is devoted to the weight of evidence and credibility of witnesses. It cannot be said that the testimony on behalf of appellee was plainly incredible or that his evidence was plainly insufficient to sustain his cause of action.

The decree of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF ELMER DRAKE, ALSO KNOWN AS FRANK ELMER DRAKE, DECEASED. CARRIE I. WASHINGTON, APPELLANT, V. MINNIE M. DRAKE ET AL., APPELLEES.
35 N. W. 2d 417

Filed December 29, 1948. No. 32477.

1. **Wills.** Where a will is executed in duplicate and one copy is shown to have been retained by the testator and the other deposited with another person, the failure to find the testator's copy after his death raises a presumption of its destruction by him with the intention of revoking the will, which presumption however may be overcome by evidence tending to a contrary conclusion.

2. **Trial.** The general rule in civil actions is that the party having the affirmative of an issue is required to sustain his position by a preponderance of the evidence.
3. **Wills.** The evidence required to overcome the presumption of revocation of a lost will must be clear, unequivocal, and convincing, that is the burden is on the proponent in the first instance to adduce evidence which is clear, unequivocal, and sufficient in and of itself or prima facie, if believed, to convince.
4. ———. The determination of the question of whether or not the proponent has in the first instance adduced sufficient evidence prima facie to overcome the presumption is for the court.
5. ———. On a determination by the court that sufficient evidence has been adduced, if believed, to overcome the presumption it disappears and thereafter the burden is on the proponent to sustain his right to have the will admitted to probate by a preponderance of all of the evidence with the jury left free to weigh it and apply it to all elements involved and to give to it such weight as they should deem it to be entitled.
6. ———. The rule requiring evidence to be clear, unequivocal, and convincing relates to the quality of evidence necessary to overcome the presumption of revocation rather than the quantum of proof necessary to admit a will to probate.
7. **Evidence.** A presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it the presumption disappears and thereafter the determination of the issues depends upon the evidence with the requirement of civil actions that the party having the affirmative in order to succeed shall sustain his position by a preponderance of the evidence.
8. **Appeal and Error.** In a case where the verdict is the only one which the evidence or lack of evidence will support the giving of erroneous instructions will not be held to be prejudicial error.
9. **Wills: Parties.** A widow is an interested party within the meaning of section 30-217, R. S. 1943, and as such may appear and contest the probate of a purported will of her deceased husband.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

William L. Walker, Leonard Dunker, and *Earl Ludlam,* for appellant.

Colfer, Russell & Colfer and *Charles E. McCarl,* for appellees.

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

YEAGER, J.

This action was originally instituted in the county court of Red Willow County, Nebraska, by petition of Carrie I. Washington to have probated what she claimed was the last will and testament of Frank Elmer Drake, deceased. This full name was not used in the will, the petition for probate, and the objections. Therein he was referred to as Elmer Drake. Minnie M. Drake and Marjorie Drake Olson, widow and daughter respectively of Frank Elmer Drake, were contestants and objectors to the probate of the alleged will. Probate was denied by the judgment of the county court. From the judgment of the county court Carrie I. Washington appealed to the district court. On the appeal by her petition she was denominated proponent and plaintiff and Minnie M. Drake and Marjorie Drake Olson were denominated contestants and defendants. The parties will be referred to herein as plaintiff and defendants.

A trial was had to a jury in the district court on issues joined. The jury returned a verdict denying probate of the alleged will. Judgment was entered on the verdict. Plaintiff filed motion for judgment notwithstanding the verdict or for a new trial, which motion was overruled. From the judgment and the order overruling the motion plaintiff has appealed.

Certain factual background concerning which there is no dispute is substantially the following: Frank Elmer Drake, the deceased, and Minnie M. Drake, defendant, were married in 1905 and remained husband and wife until June 4, 1947, when Frank Elmer Drake died as the result of injuries sustained on June 1, 1947. The defendant Marjorie Drake Olson is their daughter and only child. Carrie I. Washington is a sister of the de-

ceased as is also one Olive M. Berkeybile. The mother of the deceased lived until 1941. In 1934 the plaintiff, Olive M. Berkeybile, and the mother of deceased lived in or in the vicinity of Manhattan, Kansas. In 1934 the deceased, who then and at all times thereafter lived at McCook, Nebraska, made a will in duplicate, that is two identical copies were made and both were fully executed in due form of law. One was retained by the deceased and the other sent to the plaintiff. The one which was retained by deceased apparently was never seen by anyone except the deceased after it was taken by deceased from the office of the scrivener on the day it was executed. At least there is no evidence that anyone saw it thereafter. Information never came to either of the defendants that deceased had ever made a will until after his death.

The duplicate appears to have been mailed to plaintiff on June 20, 1934. In what has been identified as an accompanying letter deceased stated that the retained copy was in his safe in his store in McCook, Nebraska. In the letter, referring to the will, it is stated: "Tom knoes where it is." The existence of the will was known to the two sisters of the deceased, his mother, and the husband of plaintiff. Apparently the first information that defendants had of the existence of the will came through Charles E. McCarl, an attorney at McCook, Nebraska.

After the execution of the will it was apparently discussed or at least mentioned among deceased, the plaintiff, the sister, the mother, and the husband of plaintiff but never after February 1943. There is no evidence of the whereabouts or existence of the retained copy of the will after that date.

It may be well to state here that no question is raised either as to the authenticity of the copy of the will offered for probate or as to the fact that at the time of its execution there were two copies, one of which was retained by the deceased.

By the terms of the will provision was made for payment of debts and funeral expenses and in it was designated place of burial which was Manhattan, Kansas. Provision was made that the widow should receive substantially what she would receive in case of intestacy. A bequest of $500 was made to one Thomas Rowland. Marjorie Drake Olson was specifically excluded from participation. The plaintiff herein was made the legatee and devisee of the rest, residue, and remainder of the estate.

By petition dated July 25, 1947, the plaintiff offered for probate in the county court of Red Willow County, Nebraska, the instrument in her hands as the last will and testament of Frank Elmer Drake. Prior thereto the defendant Minnie M. Drake had been appointed and had qualified as administratrix of the estate as an intestate estate.

To the petition objections were filed by the defendant Minnie M. Drake. The objections were dated August 30, 1947. The defendant Marjorie Drake Olson filed objections dated October 15, 1947. The objections of the two defendants are in terms and substance substantially the same.

Substantially it was alleged in the objections that the instrument offered for probate was not the last will and testament of Frank Elmer Drake; that the instrument offered was a copy of a purported last will and testament; that diligent search had been made for the copy retained by deceased and it could not be found; that conditions had changed since the time of the execution of the will in duplicate and that it was the belief of the defendants that the will had been destroyed by deceased with intent to revoke the same; and that subsequent to the time of the execution of the purported will and up to the time of his death deceased manifested by acts and declarations that he had no last will and testament.

For answer and reply to the objections plaintiff denied

the destruction and revocation asserted by defendants and reasserted her contention that the instrument offered for probate was the last will and testament of Frank Elmer Drake.

It was on a trial of the issues thus made that the county court denied probate of the instrument.

These were the issues presented by appropriate pleadings to the district court on appeal where as pointed out probate was denied by verdict of a jury.

The theory on which the case was presented both by plaintiff and defendants was that here was a will made in duplicate with the one retained by the testator not found or accounted for, therefore there was a presumption that the will had been destroyed by the maker with intention to revoke and the burden was on the proponent to overcome the presumption by evidence tending to a contrary conclusion.

The theory thus adopted by the parties is well stated in 68 C. J., Wills, § 759, p. 994, as follows: "Where one copy of a will executed in duplicate or triplicate, or the like, is shown to have been retained by the testator, the other or others having been intrusted to, or deposited with, another person, or other persons, the failure to find the testator's copy, after his death, raises a presumption of its destruction by him with the intention of revoking the will, although such presumption may be overcome by evidence tending to a contrary conclusion."

In 1 Underhill on the Law of Wills, § 261, p. 356, it is stated: "If the testator has retained one copy, placing another in the hands of another person; and if the copy, which it is shown he had never parted with, cannot be found upon his death, or if, when it is found, it is torn or canceled, the presumption is that the will is wholly revoked, even though a duplicate is produced intact." See, also, Bates's Estate, 286 Pa. 583, 134 A. 513, 48 A. L. R. 294; In re Estate of Crosby, 126 Neb. 509, 253 N. W. 652; In re Estate of Kane, 109 Neb. 449, 191 N. W. 680.

No assignment of error is predicated upon a misunderstanding or departure from this rule. The claim in this connection is that the court in its instructions misdirected the jury as to the burden the proponent was required to assume to rebut or overcome the presumption of revocation and to cause admission of the will to probate.

Plaintiff says the court charged that it devolved upon the proponent to overcome by clear, satisfactory, and convincing evidence the presumption that the deceased had destroyed the original will with the intention of revoking it, that is, not necessarily by the greater number of witnesses, but by such evidence which, on the whole, when fully, fairly, and impartially considered by the jury, would produce on the minds of the jurors such a strong impression that men of ordinary reason could not draw a different conclusion therefrom. She says that the instructions in this respect were erroneous in that an improper burden was thus imposed. She contends that her burden in the premises was only to rebut and overcome the presumption and to prove the will by a preponderance of the evidence. She asserts that this being a civil action she, having the affirmative of the issues involved, was required to sustain her contentions only by a preponderance of the evidence.

That this is a civil action there can be no question. Also the general rule in this respect in civil actions is that the party having the affirmative of an issue is required to sustain his or her position by a preponderance of the evidence. Marx & Kempner v. Kilpatrick, 25 Neb. 107, 41 N. W. 111; McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665; Murray v. Burd, 65 Neb. 427, 91 N. W. 278; Estate of Davidson v. Davidson, 70 Neb. 584, 97 N. W. 797; In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429; Whitney v. Wyatt, 111 Neb. 328, 196 N. W. 322; Weiner v. Aetna Ins. Co., 127 Neb. 572, 256 N. W. 71, on rehearing, 128 Neb. 575, 259 N. W. 507; Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N. W. 2d 748.

The decisions of this court and courts of other jurisdictions either do or appear to impose a higher burden upon a proponent of a lost will or one where a duplicate in the hands of a testator has been lost to overcome the presumption of revocation than that of a preponderance of the evidence. The same is true of the statements found in authoritative texts.

In 2 Page on Wills (Lifetime Ed.), § 876, p. 729, the following appears: "It is said that the evidence which rebuts such presumption must be clear and satisfactory, or that it must exclude every presumption of revocation by the testator."

In 68 C. J., Wills, § 814, p. 1029, it is said: "However, where the will was last seen or heard of in the possession or custody of the testator and it cannot be found after his death, it is presumed that he destroyed it with the intention of revoking it, and clear and satisfactory proof is required to rebut or overcome the presumption."

In Dalbey's Estate, 326 Pa. 285, 192 A. 129, it was said: "The evidence required to overcome the presumption of revocation of a lost will must be positive, clear and satisfactory."

In In re Calef, 109 N. J. Eq. 181, 156 A. 475, it was said: "The rule of law with which we are most concerned is succinctly stated by Vice-Chancellor Reed in In re Willitt's Estate, *supra* (46 A. 519), as follows: 'The rule of evidence controlling the probate of a lost or destroyed will is that the existence of a duly executed will, and its contents, must be proved with clearness and certainty.' * * * The presumption is one of law in some jurisdictions * * * and of fact in others."

In Thomas v. Thomas, 129 Iowa 159, 105 N. W. 403, it was said: "It appearing that a will, conceded to have been executed, cannot be found after the death of the testator, the presumption arises that the same was destroyed by him animo revocandi. And the burden is upon the party seeking to establish the will to over-

come such presumption by evidence strong, positive, and free from doubt." The necessity that the proof should be free from doubt however was later rejected in Goodale v. Murray, 227 Iowa 843, 289 N. W. 450, 126 A. L. R. 1121.

In the opinion in Goodale v. Murray, *supra,* it is said: "It has been the uniform holding of this court, and of courts generally, that to establish a lost will, it is incumbent upon the proponent to prove by clear, satisfactory and convincing testimony, first, the due execution and existence of the instrument; second, that it has been lost, and could not be found, though diligent search was made in all places where there was a reasonable likelihood of its being found, with testimony of the nature of the search, and the places searched; third, that the presumption of its destruction by the testator with the intention to revoke it, arising from its absence on his death, has been rebutted; and, fourth, the contents or provisions of the will."

In Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383, 110 Am. S. R. 431, it was said: "Where parol evidence is relied on to show that a will in existence was revoked by implication by one which can not be found, such evidence should be clear, unequivocal, and convincing, * * *." This principle was approved in Williams v. Miles, 87 Neb. 455, 127 N. W. 904.

The purpose of the litigation in these two Nebraska cases and others reported in a series bearing the same title was not to prove the execution and existence of a lost will for probate but for the purpose of showing that an earlier will had been revoked by the lost will. The purpose of the quotation was nevertheless to define the character and quality of evidence necessary to rebut the presumption that a will left in the hands of a testator and not found after his death had been revoked. Thus interpreted this court in that case, we think, committed this jurisdiction to the rule that the evidence required to overcome the presumption of revocation of a lost

will must be clear, unequivocal, and convincing.

There can be no doubt that the Iowa cases do fix upon proponents of lost wills such as in the case at bar a burden in all respects greater than proof by a preponderance of the evidence. There can be no doubt that decisions of other jurisdictions do or tend to do so. It cannot be said however that this jurisdiction and some of the others clearly so do.

It will be observed from the quotations regarding this subject that the reference is to *the quality of evidence necessary to overcome the presumption of revocation* rather than *the quantum of proof necessary to admit a will to probate.* We think this has significance.

We are persuaded that this court did not intend to make the preponderance rule of civil actions inapplicable to this type of case, and establish and impose a different burden upon a proponent of a lost will.

We are persuaded that it was the purpose to require in the first instance that the proponent adduce evidence which is clear, unequivocal, and sufficient in and of itself or prima facie, if believed, to convince in order to overcome the presumption of revocation, and if there is an issue as to execution and existence to establish that fact, whereupon for the purposes of the case the presumption would disappear. The sufficiency of the evidence in the first instance becomes a matter for determination by the court.

After a determination in this respect favorable to the proponent reasonably and logically the burden would be on the proponent to sustain his right to have the will admitted to probate by a preponderance of all of the evidence with the jury left free to weigh it and apply it to all elements involved and to give to it such weight as they should deem it to be entitled.

This reasoning is consistent with the preponderance rule in civil cases, also a well-recognized rule as to the office and weight of presumptions, and at least one other situation wherein the decisions apparently but not ac-

tually imposed in a type of civil action a burden of proof greater than by preponderance of the evidence.

It is well established in this jurisdiction that a presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it the presumption disappears and thereafter the determination of the issues depends upon the evidence with the requirement as in other civil actions that the party having the affirmative of the issue involved in order to succeed shall sustain his position by a preponderance of the evidence. 1 Jones, Commentaries on Evidence (2d ed.), § 30, p. 57; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185; Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270; In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513.

The case of Riley v. Riley, *ante* p. 176, 33 N. W. 2d 525, was not a case where the matter of evidence to overcome or rebut a presumption was involved but one wherein this court was called upon to define the significance to be attached to evidence which in the first instance was required to be "clear, satisfactory, and unequivocal." In defining the significance to be attached it was said:

"The rule is not one of weight but of quality and substance of evidence. It means that when he has done this, in the absence of anything to the contrary, his burden in this respect has been sustained.

"If however its weight is brought into question then before he shall be entitled to have his position sustained he, having the affirmative, must sustain it by a preponderance of the evidence."

Any significance to be attached to the words "clear, satisfactory, and unequivocal" other than the one pointed out herein would destroy the traditional burden of proof in civil actions and substitute in its stead a burden as uncertain and indefinite as the uncertainty and indefiniteness which inheres in the words themselves. We

conclude therefore that the instructions of the court, in the respects herein pointed out, were erroneous, however, the error was without prejudice since from an examination of the evidence it becomes clear that the verdict was the only one which was or could have been justified. Clearly on the evidence the defendants were entitled to a directed verdict in their behalf. In a case where the verdict is the only one which the evidence or lack of evidence will support the giving of erroneous instructions will not be held to be prejudicial error. Lebs v. Mutual Benefit Health & Accident Ass'n, 124 Neb. 491, 247 N. W. 19.

There is no direct evidence or other evidence from which a reasonable inference could be drawn the purport or effect of which was to overcome or rebut the presumption that the will had been revoked.

The facts in this connection as disclosed by the record which were adduced by the plaintiff have already been summarized and they will not be repeated. Suffice it to say here that no evidence was adduced as to the place of repose of the retained duplicate of the will except that contained in the letter of transmittal of the other copy in 1934. No evidence of its existence thereafter was adduced except indefinite references to it in conversations by deceased with his mother, his two sisters, and his brother-in-law prior to 1943. There was no evidence that anyone other than the deceased, the scrivener, the attesting witnesses, the mother, the two sisters, and the brother-in-law knew of the will until the duplicate was offered for probate by the plaintiff.

In the light of this state of the record it cannot well be said that the plaintiff adduced evidence of the quality sufficient to overcome the presumption that the will had been revoked by the testator.

An error assigned is that the district court erred in refusing to strike the objections and answer of the defendant Minnie M. Drake. The theory of the motion was that since the will gave her, as widow of the testator,

what she would have received in case of intestacy she was not an interested party within the meaning of section 30-217, R. S. 1943. The contention is without merit.

The pertinent part of the provision of the statute is as follows: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, together with a petition for its probate, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, * * *."

This court in the case of In re Estate of Sexton, 146 Neb. 618, 20 N. W. 2d 871, interpreted this provision and there declared that anyone who is or claims to be an heir of a deceased person or otherwise interested in the estate is entitled to contest the probate of a will.

It is pointed out in Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123, and sustained in Salmons v. Salmons, 142 Neb. 74, 8 N. W. 2d 517, that since 1907 a surviving spouse becomes an heir as to both the personal property and real estate of the deceased husband or wife.

Under the interpretation made in In re Estate of Sexton, *supra,* from which we are unwilling to depart, the defendant Minnie M. Drake, as an heir, had full right under the statute to contest any purported will of her deceased husband offered for probate.

The judgment of the district court is affirmed.

AFFIRMED.

IRVING SNYDER, DOING BUSINESS AS DENVER CAR & TRUCK MARKET, APPELLANT, V. HARRY LINCOLN, DOING BUSINESS AS LIBERTY CAR COMPANY ET AL., APPELLEES.

35 N. W. 2d 483

Filed December 29, 1948. No. 32490.

1. **Fraud: Larceny.** Where the owner of personal property is induced by fraud to part with its possession without intending

also to part with the title, the transaction is larceny if the person so receiving the possession without the title has at the time a secret intention of converting it permanently to his own use and does so without the consent of the owner.

2. ———: ———. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence.
3. **Sales.** One obtaining possession of property by larceny cannot convey good title even to an innocent purchaser for value.
4. **Estoppel.** The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss, must sustain it, if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment.
5. ———. However, the foregoing rule has no application in cases where the wrong was accomplished through the instrumentality of a criminal act, it being held in such cases that the crime, and not the negligent act, was the proximate cause of the injury.
6. **Constitutional Law.** The Legislature may not validly in a regulatory act under the police power invade the right of contract, impair rights of property, or restrict the courts in the consideration of evidence and the determination of title and ownership of property and contractual rights and obligations.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed.*

Levin & Brodkey, for appellant.

Wear, Boland & Nye and *Robert E. McCormack,* for appellees.

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

CHAPPELL, J.

This was an action to replevin a car. Tried to the court, jury waived, defendants were awarded a judgment. Motion for new trial was overruled, and plaintiff appealed to this court.

In the final analysis, the primary question presented is whether the car was sold by plaintiff or was stolen from plaintiff. Concededly, if plaintiff sold and delivered the

car to a fraudulent vendee as defendants contend, then the law would protect innocent purchasers, and defendants, if within that category, would be entitled to recover. On the other hand, if, as plaintiff contends, the car was stolen from plaintiff, then innocent purchasers could acquire no title which the law would protect, and plaintiff would be entitled to recover. We sustain plaintiff's contentions.

As stated in Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281: "It is well settled that when property is obtained from its owner by fraud, and the facts show a sale by the owner to the fraudulent vendee, an innocent purchaser of the property from the fraudulent vendee will take good title. The inquiry is: Did the owner intend to transfer the ownership as well as the possession of the property? If he did, there was a contract of sale. The essential thing in the passing of title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention." See, also, Sullivan Co. v. Larson, 149 Neb. 97, 30 N. W. 2d 460.

The opinion in Parr v. Helfrich, *supra,* also approved a statement appearing in Rowley v. Bigelow, 12 Pick. (Mass.) 307, to the effect that: "The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none."

As we view the record, it will be unnecessary to discuss at length or attempt to make specific application of the Colorado statutes relating to the execution and delivery or assignment of certificates of title and certificates of ownership of motor vehicles, or to determine whether or not defendants or either of them were innocent purchasers for value.

Under rules of law heretofore stated, and hereafter recited, our conclusions must be based entirely upon the factual situation appearing in the record.

The evidence is not in dispute. It appears in substance that on August 30, 1947, plaintiff, a licensed used car dealer in Denver, Colorado, was the owner and holder of a valid Colorado certificate of title to a 1946 Chevrolet Aero Sedan, the car involved.

On that date, Saturday afternoon, at about 2:30 p. m., a person unknown to plaintiff but identified as R. Bryan Owen or R. E. Owen, a blond, light-complexioned man, about 29 or 30 years old, 5 feet 9 inches tall, weighing about 175 pounds, and dressed in a United States Navy jacket and blue pants, came upon plaintiff's car lot. There he looked over three or four cars and asked one of plaintiff's salesmen for permission to try out the car in question. It was already serviced for driving, and such permission was granted. Thereupon Owen drove the car away and returned in 10 or 15 minutes. He then said he liked the car but wanted to show it to his wife at a given address in Denver, later found to be fictitious and nonexistent. The salesman hesitated, and Owen offered to leave his check for the purchase price. Whereupon, in the presence of another witness, the salesman told Owen in substance that he could not and would not accept the check unless it was certified, and that plaintiff could not and would not sell or deliver the car or the title thereto until and unless the check was certified, but that Owen could take the car and show it to his wife if he desired to do so.

No certificate of title or certificate of ownership was ever given or assigned to Owen by plaintiff as required by the Colorado statutes, and he was never given any bill of sale, mileage certificate, or any other paper or document by plaintiff as evidence of ownership or that a contract of sale had been made. Owen simply left his check, without certification, drove the car away, ostensibly to show it to his wife as permitted by plaintiff, and never returned.

Two or three hours after Owen had left, plaintiff notified the Denver Police Department, and on Tuesday,

Sunday and Monday Labor Day intervening, plaintiff also notified the Federal Bureau of Investigation. The check was never endorsed or deposited by plaintiff, but on Tuesday, just before 3 p. m., it was learned that there was no such account. Owen had not been apprehended at the time of trial of the case at bar.

On September 5, 1947, R. E. Owen, purportedly from Columbus, Georgia, gave D. B. Pearson Motors of Kansas City, Missouri, an ordinary bill of sale for the car, for which D. B. Pearson gave Owen a check for $1,850, which was endorsed "R E Owen," and marked paid on September 6, 1947.

Neither D. B. Pearson, doing business as D. B. Pearson Motors, nor defendant Harry Lincoln, doing business as Liberty Car Company, testified as witnesses. However, Jack Lincoln, father of Harry Lincoln, and an employee of his son's company, testified that he purchased the car for his son from D. B. Pearson Motors in Kansas City on September 5, 1947, the same day it was delivered by Owen to D. B. Pearson Motors. A check from Liberty Car Company, by Harry A. Lincoln, payable to D. B. Pearson Motors, for $2,125, dated September 5, 1947, marked paid on September 24, 1947, appears in the evidence.

Jack Lincoln testified that at the time he purchased the car he saw the bill of sale given by Owen, but never saw any certificate of title for the car, and that none was then delivered to him. Neither did he inquire who owned the car ahead of Owen. D. B. Pearson told him the certificate of title was then in the North Kansas City Bank as collateral for a loan of money on cars, and that he would get the same and attach it to the Liberty Car Company's check for return when it was cashed. Such statement, if made, was evidently false.

In that connection, the record discloses that on September 20, 1947, R. E. Owen of 1892 Alton, Mascage County, Columbus, Georgia, ostensibly under two signatures appearing to be entirely different from those alike

and appearing on his check left with plaintiff, his bill of sale given D. B. Pearson Motors, and his endorsement on the check given to him by D. B. Pearson, made application for Missouri certificate of "Title Number 910812" without surrendering any title number or attaching the certificate of any dealer or vendor. Therein the applicant gave his "Source of Ownership" as Kellen Motor Company, 811 Broadway, Columbus, Georgia, for cash, under date of August 17, 1947, which, it will be noted, was 13 days before the car was taken by Owen from plaintiff. However, across the face of the application we find both written and stamped thereover, in large letters, the words "Cancel," together with the stamped date "Sep 22 1947."

However that may be, the record also discloses that on September 20, 1947, D. B. Pearson Motors, by D. B. Pearson, made application for the issuance of Missouri certificate of "Title Number 910813" and in doing so "Surrendered Title Number Ga. B. of Sale." Therein, the applicant gave its "Source of Ownership" as R. E. Owen, 1892 Alton, Columbus, Georgia, for cash, under date of September 5, 1947. The "Certificate of Dealer or Vendor" thereon is not dated, but bears the purported signature of R. E. Owen, which is the same in character as those appearing on the purported application of R. E. Owen for Missouri certificate of "Title Number 910812" heretofore described. The "Certificate of Dealer or Vendor" also has written in the left-hand corner thereof "Subscribed & sworn to before me this 19 day of Sept 1947 Dean B. Pearson." Also stamped thereon appear the words "My Commission Expires July 22, 1951," but no seal appears thereon. It will be noted, also, that no witnesses in the case at bar ever identified or verified in any manner the genuineness of the signatures of R. E. Owen appearing upon the foregoing applications.

A Missouri certificate of title, issued upon the basis of the last foregoing application, does not appear in

the record but doubtless under the evidence we may conclude that one was issued to and assigned by D. B. Pearson Motors to Liberty Car Company, because on September 27, 1947, the Liberty Car Company obtained a Nebraska certificate of title, upon the basis of "Previous No. 47 Missouri Cert of Title 910813."

On October 14, 1947, defendant Chauncey Eugene Wilson, engaged in the hay, grain, and livestock business at Gothenburg, gave his check to the Liberty Car Company for $2,200, paid October 17, 1947, for purchase of the car involved. Also, on October 14, 1947, Liberty Car Company, by Harry Lincoln, assigned the Nebraska certificate of title to Wilson, under the notarial seal of and an acknowledgment taken by Jack Lincoln.

When Wilson purchased the car, it was in a closed garage at the home of Harry Lincoln's brother and not in Liberty Car Company's place of business, as were two other cars purchased at the same time. The Federal Bureau of Investigation eventually located the car in Wilson's possession at Gothenburg, and instructed him not to dispose of it. On October 24, 1947, plaintiff's attorney called Wilson by telephone, who informed the attorney that he had the car, having purchased it from Liberty Car Company. The attorney then informed Wilson that the car had been stolen from plaintiff, who wanted possession of it, whereupon Wilson agreed to and did bring the car to Omaha, where it was taken by replevin in the present action.

Defendants admitted that plaintiff did not deliver Owen any certificate or other evidence of title or ownership, as required by the Colorado statutes, but contended that a sale could be made and that the title to the car could pass without the execution, delivery, and recording of such instruments, since Colorado did not have any statutory provision such as section 60-105, R. S. Supp., 1947, hereinafter discussed.

Without further discussion, we may assume that contention to be true, solely for the purpose of argument,

and still find that defendants are not in position to prevail, because there was no competent evidence that plaintiff intended to or ever did sell, pass the title, or transfer the ownership of the car to Owen in any manner.

True, plaintiff gave him possession of the car to show it to his wife, but gave him no title or right of ownership or power to sell it. It is generally the rule that mere possession of a chattel, by whatever means acquired, if there is no other evidence of ownership or of authority from the owner to sell, will not, in the absence of controlling estoppel, enable one to give good title as against the true owner, even to a buyer for value in good faith, and without notice of the want of title in the seller. See First Nat. Bank of Bridgeport v. First Nat. Bank of Hartington, 111 Neb. 441, 196 N. W. 691.

There are no controlling elements of estoppel appearing in the case at bar. Plaintiff was guilty of no conduct precluding him from denying Owen's authority to sell the car, or transfer title thereto. Rather, from the record before us we can only conclude that Owen obtained possession of the car by fraudulent representations and larceny by trick or device. In that manner, he received the mere possession thereof without the title or any right of ownership or authority to sell, having at the time a secret intention of converting it permanently to his own use without the consent of plaintiff, and he carried out that intention.

As stated in State v. Joseph, 63 Utah 1, 221 P. 850, quoting with approval from People v. Berlin, 9 Utah 383, 35 P. 498: " 'If the owner of personal property is induced by fraudulent representations to part with its possession intending also to part with the title, the transaction cannot be larceny. But if the person receiving the possession without the title has at the time a secret intention of converting it permanently to his own use and does so without the consent of the owner, he commits the crime of larceny.' " See, also, Swartz v. White, 80 Utah 150, 13 P. 2d 643.

Also, as stated in Georgis v. State, 110 Neb. 352, 193 N. W. 713: "If a person obtains possession of money from the owner by fraud, with the intent to appropriate the same to his own use and deprive the owner of his property therein, the taking is larceny. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet, where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence. Crum v. State, 148 Ind. 401; State v. Dobbins, 152 Ia. 632; 25 Cyc. 40." See, also, State v. Hall, 76 Ia. 85, 40 N. W. 107, 14 Am. S. R. 204.

It was the larceny, and not a sale by or any negligent act of plaintiff, which was the proximate and effective cause of injury to the parties. The general rule is "where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enables such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment." 31 C. J. S., Estoppel, § 103, p. 325. However, the foregoing "rule does not apply in cases where the wrong was accomplished through the instrumentality of a criminal act, it being held that in such cases the crime, and not the negligent act, is the proximate cause of the injury." 31 C. J. S., Estoppel, § 103, p. 330. See, also, 21 C. J., Estoppel, § 176, p. 1172; Schumann v. Bank of California, N. A., 114 Or. 336, 233 P. 860, 37 A. L. R. 1531.

As we view it, the applicable rule is that one obtaining possession of property by larceny cannot convey good title even to an innocent purchaser for value.

The foregoing applicable propositions of law are set forth and discussed at length in the authorities cited in the annotation to 1 Uniform Laws Annotated, Sales, § 23, p. 191, and pocket parts supplement thereto, p. 174. They are too numerous to cite at length in this opinion.

Finally, defendants argued, without citation of any authority, that the Nebraska certificate of title held by

Wilson was conclusive of his ownership and right to possession of the car. We cannot so hold.

Their argument was premised upon section 60-105, R. S. Supp., 1947, which provides in part: "No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

The plaintiff in Mock v. Kaffits, 75 Ohio App. 305, 62 N. E. 2d 172, a replevin action to recover a stolen automobile, made a like claim. That case is factually and legally similar to the case at bar, and Ohio has a statute identical in all material respects with the provisions of the Nebraska statute above set forth. In the opinion, the Ohio court said: "It is therefore clear that theft, misrepresentation and fraud surrounded the conception of plaintiff's source of title. And this is true even though he is an innocent purchaser for value. * * *

"Just what is the purpose of the Certificate of Title Act? The answer is found in Automobile Finance Co. v. Munday, 137 Ohio St., 504, 521, 30 N. E. (2d), 1002, wherein Judge Turner stated that 'the very purpose of the law is to protect ownership against fraud.' If plaintiff's theory be adopted, it must be perceived that the avowed purpose of the act would be frustrated. It would become a shield to the thief's criminal act and would stamp with the law's approval the source of title which flows from him. It would surely follow that Ohio might be made the dumping ground for stolen cars."

Be that as it may, in Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, plaintiff relied upon the foregoing statutory provision. In the opinion, this court said: "The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and

consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations.

"The plaintiff has cited no case and we have found none the effect of which is to say that the legislature is empowered, under the guise of a police regulation, to validly invade the field of contract and property rights and to restrict the courts in the exercise of their proper functions.

"We must therefore hold that this statutory provision may not be considered as in aid of plaintiff's cause of action. The case must turn on other considerations."

For the reasons heretofore stated, we conclude that the judgment of the trial court was not supported by any competent evidence, and that being clearly wrong, it should be and hereby is reversed.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1949

DOROTHY BATH, APPELLANT, V. HERMAN BATH, APPELLEE.
35 N. W. 2d 509

Filed January 10, 1949. No. 32456.

1. **Infants.** In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
2. **Divorce.** Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Robert S. Finn and *Dwight Griffiths,* for appellant.

Armstrong & McKnight, for appellee.

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

MESSMORE, J.

This is an action brought by Herman Bath to modify a decree of divorce obtained by his wife Dorothy Bath, to the extent of awarding him the custody of two minor sons, the issue of such marriage.

The parties were married in 1937 and immediately after their marriage established a home on a farm belonging to John Bath, the father of Herman Bath. On December 7, 1943, Dorothy Bath, plaintiff, obtained a decree of divorce from Herman Bath on the grounds of extreme cruelty. The defendant did not file an answer. At that time Richard William Bath was four years old and Dennis Eugene Bath was four months old. On December 4, 1943, by stipulation, Dorothy Bath was awarded the absolute custody of the two minor children. The defendant agreed to pay $30 per month for child support, with the right to visit the children. In the divorce decree the trial court ordered that the children should at all times be subject to the jurisdiction of the court, and that the plaintiff should keep the court advised of their whereabouts and not remove the children from the jurisdiction without first filing with the court a statement of her intention to so remove them. In January 1944, after the plaintiff had removed to Bakersfield, California, a notice was filed in the office of the clerk of the district court showing plaintiff's place of residence.

On January 9, 1948, the defendant filed an application to modify the decree of divorce, setting forth the terms of the decree and charging that the plaintiff had not provided a separate home for the children but that she and her children live with her mother; that since July 1947, he and his present wife have had the care, control, and custody of the minor children; and set forth certain facts upon which he contends there has been a change in conditions since the granting of the decree of divorce. The plaintiff, by answer and cross-petition, denied the allegations of the application and affirmatively alleged certain facts as to why the custody of the two children should not be granted to the defendant. The facts alleged in the pleadings to support the contentions of the respective parties will be covered in a résumé of the evidence.

On February 17, 1948, after trial, the district court

entered a decree awarding the custody of the older son, Richard, to the defendant, and the younger son, Dennis, to the plaintiff, requiring the defendant to thereafter pay $30 per month for the support of Dennis during his minority, and allowing an attorney's fee. Motions for new trial were filed by both plaintiff and defendant and were overruled. Thereupon the plaintiff gave notice of appeal and moved that a supersedeas bond be fixed. Certain procedure was then had which need not be detailed as to keeping the custody of the children in status quo until this appeal was finally determined. The defendant cross-appealed, contending that the court, in addition to having awarded him the custody of Richard, should have awarded him the custody of Dennis.

The principal and controlling assignment of error contended for by the plaintiff is that the decree of the trial court is not sustained by the evidence and is contrary to law.

For convenience the appellant and cross-appellee will retain title of plaintiff as originally designated, and the appellee and cross-appellant will retain the title of defendant as originally designated.

The defendant is engaged in farming 160 acres of land rented to him by his father who is a farmer living a mile and a quarter from the defendant, and a brother lives about the same distance from the defendant. Defendant has been engaged in farming this land for three or four years. He was married to his present wife July 28, 1946. The farm is well improved, with a six-room remodeled brick house, part of which is insulated, equipped with electricity and bath. The boys occupy an upstairs room that has been insulated for their use. At the time of the trial the boys had lived with their father and his present wife approximately seven months. Richard came to the defendant's home about the 6th of June, 1947, and Dennis was there at different times up to the first of August, 1947. Both have resided there

since that time. Mrs. Harriet Blythe, the maternal grandmother, brought the children from Morro Bay, California, to Kansas City, Missouri. She wrote the defendant and his wife to come there and pick up Richard, which they did. Upon delivery to his father, Richard was afflicted with a cold, and medicine was furnished to the father to be administered as required. The maternal grandmother remained in Kansas City, according to the defendant's evidence, to receive treatments for rheumatism. Prior to Thanksgiving the grandmother delivered the children's winter clothing to the father and returned to Kansas City where she remained until Christmas.

Richard started to school, entering the fourth grade. The school is about a mile and a quarter distant from the defendant's home. At times he rides a pony to school, sometimes a bicycle which was furnished by his relatives in California, and on cold days is taken to school in an automobile. His grades in school have improved since he started.

Shortly after Richard's arrival at the defendant's home he was taken to a physician and later to a specialist to determine whether or not he was afflicted with tuberculosis. The tests were negative.

Defendant testified that at the time of Richard's arrival he was nervous and in a run-down condition. A local physician diagnosed his difficulty as asthma, and applied tests relating it to house-dust which seemed to be the cause of his condition. He testified that Richard was a nervous child at the time he examined him, did not seem to be stabilized, but improved physically and seemed to be happy in his environment.

The defendant's present wife took the children with her on shopping trips, and provided special entertainment for them on occasions. The boys regularly attended Sunday school and church, and on occasions visited with numerous relatives of the defendant and his present wife in the immediate vicinity.

Defendant testified further that at the time of the divorce he was unable to provide a home for the children except his parent's home, and that his mother was aged and not able to take care of the children.

Exhibit No. 1 is a letter dated October 8, 1946, written by the plaintiff to the defendant, the substance of which is that upon her return from Morro Bay where she had seen the children she was quite disturbed in the change she found in Richard, that he "is getting entirely out of hand and doesn't seem to know what mind means, although a lot of the time he is as good as can be." Other parts of the letter are a request for the defendant to write to Richard, because since the defendant's remarriage Richard has felt that he has lost the love of his father, and that a letter to the effect that the father still loved him would aid the situation. The letter shows that she had expended some money for the children's clothes and had paid doctor bills in their behalf.

It appears that the defendant generally addressed his letters to Richard, and made no inquiry with reference to Dennis. He wrote not to exceed once every two months. Also, from the time the plaintiff moved to California in December 1943, until the two children returned to Nemaha County, Nebraska, in June 1947, the defendant had seen Dennis on one occasion in October 1944. At that time he visited the plaintiff and the children in California, arriving about ten o'clock on a Friday night and remaining until Monday morning. He was with the children except on Saturday night when he took the plaintiff to a show and a dance. On one other occasion, in the summer of 1945, he saw Richard when he returned with his maternal grandmother to Nebraska for a visit.

The defendant testified that Richard had been moved from one school to another in California and that the child had led an unsettled existence from the time the plaintiff moved to California. The plaintiff moved to California in December 1943, and within a month after

her arrival, moved to a home at 1812 Orange Street in Bakersfield, and continued to reside there until March 1947, or for approximately three years. Until she moved to that place she stayed with a Mrs. Higgins, a cousin of her mother's, at 800 Oleander Street. In March 1947 she vacated the Orange Street residence due to an increase in rent which she could not pay, and the children were taken to Mrs. Higgins' home at Morro Bay. The plaintiff, after disposing of her furniture and in about three weeks, moved to Morro Bay and lived with her children in the home of Mrs. Higgins. She was with the children continually until they returned to Nebraska in June 1947.

With reference to the change in schools, the record shows that Richard attended Lowell School in Bakersfield two years without interruption. The following year he started to school in Morro Bay. By November first it was apparent the apartment Mrs. Higgins was to provide for the plaintiff and her family would not be finished, so Richard returned to Bakersfield and enrolled in the same school he had attended. When the plaintiff moved to Morro Bay, Richard enrolled in school there for the rest of the school year.

Other witnesses testified that the defendant is a person of good habits and character, likewise his present wife; also as to Richard's regular attendance at school; that both children attended Sunday school and church; and that the children are provided with a good home. However these witnesses had not been in the home, or if so, had visited there infrequently.

The plaintiff testified that shortly after her divorce from the defendant she went to California with her mother and the two children and as to the different residences she occupied. She obtained employment as a meter reader for a gas and electric company. She usually got her own breakfast, ate where she could at noon, was home in the evening, and generally prepared the evening meal. She read to the children, played with

them, put them to bed, and provided for their welfare generally. During plaintiff's working hours her mother took care of the children, and there is no competent evidence that she is unable to assist the plaintiff in such respect at this time.

The plaintiff further testified that the defendant told her that he did not believe that Dennis was his child, and told her if she remarried that it would be necessary for her husband to adopt the children. He was not desirous of having Dennis visit him in the summertime together with Richard, as it would be too much of a burden on his present wife to take care of both of the children and do her work.

It appears by correspondence dated April 9, 1946, that the defendant spent about $1,300 in three months, or over $400 per month, and was worried about his finances. This money apparently was spent on parties that he had had on different occasions, the extent of which is not shown. He also admonished the plaintiff to not let the boys develop a temper like he had which he thought was caused by scoldings and nervousness. At another time the defendant requested the plaintiff to send him $40 to pay for a tonsillectomy for Richard when he was visiting in Nemaha County with his grandmother in the summer of 1945. She did not send the amount, so the operation was not performed. However, the plaintiff had the operation performed in 1946. Defendant made no contribution for the operation and did not make any contributions other than the $30 per month as required by the court in the divorce action.

Plaintiff testified that when she had possession of the children they attended church and Sunday school; that defendant requested Richard to come and visit him in Nebraska, but did not request that Dennis come. She informed him that she did not want the children separated and if one went on a visit the other should go also. She further testified that when she came to Nebraska and went in search of Richard, accompanied

by the sheriff, she was unable to find him at the defendant's home or his grandparent's home. She went to the schoolhouse, and at that time the defendant's brother was helping Richard over a barbed-wire fence, and he ran towards his uncle's home. She called to him and he acted as if he were afraid. She searched but was unable to find him. She further testified that the children were to stay with their father just for the summer; and the defendant testified that he and his wife were under the impression that the boys were there just for the summer.

The plaintiff further testified that during the last month the children were with her she quit her employment and spent the time with them, taking them on picnics, on walks, and occasionally to shows, and entertaining them generally. After the children left for Nebraska she moved different places, had different kinds of employment, and at the time of returning to Nebraska had employment in a nursing capacity at the Bakersfield hospital; that Richard was not unruly, he was like any other child who got out of hand occasionally. There is nothing in the record that discloses that he was unruly except as heretofore pointed out. An examination of the report cards appearing in the record shows Richard's regular attendance; that he is a conscientious, intelligent, well-behaved child; and that his grades are average or better and apparently as good in one school as in another.

Mrs. Higgins testified that she graduated from teacher's college in 1910 and went to California where she taught school; that she adopted three children and raised them, the youngest one being now 21 years old; that she engaged in the wholesale produce business after the death of her first husband and disposed of this business to her present husband and a son in 1931; that they have built a residence in Morro Bay recently and an upstairs apartment for the use of the plaintiff and her children, with a private entrance, the children

being privileged to at all times have the run of the entire house. The upstairs apartment is modern, newly and completely furnished, with a bath, kitchen and dining room, large closets, large living room and large bedroom. This witness helped raise the plaintiff and had custody of her for three years. She testified that the plaintiff is devoted to her children, to their health and to see that they have proper food; that they have well-balanced meals; that Dennis was always healthy, and Richard had his tonsils out and had pneumonia once, which was about the extent of his illness, and that he did not have asthma.

Reference is made to correspondence by this witness with the defendant and his wife as to the adequacy of their home for Richard and her appraisal of the situation concerning the custody of the children. This correspondence is offered for impeachment and, at most, goes to her credibility as a witness, which has been considered by the court in such respect.

The foregoing is substantially the competent and relevant evidence shown by the record.

Section 42-312, R. S. 1943, with reference to changing the custody of children, provides as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

It appears from the record that the plaintiff was entrusted with the care, control, and custody of these two minor children at the time she obtained her divorce. By doing a man's work which, when service men returned from the war, she was required to relinquish, and with the help of her mother and Mrs. Higgins, she provided for the comfort, health, and welfare of these two boys during trying years when they needed a

mother's care and when the defendant, by his own admission, was unable to provide a home.

Defendant's alleged change of conditions since the granting of the divorce are his reformation, his second marriage, and a remodeled home. True, defendant has a good home. The record discloses that the plaintiff has just as adequate a home, with the same amount of facilities and the same benefits for raising the children as the defendant.

Not until this trial did the defendant or his present wife express a desire to have the custody of the younger child, Dennis, now nearly five years of age. Defendant has not refuted the fact that he denied Dennis was his child. In writing to the children he wrote to Richard, the older child, upon the theory that he was older and could read. He ignored the existence of Dennis. This testimony shows a malignity of heart and a disregard for the future reputation and happiness of Dennis entirely inconsistent with the defendant's professed parental care. The trial court did not find the plaintiff to be an unfit and improper person to have the care, control, and custody of the younger child, and previously in the divorce action had found her to be a fit and proper person to have the control, care, and custody of both children.

Defendant offered certain letters in evidence, written by the maternal grandmother, constituting expressions of her opinion as to what would be for the best interests of at least the older child. These letters were properly not admitted in evidence and, at most, constituted the maternal grandmother's opinion, and were not binding on the plaintiff.

By agreement of the parties, the trial judge talked to Richard and reported that from this conversation Richard liked both of his parents, was happy with them both, and expressed a preference to be with his father. The child's statement may be considered, but is not controlling in determining his custody.

The rule to which this court is committed appears in Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771, as follows: "In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother."

And as stated in Feather v. Feather, 112 Neb. 315, 199 N. W. 533: "We think it is generally conceded that the best interests and welfare of a child of tender years will be best subserved by placing it in the custody of its natural mother, if she is a fit and proper person." See, also, Boxa v. Boxa, 92 Neb. 78, 137 N. W. 986; Downs v. Downs, 134 Neb. 457, 279 N. W. 151; Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

As stated in Gross v. Gross, 122 Neb. 25, 239 N. W. 201: "Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action."

From an examination of the record, we are convinced that for the best interests of these two minor children they should not be separated, and in this regard the following authorities are applicable.

In Poor v. Poor, 237 Mo. App. 744, 167 S. W. 2d 471, the custody of two boys aged six years and 11 months was involved. By stipulation of the parties, the same as in the instant case, the mother was given the custody of the children. Subsequently the father filed an application to have the custody awarded to him. He had remarried and there was evidence that tended to establish that the conditions of his home were congenial and happy, and that he was in a much better financial condition than at the time the divorce was granted. He contended the home conditions of the mother created an unfavorable environment for the children. The trial court divided the custody, awarding the older boy to the father and continued the custody of the younger boy

with the mother. The court, after an explanation as to the older boy needing the advice of the father and the father's attachment to the children, came to the conclusion that it would not be wise to sacrifice the interests of the children, and stated as follows: "It is always a tragedy in the life of a child when its parents are divorced. It is the children who suffer the bitter fruits of their folly. This has been the lot of * * * (the two little boys in question) and another tragedy should not be injected into their lives by separating them. * * * It is our conclusion that it is not to the best interest and welfare that these children be separated at this time; and that there is not sufficient change in the conditions of the parties, financially or otherwise, to warrant the court changing the original decree, * * *." See, also, Dunnigan v. Dunnigan, 182 Md. 47, 31 A. 2d 634; Tuter v. Tuter, (Mo. App.) 120 S. W. 2d 203; Fisher v. Fisher, (Mo. App.) 207 S. W. 261; Gibson v. Gibson, 156 Ark. 30, 245 S. W. 32; Ellis v. Johnson, 218 Mo. App. 272, 260 S. W. 1010; Bedal v. Bedal, (Mo. App.) 2 S. W. 2d 180.

In the light of the foregoing decisions it is clear that generally the love, solicitude, and devotion of a mother cannot be replaced by another, and is worth more to a child of tender years than all other things combined. A child should not be deprived of necessary and wholesome influences which spring from these characteristics of a mother if it can reasonably be avoided.

From an examination of the record and the authorities as herein cited, we conclude that the plaintiff should be, and is hereby, awarded the care, control, and custody of Richard William Bath and Dennis Eugene Bath, minor children of the plaintiff Dorothy Bath and the defendant Herman Bath, and that the defendant have the right to visit said children at reasonable and proper times as may be determined by the district court; it is further ordered that the defendant pay to the plaintiff the sum of $40 per month for the support and mainte-

nance of Richard William Bath and Dennis Eugene Bath until further order of the district court, and the sum of $200 as attorney's fees for services rendered in this court, in addition to the allowance for attorney's fees in the district court. The district court is hereby directed to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

PAINE, J., dissenting.

I think that the order of the district judge was right in giving nine-year-old Richard to his father, and should not be reversed by this court. He heard the testimony, found in the 400 pages of the bill of exceptions, as it was given in his court; he saw these witnesses on the witness stand, especially while they were undergoing cross-examination.

Again, one should not overlook the fact that the trial judge in the custody hearing was not a stranger to the parties, but was the same judge who had granted the divorce. At that trial no answer was filed by the defendant, but a stipulation and agreement, signed by both parties and their attorneys, was filed in court, in which the parties agreed that the plaintiff should have the sole and exclusive care, custody, and control of the two minor children; that the defendant should have the right to visit them; that defendant should pay $15 a month each, or a total of $30 a month, for the support of said children; and setting out that the parties had divided the personal property between them, which personal property has been accepted by the plaintiff in full of her claim for alimony against the defendant.

In strict accordance with the stipulation of the parties, the trial judge originally awarded the custody of both boys to the mother, who immediately took them to California, where they moved about from place to place. The evidence shows that Richard likes life on the farm, gathering eggs, turning stock into the pasture, and even on one occasion drove the tractor. He has a pony to ride to school and has improved in his school work. With the defendant and Ruth and his grandfather, John Bath, he

has attended Sunday school and church regularly. The same trial judge very properly under this evidence awarded the future custody of Richard to the father, with whom the judge said Richard told him he desired to stay.

The original decree of divorce was entered December 7, 1943, and stated that Richard was four years old and Dennis a few months old.

While the plaintiff appealed from the order entered February 17, 1948, changing the custody of Richard to his father, and put up a supersedeas bond of $500, yet, as she was planning an immediate return to California with the children, this court upon application and affidavits being filed entered a temporary order for the defendant father to retain the custody of Richard, even though supersedeas bond had been given. See 27 C. J. S., Divorce, § 324, p. 1258. The older boy, Richard, has now been continuously with defendant and his present wife, Ruth, since June 6, 1947.

Many witnesses were called to prove the good character of Herman and Ruth Bath, consisting of men of prominence and affairs, and close neighbors. All these witnesses vouched for the exemplary conduct of Herman Bath, who does not now use profanity, smoke, or drink; that he is a steady, hard worker and good farmer; and for the fine, high character of Ruth Bath. There can be no question but that the good character of Herman and Ruth Bath was proved beyond a doubt, and that they would give constant, daily, undivided attention to the care of Richard, whom they love and who not only loves them but is happier with them on the farm than he has ever been in his life.

In this record we find a letter written by plaintiff and another by the defendant which show certain facts. The defendant wrote plaintiff a letter, being exhibit No. 7, thanking her for pictures and records of school work, and said that her picture looked as though she had been working too hard. He then referred to some woman and

said that she had doubtless heard stories about "Cappy and I," but that the affair was not serious and he was not going steady with her. He urged plaintiff to be careful with the boys and not let them develop a temper like he had. He said that he had gone on several parties that had lasted several days, but he never got too drunk to know what he was doing. He said he had wasted the last two years, he had spent a lot of money, and it was all because he felt lost and terribly lonesome.

This letter, exhibit No. 7, bore the date April 9, 1946, which was only a few months prior to his marriage to Ruth. The defendant said that the date on this letter had been changed. Plaintiff did not produce the envelope showing the postmark, and while defendant admitted he wrote the letter he insisted it was written many months previous to its date. Because of the fact that the court reporter for some reason copied all of these many letters into his bill of exceptions instead of attaching the originals, it is impossible for the court to examine the original and see if the date appears to have been changed.

I will now set out some of the contents of letters written by the plaintiff. In exhibit No. 53 we have an envelope postmarked at Bakersfield, California, December 27, 1945, and addressed to "Mr. & Mrs. Don Coulter," R. R. 2, Auburn, Nebraska. The letter therein, being exhibit No. 52, was addressed "Dear Mabel," and parts of the letter read as follows:

"Larry's Aunt told me today that Larry is back in the states and will be here the first part of February. I haven't written him for about three or four months. I've been going with another fellow since last February. He's the one I want but think its hopeless. He's married and his wife refuses to divorce him so—He's the grandest fellow and is the one guy that is everything I've ever wanted. He's 37, but looks about 32, blond, a few inches taller than I am, and just swell. Also I forgot to add that he's got money. He's been separated for a year and a half. If I ever thought that she'd let him go I'd wait but

I have my doubts so I'll probably end up by breaking it up one of these days. I've always said that if I ever got married again it would be to someone older. So much for that. * * *.

"We had to work Mon. but we all got through about 11 o'clock and by the time we hit the office at 2 o'clock we were in the grove and on the beam. Of course the whole gang just had to go to one of the bars and have a few Tom & Jerrys. I had a swell glow when I got home but had to get rid of it as Mom and I took Dicky and Dennis down to Aunt Edith's for Christmas Eve. I went out Christmas Eve but took it easy as I had a headache from the afternoon and wanted to feel good Christmas Morning."

The defendant's exhibit No. 1 is a letter written by plaintiff under date of October 8, 1946, and addressed to "Dear Herman." It appears that the boys were living over at Morro Bay with Mrs. Higgins, for the plaintiff writes to defendant and says in exhibit No. 1: "I just got home from Morro Bay from seeing the kids. * * * I was quite disturbed over the change I found in Dicky. He is getting entirely out of hand and doesn't seem to know what mind means, although a lot of the time he is as good as can be. * * * I have been seriously considering marriage for several weeks * * *. The children both like Tommy a lot and he likes them, but his work in the oil field move him around so much."

An elderly lady, Mrs. Edith L. Higgins, of Morro Bay, California, came to Nebraska to testify as the plaintiff's only witness, aside from the clerk of the district court, called in her behalf as to the facts in the case, although plaintiff had lived in that part of Nebraska up to the time she moved to California.

When plaintiff, her mother, and the two boys went to California in December 1943, right after the divorce, they lived with Mrs. Higgins until they got a place on Orange Street, also in Bakersfield. Mrs. Higgins testified that her husband had built a house in Morro Bay, with an

apartment finished upstairs which plaintiff could use. However, this is about 150 miles from Bakersfield, where plaintiff last had employment in a hospital, but testified she did not know whether she still had the position.

One of the questions on the cross-examination of Mrs. Higgins, and the answer thereto, was as follows: "Q Well, I will ask you, Mrs. Higgins, if in September you didn't write to Mr. and Mrs. Herman Bath in regard to these children, and state: 'I am so thankful that he—meaning Dicky—can be rooted somewhere and have people care for him. Both he and Dennis have been such a part of my life and planning it tears at my heart strings to be separated from them.' And further stated that: 'Dicky has always loved the farm and had a deep feeling for his father and grandparents.' A I did."

Mrs. Higgins testified that while the children were near her she took them to Sunday school regularly, as she had a car. She testified that at the end of May 1947 she bought a round-trip ticket for the grandmother, Mrs. Blythe, to bring the children back to Nebraska, but only a one-way ticket for Dicky; that she bought them because she was an experienced traveler; and that Mrs. Blythe gave her the money for them.

During the trial of the case at bar, and when Ruth Bath, was concluding her testimony, plaintiff's attorney objected to the presence of Dicky Bath, who had just been brought into the courtroom. The attorney for the defendant said that he had had him brought into the courtroom to use as a witness for defendant. Plaintiff's attorney objected to the use of Dicky, a child of nine years, as a witness for the defendant, and argued that his father and present wife might have prejudiced the child's mind against his mother during the seven months he had lived with them. It was then agreed by counsel for both parties that the court should take Dicky into a separate room and talk with him, and a recess was taken and the judge took Dicky in another room and talked to him.

After the trial, and before the hearing on the motion

for new trial, the court made the following statement in the record: "That it was agreeable to both parties, and that the Court talked to the child, and that the Court reported back to respective counsel the gist of said conversation in which said child stated that he liked both parents and was happy with them both, but he expressed his preference to remain with his father."

In a recent case it was held in effect that, on petition to change custody of children of divorced parents, where evidence indicated that either mother's home or father's home would be proper for children, testimony, including that of children, that they preferred to continue to live with father and his present wife, whom they often referred to as "Mother," supported decree continuing custody with father. Grandell v. Short, 317 Mass. 605, 59 N. E. 2d 274.

In the above case the girls were only seven and eight years of age. The court also said generally that such findings of the court, based on oral testimony, both parents being present during the trial, are not to be set aside unless plainly wrong.

Many courts have held that evidence of the child's preference is admissible and such fact should be considered by the trial court, which is exactly what Judge Falloon did in the case at bar.

Child custody orders are necessarily subject to the control of the court in a divorce action, do not become final, and may be modified or changed from time to time as the best interest of the child may appear.

"The welfare of the child is the controlling consideration, and whenever it is shown that it is best for the welfare of the child that it be transferred from the custody to which it was awarded, the court will in its discretion modify the decree; otherwise modification is properly denied." 27 C. J. S., Divorce, § 317, p. 1189. See, also, Feather v. Feather, 112 Neb. 315, 199 N. W. 533; Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214.

"This court is not bound by the strict rule of law which

binds the parties to an action; the state is a party here, in that its interest adheres to any action concerning the care and custody of an infant, when made the subject for judicial inquiry. The rights of parents, without exception in such cases, yields to the welfare of the infant. The matter rests rather upon sound judicial discretion than upon hard and fast rules of law. The judicial review upon appeal of judicial discretion of the nisi prius court is limited to judicial abuse of discretion." Weber v. Redding, 200 Ind. 448, 163 N. E. 269. See, also, Trevino v. Trevino, (Tex. Civ. App.) 193 S. W. 2d 254.

The Nebraska court has quoted an authority to the effect that " 'Every child born in the United States has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection, "and such government is obligated by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." Mercein v. People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653.' " State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677.

And again, our court has said in effect that the welfare of the child is the primary consideration to which all other questions must yield, and the court should consider, not only the spiritual and temporal welfare, but also the minor's further training in education and morals. See In re Guardianship of Herten, 127 Neb. 88, 254 N. W. 698.

There appears to be a belief held by some in Nebraska that if the custody of a child is given to the mother in the original divorce decree it cannot be taken from her unless and until she is shown to be an unfit person to have such custody. Such a statement appears in a per curiam opinion entered in Gross v. Gross, 122 Neb. 25, 239 N. W. 201.

The Gross case is cited in one other opinion, to wit, Downs v. Downs, 134 Neb. 457, 279 N. W. 151, which also appears to support the idea that only if the mother is proved unfit can the custody of her child, once given to

her, be changed. However, a careful reading of these two opinions shows the additional qualification, "or the best interests of the child require such action," as a modification of the other statement, which is therefore in accord with the Nebraska statute and the laws of many other states.

It is, therefore, my firm conviction that a district judge can and should change the custody of a child whenever it is for the best interests of such child, for our law which governs this matter says nothing about proving a mother unfit, but reads as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." § 42-312, R. S. 1943.

In this case the defendant has a cross-appeal asking that custody of Dennis also be awarded to him. The evidence as to this younger boy is as convincing as to the older boy. He loves the defendant and Ruth, for the evidence shows that when Dennis was at their farm home and when she was entertaining a club he would not eat until he could eat with her. In the months he lived in the farm home he developed in every way, and should in my opinion be there with his older brother; but it may be admitted that Dennis is of a tender, preschool age and the trial judge left his custody with his mother, which means, of course, his grandmother, Mrs. Blythe, and the cousin, Mrs. Higgins, as the mother is away working every day she can get employment and is out on dates many evenings.

"On appeal in an equity case, this court tries the case de novo; but where the witnesses appear in person before the district court and their testimony is conflicting, the conclusions reached by that court as to the credibility of the testimony are entitled to consideration." Enterprise Planing Mill Co. v. Methodist Episcopal Church, 100

Neb. 29, 158 N. W. 386. See, also, Shafer v. Beatrice State Bank, 99 Neb. 317, 156 N. W. 632; Greusel v. Payne, 107 Neb. 84, 185 N. W. 336; Jones v. Dooley, 107 Neb. 162, 185 N. W. 307; In re Estate of Waller, 116 Neb. 352, 217 N. W. 588; Yardum v. Evans, 120 Neb. 699, 235 N. W. 85; Southern Surety Co. v. Parmely, 121 Neb. 146, 236 N. W. 178; Cary v. Reiter, 122 Neb. 476, 240 N. W. 582; State v. Cheyenne County, 123 Neb. 1, 241 N. W. 747; Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869; Aeschleman v. Haschenburger Co., 127 Neb. 207, 254 N. W. 899.

"When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Green v. Green, 148 Neb. 19, 26 N. W. 2d 299. See, also, Maryland Casualty Co. v. Geary, 123 Neb. 851, 244 N. W. 797; Sutherland v. Sutherland, 132 Neb. 558, 272 N. W. 549; Watkins v. Waits, 148 Neb. 543, 28 N. W. 2d 206; Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548; Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643; Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877; Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891.

"A reviewing court would accept the findings of a chancellor upon questions of fact, based on statements of witnesses whom he saw and heard testify, unless such findings were clearly and palpably erroneous." Kent v. Kent, 315 Ill. App. 284, 42 N. E. 2d 958.

"We believe that the present manifestation of interest in this boy on the part of his father should be encouraged and not discouraged. We prefer to determine this father's right to the custody of his son by his present conduct and not by his past conduct. We decline to say the father of this boy has been guilty of lack of interest or of conduct so unbecoming of a father as to forfeit his right to his son's custody." Kent v. Kent, *supra.*

"The modification must be based upon some change in

circumstances, or on the wishes (which are not controlling) of the children, and always for their good, for that is the sole guide in all changes of custodianship. Broadly stated the controlling considerations are a change of circumstances, the conduct of the custodial party, the morals of the parents, their financial condition, the age of the children and the devotion of either parent to the best interests of the children." Keezer, Marriage and Divorce (3d ed.), § 725, p. 764.

In a recent case of Madgett v. Madgett, 149 Neb. 41, 29 N. W. 2d 875, a default decree of divorce was entered July 20, 1945, which incorporated a property settlement. Thereafter, on an amended petition to modify the original decree of divorce as to the care, custody, and maintenance of the children, the trial court entered an amended decree April 9, 1947, from which decree the divorced wife appealed. The sons were ten and five years old. The father had a responsible position in an insurance company at a good salary. His mother had agreed to come and live with him and maintain his home. The children's mother remarried and moved to Denver, and the opinion says that the record reflects that she had failed to show the intelligent and proper regard that a mother should have for her sons. It was held that the amended decree was equitable and should be affirmed. This change of the custody of the two young boys from their mother to their father, who now has a good home for them, was based on the section of the statute heretofore set out, section 42-312, R. S. 1943, and says the controlling question is what is for the best interests of these two boys. The change in custody entered by the trial court was affirmed.

In the case at bar, the testimony of the defendant was supported by that of his excellent wife and many neighbors and friends while the plaintiff's evidence was supported by but one witness, her elderly cousin, Mrs. Higgins, who had come from California.

In appeals in actions in equity this court is required

to try the issues de novo, without reference to the findings of the trial court. However, in a vast number of opinions of our court it has been said in many ways that this court should consider the fact that the trial judge observed the witnesses, and in the case at bar both the plaintiff and the defendant appeared personally before him. He also examined this nine-year-old son, Richard, and decided that it was for his best interest that his custody be given to his father and his present wife, Ruth, and that he be given a permanent home on their farm.

. The trial judge found that the circumstances of the defendant had greatly changed since the divorce was granted. Instead of living with his parents, his mother being sickly, defendant now had a modern six-room farm home. He has a fine young wife, to look after the spiritual and temporal welfare of Richard, and she will be able to devote much time to his further training, education, and morals.

In the case at bar, the district judge had a stipulation before him in the trial of the divorce case that the mother should be given the custody of these boys, but such an agreement is not controlling, and in later proceedings for the change of custody the future welfare of the child is the primary consideration, to which all other questions must yield.

In my opinion the order of the trial court was right and should be affirmed.

SIMMONS, C. J., dissenting.

I would affirm the judgment of the district court.

CHAPPELL, J., dissenting.

I respectfully dissent. As I view the record, the circumstances of the plaintiff, the defendant, and the boy Richard have all changed, and it would be for the best interests of Richard to be placed in his father's custody. That conclusion section 42-312, R. S. 1943, specifically permits.

Almost immediately after plaintiff was awarded the

divorce, she removed the children to California, in violation of the very decree upon which she now relies. There she moved them from pillar to post, and placed them in the care and supervision of others than herself, until in her custody Richard became uncontrollable, ill, nervous, and insecure, longing always for his father and the farm. In that situation, ultimately with no place to live, and her mother too ill to look after them, it is apparent that plaintiff sent the boys to their father in Nebraska, never intending that Richard should return. As I view it, the plaintiff is incompatible with and temperamentally unfit to have his custody.

Since the divorce, the father has married a lovely woman, whose character has never been the subject of attack. The father is now a substantial farmer with an excellent, stable home, wherein Richard has completely changed in character to become well, strong, cooperative, obedient, and happy. In other words, in that home of love, devotion, stability, and security, wherein he longs to live, Richard has found himself.

The future of a ten-year old boy is judicially at stake. His wish, expressed in anguish upon many occasions, has been judicially thwarted and denied. In State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677, this court held: "In awarding the custody of a minor child of over nine years of age, and of apparent intelligence and discretion, the express wishes of the child will usually be accorded great weight."

I believe that the judgment of the trial court should be affirmed.

IN RE ESTATE OF ADDIE FARR, DECEASED. FERN ALLEN ET AL., APPELLEES, V. CLIFFORD D. FARR, EXECUTOR, APPELLANT.

35 N. W. 2d 489

Filed January 10, 1949. No. 32438.

1. **Wills.** In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.
2. ———. It is not error for the court to refuse or fail to set forth separately the four elements in an instruction if their essentials are sufficiently contained in instructions given.
3. ———. The holding in Latham v. Schaal, 25 Neb. 535, 41 N. W. 354, and the like holding of the other cases cited in the opinion, that in a will contest on the ground of undue influence it must be shown that the circumstances of the execution of the will were inconsistent with any hypothesis but undue influence are overruled.
4. ———. In a will contest on the ground of undue influence the contestant is entitled to have the jury consider all facts adduced and also all reasonable inferences which may be drawn from such facts.
5. ———: **Appeal and Error.** In a will contest on the ground of undue influence which has been submitted to a jury on conflicting evidence on that issue the verdict of a jury finding that the will was procured by undue influence will not be disturbed on appeal unless it may be said that there was no competent evidence to sustain it.

APPEAL from the district court for Rock County: DAYTON R. MOUNTS, JUDGE. *On motion for rehearing, former opinion and judgment vacated and set aside and judgment of district court affirmed.*

Arthur A. Weber and *Wells, Martin & Lane,* for appellant.

G. A. Farman, Jr., and *Julius D. Cronin,* for appellees.

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

YEAGER, J.

This is an appeal from a judgment of the district court entered on the verdict of a jury denying probate to a purported last will and testament of Addie Farr, deceased. The will was contested by W. E. Farr, known as Gene Farr, and Fern Allen, son and daughter respectively, on the ground, among others, that it was procured by undue influence of Clifford D. Farr, another son and the proponent. Clifford D. Farr is appellant and W. E. Farr and Fern Allen are appellees.

On a trial to a jury in the district court a verdict was returned sustaining the contention of the contestants and denying admission of the will to probate. Judgment was entered on the verdict.

In an earlier opinion which appears as In re Estate of Farr, *ante* p. 67, 33 N. W. 2d 454, the judgment of the district court was reversed with directions to set aside the verdict and to adjudge that the instrument was the last will and testament of Addie Farr, deceased, and to cause the judgment to be certified to the county court.

The opinion was predicated upon the theory that there was not sufficient evidence to justify submission of the issue of undue influence to a jury.

After reargument and further examination and analysis we have concluded that we were in error in this respect and accordingly for the purpose of a decision herein the former opinion to the extent that it is in conflict herewith is withdrawn.

Except for errors assigned as to instructions tendered by proponent and refused and as to instructions given by the court on its own motion the only question for review is that of whether or not there was sufficient evidence upon which to submit to the jury the charge of undue influence.

The will which is the subject of the contest herein was executed by Addie Farr on October 30, 1945. She died January 2, 1947, at about the age of 81 years. By the terms of the will W. E. Farr was to receive $5; Elmo

Keller and Clesson Keller, grandchildren, $5 each; Thelma Holiday, a granddaughter, $100; Roy M. Farr, a son, a described quarter section of land; and Clifford D. Farr, the proponent, the residue of the real and personal estate subject to the payment of $1,000 in cash to Fern Allen, one of the contestants, within six months after the death of the testatrix.

The personal estate has not been described but as residue there are 320 acres of land and a house and lots in Newport, Nebraska, which by virtue of the residuary clause in the will would go to Clifford D. Farr. What this land and the house and lots are worth is made none too clear but they are of considerable value. It appears that Clifford D. Farr was to receive the entire estate of his mother except sufficient for payment of debts and funeral expenses, 160 acres of land, and bequests amounting to $1,115.

The will was offered in the county court and there, over objection of the appellees here, was admitted to probate. Appeal was taken to the district court where, as already stated, probate was denied. It was denied on the ground that the will was procured by undue influence.

As pointed out the assignments of error relate to instructions given and refused and to the question of whether or not there was evidence sufficient upon which to submit the question of undue influence. The assignments of error relating to instructions which require consideration will be discussed first.

The first of these assignments asserts that the court erred in refusing to give appellant's tendered instruction No. 7, the pertinent part of which is as follows: "Before you can find for the contestants, the contestants have the burden of proving by the preponderance of the evidence that (a) Addie Farr was a person who would be subject to such influence, (b) that Clifford D. Farr had an opportunity to exercise such influence, (c) that Clifford D. Farr was disposed to exercise such influence, and (d)

that the resulting will was the effect of such influence," and giving its instruction No. 10, the pertinent part of which is as follows: "You are instructed that in order for the contestants, Fern Allen and W. E. Farr, to prevail in this case on the ground of undue influence two things must be proven by them:—First: That undue influence was in fact exerted by Clifford D. Farr. Second: That it was successful in subverting and controlling the will of the testatrix, Addie Farr. Both of these facts must be proven by the contestants by a preponderance of the evidence in order to defeat the will on the ground of undue influence."

The appellant correctly asserts that in a will contest on the ground of undue influence the burden is on the contestant or contestants to establish by a preponderance the four elements enumerated in his tendered instruction No. 7. In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801; In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63. It is not error however for the court to refuse or fail to set forth separately the four in an instruction if their essentials are sufficiently contained in instructions given.

In the case of In re Estate of Keup, *supra,* this court considered an instruction in substance like instruction No. 10 given in this case which instruction was being subjected to the same criticism as here. In determining that the instruction was sufficient, it was said: "While the four elements must be established by the evidence to make a case sufficient to submit the issue to a jury and to sustain a verdict based thereon, however, it is not necessary that the court give an instruction setting forth the four elements separately provided they are sufficiently contained in the instructions given. We have examined the instructions given by the court and find they are sufficient." Here likewise we find that the instruction given in this respect was sufficient and that the assignment is without merit.

The next instruction excepted to is No. 11. It is discussed in argument along with instruction No. 12. It is urged that these two instructions read together placed matters before the jury concerning which there was no evidence and that they contained an overemphasis of certain matters. We think the contentions are without merit.

The first paragraph of instruction No. 11 is definitive of undue influence not inconsistent with instruction No. 10 and is introductory to cautionary provisions to the jury enjoining upon them a degree of care in weighing and considering the evidence altogether favorable rather than unfavorable to the appellant. The gist of the instruction was an emphasis upon the necessity for proof of the elements necessary to establish that a will was the result of undue influence. We fail to see how this could be ground for complaint on behalf of appellant.

Instruction No. 12 is also a cautionary instruction which cannot be calculated to favor the appellant, and also we think it cannot properly be considered as favoring the appellees. The part of the two instructions to which primary objection is obviously made is found in the fourth paragraph of instruction No. 11 and is in substance and in almost the exact wording of a pronouncement made in In re Estate of Noren, 119 Neb. 653, 230 N. W. 495, and repeated in the opinion in In re Estate of Bowman, *supra*. It cannot well be said that a cautionary measure imposed for guidance of this court in such situations as this becomes error when in a like situation the same measure of guidance is extended to a jury.

In another assignment of error instructions Nos. 11 and 12 are criticized on the ground that they invited the jury to speculate and permitted the drawing of improper inferences. They have been examined and we fail to find any reasonable basis for the criticism.

Appellant complains of instruction No. 14½ which is as follows: "If you find from the evidence that the will makes an inequal, unreasonable or unnatural disposition

of the property of the deceased, you may consider this fact along with all the other evidence in the case in determining whether or not the will is the result of undue influence, as defined in these instructions."

Appellant contends that there was no evidence upon which to justify a consideration by a jury of whether or not the disposition made by the will was "unreasonable or unnatural." He however does not contend that unreasonableness or unnaturalness of a disposition in a will if the contention is supported by evidence is not a proper issue.

Assuming but not yet deciding that a jury question was presented on the question of undue influence we are of the opinion that there was evidence from which a jury might properly infer that the disposition made by this will was unreasonable and unnatural. This evidence will not be pointed out here but it will become apparent in the later consideration of the case. We conclude that the assignment is without merit.

Appellant contends that the court erred in refusing to give his tendered instruction No. 8, the pertinent part of which is as follows: "You are further instructed that if you can reasonably draw contrary or opposing inferences from the facts as you find them on the evidence, one inference which might lead to a supposition of undue influence and a contrary inference that no undue influence was exerted by Clifford Farr, your verdict should be in favor of the proponent * * *." The substantial contention in this connection is that the jury should have been instructed if they could reasonably infer that there was undue influence and also infer that there was not that they were required to accept the latter and reject the former inference.

If we are to follow a line of pronouncements of this court beginning in 1889 and carrying through to April 1926, which line has never been directly overruled, it will become necessary to say that it was error for the

court to refuse to give this instruction or one of like import.

In Latham v. Schaal, 25 Neb. 535, 41 N. W. 354, in a syllabus point by quotation from Maynard v. Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. R. 276, this court said: "Influence, to vitiate a will, must be such as to amount to force and coercion, destroying the free agency of a testator, and there must be proof that the will was obtained by this coercion; and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be proved, and in connection with the will and not with other things." This is not an accurate quotation of what the Michigan court said but it does faithfully reflect the holding. The holding however was overruled by that court in Bush v. Delano, 113 Mich. 321, 71 N. W. 628. The pronouncement in Latham v. Schaal, *supra,* was followed and approved in Stull v. Stull, 1 Neb. (Unoff.) 389, 96 N. W. 196; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39; In re Estate of Dovey, 101 Neb. 11, 162 N. W. 134; and In re Estate of Kees, 114 Neb. 512, 208 N. W. 637.

It will be observed that the tendered instruction is in all substantial particulars the same as the quoted syllabus point except that the instruction employs the term "inference" whereas the syllabus point uses "hypothesis." The former term having more technical substance than the latter, the instruction was no less favorable to appellees than it would have been had the latter been used instead.

The later cases, while they do not overrule this pronouncement, do not include in the burden of proving undue influence sufficient to overcome a will the requirement that the evidence shall exclude inconsistency with any other hypothesis, or inference.

In In re Estate of Wilson, 114 Neb. 593, 208 N. W. 961, quoting from Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650, it was said: "Where it is alleged that the

execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended."

This statement was quoted with approval in In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928. Also in the opinion it was said: "Mere supposition of undue influence is not sufficient to carry the case to the jury, but it must appear by proof, or by fair inference to be drawn from the facts established, that there was undue influence."

In In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573, it was said: "Considering first the issue of undue influence it may be stated here that the general rule is that the burden is upon the party alleging that a will was procured by undue influence to establish that the testator was induced by improper means so to make it."

In In re Estate of Bowman, *supra,* quoting from Ginter v. Ginter, 79 Kan. 721, 101 P. 634, 22 L. R. A. N. S. 1024, it was said: "In making his proof a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts."

The rules stated in these late cases were reiterated in In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

It is made clear by these cases that in a case where a will is being contested on the ground of undue influence the contestant is entitled to have considered by the jury all evidence and all inferences reasonably to be drawn from the evidence. We think this should be the proper and accepted rule.

To hold that a hypothesis or inference that there was no undue influence is sufficient to defeat a contest of a will on the ground of undue influence would be to deny to a contestant the right to have his evidence weighed in its own light and in the light of reasonable inferences to be drawn from it.

This ought not to be true especially in the light of what usually confronts the court in a case of this kind as pointed out in In re Estate of Noren, *supra,* as follows: "Undue influence * * * is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity afforded designing persons for the exercise of improper control."

We hold that the court did not err in refusing to give requested instruction No. 8. The holdings of the cases cited herein in conflict with this conclusion are to this extent overruled.

There remains the question of whether or not there was sufficient evidence to sustain the verdict or in other words whether there was sufficient evidence upon which to submit the issue of undue influence to a jury.

As a background for this determination it appears necessary to set out certain of the family history and the circumstances which led to the making of the will in question.

In the immediate background of this controversy is the elimination of the interest of the deceased, Addie Farr, in two ranches in Rock County, Nebraska, and the division thereof between Clifford D. and W. E. Farr.

William E. Farr was the husband of Addie Farr and the father of Clifford D. Farr, W. E. Farr, Roy M. Farr, Fern Allen, and Gertrude Keller and the grandfather of Thelma Holiday, Elmo Keller, and Clesson Keller. He died testate on December 25, 1916. In his lifetime he purchased the nucleus of what is described in this record as the north and south ranches. He and his family lived on the south ranch from probably 1882 until about 1914 when he bought a store in Newport, Nebraska, where he moved his residence. He bought a house and some lots in Newport also. After his death

other lands were purchased which became a part of the two ranches.

By his will William E. Farr gave his widow the house in Newport and adjoining lots, one-fourth interest of all personal property, all personal effects, household goods, jewels and ornaments, and $500, and an undivided one-third of the south ranch. The three sons were given the remaining two-thirds of the south ranch, three-fourths of the personal property, all of the north ranch, and the store property including the connected lots.

The estate was heavily encumbered and the will required that the sons should pay off the indebtedness against the ranches, otherwise the land was to go to the widow. The two daughters were to be paid $3,000 each after the mortgages against the lands were paid off.

It became necessary later to refinance, so to facilitate this the two daughters released their liens. Later, apparently, they received the amounts provided for them in the will.

The ranches were operated by the mother and the three brothers on a partnership basis until 1927 when Roy surrendered his interest in the estate and withdrew. At some time not necessary to be made certain the store was closed and became no longer a part of the operations.

After Roy withdrew, the mother and the other two brothers continued to operate as a partnership. Over the years adjoining lands were purchased and depending upon the ranch which they adjoined they were added thereto and were treated and considered a part thereof.

In July 1945 it appears that difficulty arose between Clifford D. and W. E. Farr and they proceeded to effect a dissolution of the partnership operation. Also they proceeded to effect between themselves and with their mother a division and distribution of the ranches and the partnership funds.

As a first step the bank account was divided equally between the two brothers. Division of the real estate was not immediately agreed upon.

Agreement was finally reached in October 1945. By the agreement W. E. Farr was to receive the south ranch and Clifford D. Farr was to receive the north one except 320 acres which the mother was to receive free of encumbrance. The mother was to receive the quarter section of land not referred to as a part of either the north or south ranch.

On October 24, 1945, instruments of conveyance and transfer were duly executed and delivered making effective the agreement. The brothers made division of the personal property. Thus the partnership was dissolved and the three parties became sole owners of separate properties.

After this it appears that Clifford D. Farr was in charge of his mother's interests and such moneys as came to her were carried in his account. There is no authentic information that he accounted to her for his stewardship in this respect. There is no suggestion intended that in this the mother was unfairly dealt with by her son.

After these events, up to and at the time of her death Addie Farr had the half section of land which had been a part of the north ranch, the other quarter section referred to, the house and lots in Newport, and the contents of the house. She left surviving her the children and grandchildren already named herein except Gertrude Keller who predeceased her.

On January 20, 1941, Addie Farr deposited a will with the county judge of Rock County, Nebraska, which was withdrawn October 30, 1945. It was withdrawn six days after the settlement with her two sons. From the testimony it would appear that by this will Roy M. Farr was to receive the quarter section of land not referred to as a part of any ranch, Fern Allen was to receive the home in Newport and the furniture and furnishings, and Elmo Keller and Clesson Keller were each to receive $5. The residue was to go to W. E. and Clifford D. Farr subject to debts.

The will of October 30, 1945, directed the payment of debts and funeral expenses. It gave to W. E. Farr, Elmo Keller, and Clesson Keller $5 each, and to Thelma Holiday $100. It gave to Roy M. Farr the same quarter section of land as was given in the former will. It gave the remainder of her property, real, personal, and mixed to Clifford D. Farr subject to the payment of $1,000 to Fern Allen within six months of the death of the testatrix.

It is this will that the contestants contend was procured by undue influence of Clifford D. Farr.

The elements necessary to be established in order to overturn a will on the ground of undue influence having already been stated herein, the proposition will not be restated.

It should be stated here that it is not the function of this court to determine the question of whether or not undue influence was established but only the question of whether or not there was sufficient evidence to justify the submission of that question to a jury and to sustain a verdict finding that the will was the result of undue influence. On this proposition there is no disagreement between the parties.

The elements will be discussed separately. There can be little if any doubt that there was evidence that Clifford D. Farr had ample opportunity to exercise influence over his mother. We think it fair to say that through the years after the death of William E. Farr he was her chief adviser and confidant and that when need or desire on her part arose he was the one who conducted her affairs. There is no evidence of a lack of cordial relationship with the other children but it was upon Clifford that she leaned. During the period between July 1945 and October 24, 1945, the dissolution of the partnership was discussed by the two of them apparently out of the presence of others. On October 30, 1945, Clifford took her to the scrivener and was present while the will was being drawn and when it was executed. It cannot well be said in the light of all this that there was a lack of evidence of

opportunity for Clifford D. Farr to exercise influence.

Was there evidence from which the jury could reasonably infer that Clifford D. Farr had a disposition to influence his mother? We think there was.

As indicated the negotiations for dissolution of the partnership extended over a considerable period of time. It reasonably appears that the delay was largely occasioned by dissatisfaction of Clifford D. Farr with what W. E. Farr proposed. It also reasonably appears from the evidence that this dissatisfaction was communicated to the mother by Clifford. It is reasonably inferable that it was on the basis of this communicated dissatisfaction that the mother was induced to agree to make a new will and later to make this one which greatly enlarged the interest to be taken by Clifford of the estate of his mother. Such a conclusion is evidenced abundantly by the testimony of Clifford generally and particularly by the following: "Q Now then you had in the back of your mind, did you, when you made the deal, that you were going to get this 320? A I felt pretty confident that I would. Q So that when you made the deal you thought you had a half section that wasn't in the figures, and you were going to have that much the best of Gene? A No, I didn't, not the best of him; I figured I was about even with him. Q In other words, in your agreements with him to settle on the proposed figures you talked about here, you knew at that time that you were going to get this half section, that that would belong to you after your settlement? A I figured mother would be fair, and knew she would do the right thing, which she did."

Coupled with this is the fact that though Clifford knew of his mother's intention and later her act, and though it affected materially his living sister and his brother W. E. very materially and substantially he communicated the information to no one of them until after the death of his mother. There appears in this sufficient to sustain a verdict the effect of which was to say that Clifford D. Farr had a disposition to influence his mother.

Was the testatrix subject to influence? The very fact that she was influenced was convincing evidence that she was subject to influence. The evidence of Clifford D. Farr already adverted to is evidence to indicate that she was influenced to make the new will by his dissatisfaction with the proposals of W. E. Farr.

Was the result accomplished sufficient to permit a jury to say that it appeared to be the effect of undue influence? Clearly the evidence was sufficient to permit a jury to say that the will was made under the influence of protestations made by Clifford D. Farr.

Was it sufficient to permit a jury to say that the influence was of such a character as to destroy the free agency of the testatrix and to substitute the will of Clifford D. Farr for her own? In the light of controlling legal principles we think it was. See, In re Estate of George, *supra;* In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Johnston, 147 Neb. 886, 25 N. W. 2d 526.

As has been pointed out in the cases cited the jury was not limited in its consideration to the bare facts adduced but, for reasons already set out, it was entitled to consider all reasonable inferences which were derivable from the established facts.

The jury had for consideration all that has already been pointed out herein and also evidence as to the value of the two ranches after division. They could readily on the evidence have concluded that the division was not unfavorable to Clifford. They obviously found that the sister was cut off with $1,000 whereas the property designated to go to her by the former will was of considerably greater value. They obviously found that it was the earlier intention of the testatrix to favor, and equally, Clifford D. and W. E. since the two of them, shoulder to shoulder with her through the years, had struggled to keep the estate together and remove its burdens. They could have found reasonably that instead Clifford was greatly favored over W. E. They could have found that

the will was executed pursuant to a secret arrangement between the testatrix and the chief beneficiary and that it was kept secret by the chief beneficiary until after the death of the testatrix with questionable motives. They of course found that the testatrix at the time she made the will was in age near four score years.

Taking into consideration all of the facts as disclosed by the record and the reasonable inferences proper to be drawn therefrom by a jury and considering them in the light of applicable legal principles we are unable to say that the evidence was insufficient to sustain the verdict of the jury.

The judgment of the district court is affirmed.

AFFIRMED.

DRYDEN & JENSEN, A CO-PARTNERSHIP, APPELLEES, V. CHARLES J. MACH, APPELLANT.
35 N. W. 2d 497

Filed January 10, 1949. No. 32480.

1. **Appeal and Error.** Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.
2. ———. This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions.

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

Wade H. Ellis and *George B. Clark,* for appellant.

Dryden & Jensen and *L. C. Hungerford,* for appellees.

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

CHAPPELL, J.

This was an action filed by plaintiff on November 2, 1945, to recover a balance of unpaid attorney's fees arising out of litigation wherein plaintiff was employed by and represented defendant.

The petition alleged in substance that defendant, by oral agreement, employed plaintiff on June 15, 1937, as attorneys to prepare and carry on certain described substantial litigation, in pursuance of which agreement plaintiff performed valuable services, thereby successfully terminating the litigation in September 1944. An itemized statement of the services rendered and the alleged reasonable value thereof was attached to and made a part of the petition, which prayed judgment for $420 as a balance due and unpaid.

On December 1, 1945, defendant answered, denying generally, and alleging that if he ever did owe plaintiff any money, a claim therefor was barred by the statute of limitations. However, as stated in defendant's brief: "The appellant does not deny that services were rendered by the appellees, but disputes the amount sought by the appellees. * * * appellant, denies that plaintiff's services were rendered for the period in question, and since certain sums had been paid for such services during the period the plaintiff was employed, that he, the appellant, is not indebted to the plaintiff in the sum as alleged, * * *."

The cause was set for trial to a jury on December 2, 1947. The transcript discloses that defendant and his attorney had due and proper notice thereof, but did not appear for the trial, whereupon a jury was impaneled, evidence was adduced, and on December 2, 1947, plaintiff was awarded a jury verdict for $420. Judgment on the verdict was filed December 22, 1947.

Defendant did not file a motion for new trial within 10 days as required by law, but waited until January 3, 1948, wherein he alleged among other things that illness of defendant, as supported by affidavit attached thereto, unavoidably prevented him from appearing or defending,

and that the verdict and judgment were contrary to law and not sustained by the evidence.

On March 10, 1948, defendant's motion for new trial was heard, whereat evidence was adduced, and the matter was argued and submitted to the trial court. By a journal entry dated March 10, 1948, and filed March 22, 1948, defendant's motion was overruled, for the reason that it was filed out of time and without sufficient showing that he was unavoidably detained or prevented from filing the same within 10 days after rendition of the verdict or date of entry of judgment thereon.

Defendant made a cash deposit and filed notice of appeal in the office of the clerk of the district court on April 9, 1948. Praecipe for a bill of exceptions was filed April 17, 1948. Counsel for defendant received the bill of exceptions on May 22, 1948, but did not serve the same upon plaintiff until August 11, 1948, who returned it on August 12, 1948, with objections thereto in its entirety because the same was out of time. The trial court thus settled the bill of exceptions on August 21, 1948, and it was filed in this court on August 23, 1948.

On September 13, 1948, plaintiff filed in this court a motion to strike the bill of exceptions. Same was duly noticed for hearing, and after presentation thereof, on September 20, 1948, the motion was sustained on October 2, 1948, and the bill of exceptions was stricken because of failure of defendant to comply with the provisions of sections 25-1140 to 25-1140.07, R. S. Supp., 1947.

In that situation, there is no bill of exceptions in the record, and, since defendant's assignments of error all required an examination of the evidence adduced in the trial court for decision thereon, we have presented only the question of whether or not the pleadings supported the judgment.

In that connection, it was held in Joyce v. Tobin, 126 Neb. 373, 253 N. W. 413: "Where bill of exceptions has been quashed, it will be presumed that evidence supports finding of fact of trial judge.

"Without bill of exceptions, the only question which can be presented to this court is sufficiency of pleadings to support judgment."

Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438, reaffirmed the rule that where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed. See, also, Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622, and Gilmore v. State, 148 Neb. 10, 26 N. W. 2d 296.

In Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711, it was said: "With the bill of exceptions quashed, it must be presumed that the evidence supports the findings of fact made by the trial judge. * * * The time having elapsed for preparing, serving, settling and filing a proper bill of exceptions, the presumption that the record supports the findings of the trial court becomes conclusive. As the pleadings support the judgment, the appeal under such circumstances must be dismissed. Joyce v. Tobin, 126 Neb. 373, 253 N. W. 413."

The affidavit of defendant in support of his motion for new trial does appear in the transcript, but it cannot be considered here because of the well-established rule that this court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions. See, Gray v. Godfrey, 43 Neb. 672, 62 N. W. 41, and Duffy v. Scheerger, 91 Neb. 511, 136 N. W. 724.

We conclude that the pleadings in the case at bar were sufficient to support the judgment, and for the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

R. BROWN, APPELLEE, V. CHARLES J. MACH, APPELLANT.
35 N. W. 2d 499

Filed January 10, 1949. No. 32481.

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

Wade H. Ellis and *George B. Clark,* for appellant.

Dryden & Jensen and *L. C. Hungerford,* for appellee.

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

CHAPPELL, J.

This was an action filed by plaintiff on November 2, 1945, to recover unpaid attorney's fees arising out of litigation wherein plaintiff was employed by and represented defendant.

The petition alleged in substance that on or about April 15, 1944, defendant, by oral agreement, employed plaintiff as an attorney to represent him in various matters arising out of litigation then pending, in pursuance of which agreement plaintiff performed valuable services to and including September 23, 1944. An itemized statement of the services rendered and the alleged reasonable value thereof was attached to and made a part of the petition, which prayed judgment for $500 as a balance due and unpaid.

On December 1, 1945, defendant answered, denying generally. However, as stated in defendant's brief: "The appellant does not deny that services were rendered, but disputes the amount sought by the appellee. * * * appellant, denies that plaintiff's services were rendered for the period in question, and since certain sums had been paid for such services during the period the plaintiff was employed, that he, the appellant, is not indebted to the plaintiff in the sum as alleged, * * *."

The cause was set for trial to a jury on December 2,

1947. The transcript discloses that defendant and his attorney had due and proper notice thereof, but did not appear for trial, whereupon a jury was impaneled, evidence was adduced, and on December 2, 1947, plaintiff was awarded a jury verdict for $500.

From that point on, the proceedings herein were identical with Dryden & Jensen v. Mach, No. 32480, *ante* p. 629, 35 N. W. 2d 497, except that the journal entry overruling defendant's motion for new trial was filed on March 17, 1948, instead of March 22, 1948, as in the foregoing case. A fortiori, the applicable and controlling rules of law herein are also the same as in Dryden & Jensen v. Mach, *supra,* and for that reason they will not be repeated in this opinion.

For the reasons therein and herein set forth, the judgment should be and hereby is affirmed.

AFFIRMED.

JOSEPH J. SIMCHO, JR., APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, A CORPORATION, APPELLANT, LAYNE-WESTERN CO., APPELLANT, J. L. BRANDEIS & SONS, A CORPORATION, APPELLEE.

35 N. W. 2d 501

Filed January 10, 1949. No. 32352.

1. **Trial.** Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error.
2. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.
3. **Automobiles.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent of him to proceed into the intersection.

4. ———. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight.
5. **Trial.** Instructions to the jury should be considered together that they may be properly understood and when, as an entire charge, it appears that they do not limit recoverable negligence to that charged in plaintiff's petition, but authorize recovery for negligence generally, they will ordinarily be adjudged to be prejudicially erroneous.
6. ———. Where two conflicting instructions are given on a question, one containing an incorrect and the other a correct statement of the law, the latter will not cure the former.
7. **Automobiles: Master and Servant.** A corporation is liable for the negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver.
8. ———: ———. A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in employer's or principal's business with his knowledge and direction.
9. **Trial.** The stating of the issues in an instruction by substantially copying the pleadings of the parties is criticized and if such an instruction results in prejudice to the complaining party it is reversible error.
10. **Negligence.** The proximate cause of an injury is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.
11. ———. When instructions are requested by either party to a suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own motion.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded.*

Kennedy, Holland, DeLacy & Svoboda and *G. H. Seig,* for appellants.

Eugene D. O'Sullivan, Arthur J. Whalen, Ernest S. Priesman, Eugene D. O'Sullivan, Jr., and *F. W. Davidson,* for appellees.

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

WENKE, J.

Joseph J. Simcho, Jr., commenced this action in the district court for Douglas County against the Omaha & Council Bluffs Street Railway Co., a corporation, the Layne-Western Co., a corporation, and J. L. Brandeis & Sons, a corporation. The purpose of the action is to recover damages against the defendants Omaha & Council Bluffs Street Railway Co. and Layne-Western Co. for personal injuries which plaintiff sustained in an accident which he alleges was caused by negligent acts of said defendants' employees. Plaintiff recovered a verdict against both of these defendants. Both defendants filed separate motions for new trial. From an order overruling said motions, each of said defendants have separately appealed.

J. L. Brandeis & Sons, appellee's employer at the time of the accident, was made a party defendant in this action because, under the provisions of the workmen's compensation law, it had made certain payments to appellee and for him. Since its right of subrogation does not become material, unless appellee sustains his recovery, no further mention will be made herein of said defendant.

The appellants will be referred to as such except when referred to separately. Then the Omaha & Council Bluffs Street Railway Co. will be referred to as the Street Railway Co. and the Layne-Western Co. by its full name.

The accident herein involved happened sometime about 9:15 a. m. on October 22, 1941, in the city of Omaha at the intersection of Leavenworth and Thirty-third Streets. It had been raining and the streets were wet. It was still cloudy and misting at the time of the accident.

Leavenworth Street runs east and west with a surfaced area from curb to curb of 54 feet. Thirty-third

Street runs north and south with a surfaced area north of Leavenworth that is 28 feet from curb to curb and south thereof, 30 feet from curb to curb. Leavenworth, at this point, is a through street with stop signs on Thirty-third Street at the northwest and southeast corners of the intersection. These stop signs are located about 8½ feet back from the curb line of Leavenworth. Both streets are hard-surfaced. Leavenworth, at the intersection, slopes upgrade to the east about 1.67 percent. Thirty-third Street, north of Leavenworth, slopes upgrade toward Leavenworth 11.39 percent. However, Leavenworth is flat as Thirty-third Street crosses it. From Leavenworth toward the south Thirty-third Street slopes upgrade 4.38 percent. There are two sets of streetcar tracks on Leavenworth, one for east-bound and the other for west-bound traffic. Each set of tracks is located about 3 feet from the center line of the street.

There were three vehicles involved in the accident. They consisted of the bus of the Street Railway Co., the tractor of the Layne-Western Co., and the panel truck of J. L. Brandeis & Sons. The vehicle of the Layne-Western Co., which will be referred to in this opinion as a tractor, is in fact a truck tractor used for the purpose of hauling trailers. The panel truck was being driven by the appellee and had come from the south on Thirty-third Street. It stopped on Thirty-third Street at a point just south of the stop sign located at the southeast corner of the intersection and about 2 feet out from the east curb. After he stopped appellee proceeded to check his route sheet in order to determine the next stop on his route of delivery. With him in the truck was his helper, Nicholas Centretto.

At about the same time the bus was approaching Leavenworth from the north on Thirty-third Street. As it reached the stop sign located on Thirty-third Street at the northwest corner of the intersection it came to a stop adjacent to the west curb. It then pro-

ceeded south into the intersection to continue on its route south on Thirty-third Street. Just after the bus had crossed the center line of Leavenworth, and when it was upon or just after it had crossed the east-bound streetcar tracks, it was hit near its right front wheel by the front of a tractor owned by the Layne-Western Co. This tractor was traveling east on Leavenworth.

As a result of the bus being hit by the tractor the driver of the bus lost control thereof. The bus continued across Leavenworth. Because the collision cramped its front wheels the bus traveled in a southeasterly direction. It ran into the J. L. Brandeis & Sons' truck as it was parked on Thirty-third Street at the southeast corner of the intersection. As a result of this latter collision the appellee claims he was injured and for these injuries he here seeks damages.

The first question involved in each of the appellants' separate appeals is the sufficiency of the evidence to present a jury question. There were several grounds of negligence submitted as to each appellant. Necessarily this question arises as to each of said grounds for if there is sufficient evidence to submit any one of them then there was a jury question as to that issue, although error requiring reversal may have been committed by submitting separate grounds of negligence in support of which there is no evidence in the record. Of course, if there was no evidence to support any one of the several grounds of negligence with which each appellant was charged then its motion for a directed verdict should have been sustained and the action should have been dismissed.

As stated in Roseland v. Chicago, M., St. P. & P. R. R. Co., 130 Neb. 637, 265 N. W. 882: "Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error."

This is discussed in Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114, as follows: "This

court has often pointed out that it is error to submit issues upon which there is no evidence to sustain an affirmative finding. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial." See, also, Tighe v. Interstate Transit Lines, 130 Neb. 5, 263 N. W. 483; Knoche v. Pease Grain & Seed Co., 134 Neb. 130, 277 N. W. 798; Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078; Pollat v. Wray, 141 Neb. 9, 2 N. W. 2d 352; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439; and Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411.

Since appellee had a jury verdict we will apply to the record the rule as stated in Remmenga v. Selk, *ante* p. 401, 34 N. W. 2d 757, to wit: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom."

In considering the testimony it is of course true, as stated in Rocha v. Payne, 108 Neb. 246, 187 N. W. 804, that: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of." See, also, Leon v. Kitchen Bros. Hotel Co., *supra*.

In submitting the case to the jury the court submitted the following separate grounds of negligence as to the Layne-Western Company:

"A. In operating said truck at a rate of speed greater than was reasonable and proper under the circum-

stances and at a rate of speed between 15 and 20 miles per hour;

"B. In failing to stop or bring its truck to a stop to avoid said collision.

"C. In failing to keep said truck under reasonable and proper control;

"D. In failing to keep a proper lookout so as to avoid said collision; and

"E. In failing to turn or change the course of said truck so as to avoid a collision."

In our discussion of the foregoing we will refer to the separate grounds submitted by the letter indicative thereof.

With reference to A the evidence establishes that the tractor was being driven east on Leavenworth Street at a speed of somewhere between 15 and 20 miles per hour. This was within the legal limit. When the driver thereof observed the bus he applied his brakes and stopped within a distance of about 10 feet and only slid his tires a distance of about three feet on the wet surface. Under all of the facts and circumstances shown by the record, we think its speed was reasonable and proper and this issue should not have been submitted to the jury.

With reference to B the evidence establishes that the driver of the tractor, upon observing the bus, immediately applied his brakes and stopped within a distance of about 10 feet. It is true that the tractor finally came to a stop when it hit the bus but the blow was light and the tractor had practically come to a stop before the collision occurred. We do not think the record contains any evidence which would justify the submission of this issue.

There is no evidence in the record that justifies the submission of C or E.

As to D there is evidence that the driver of the tractor did not see the bus until it was immediately before him some 15 feet away; that he immediately

applied his brakes and stopped within about 10 feet but not before he hit the bus; that as a result of hitting the bus it cramped the front wheels thereof and threw the driver so he no longer had control of its operation; that the bus, with its wheels cramped, then continued across the intersection completely out of control; that it ran into the Brandeis truck. This evidence presented a jury question on this issue.

In submitting the case to the jury the court submitted the following separate grounds of negligence as to the Street Railway Company:

"A. In failing to stop said bus at the stop sign;

"B. In failing to yield the right of way to the truck owned by the defendant Layne-Western Co.;

"C. In failing to have its bus under proper control.

"D. In failing to keep a proper lookout so as to avoid said collision;

"E. In failing to turn or change the course of said bus to avoid said collision;

"F. In employing an incompetent and inexperienced driver knowing said driver to be incompetent and inexperienced;

"G. In driving said streetcar bus on the wrong side of 33rd Street."

With reference to A the direct evidence is all to the effect that the bus did stop at the stop sign. We do not think the facts and circumstances as they relate themselves to the accident would permit any inference that it did not do so. This issue should not have been submitted to the jury.

In discussing B and D these principles are applicable:

"A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent of him to proceed into the intersection." Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660.

" 'The duty of the driver of a vehicle * * * to look for vehicles approaching on the highway implies the duty to see what was in plain sight.' Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36, citing Kemmish v. McCoid, 193 Ia. 958, 185 N. W. 628." Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673.

The bus driver testified that as he started to enter the intersection from a standing start that he looked to the west but did not see the tractor; that he looked again when on the west-bound streetcar tracks and saw the tractor coming from the west but at a distance which he approximated to be about 75 feet; that he proceeded on at a speed of about 10 miles per hour and was hit near the right front door of his bus at a point on or just south of the east-bound streetcar tracks. From the other evidence in the record, particularly that relating to the speed of the tractor, the jury could have found that when the bus driver entered the intersection the tractor was in plain sight but that he failed to see it; that when he saw it as he looked to the west, at about the time he was on the north track, that it was much closer than he thought it was; and that on either occasion, considering the speed of the bus, he had time enough to yield the right-of-way had he been keeping a proper lookout and observed the oncoming tractor. Both of these issues were properly for the jury.

There is no evidence in the record to justify the giving of C and E.

As to F there is no evidence that the driver of the bus was either inexperienced or incompetent. He had been driving a bus for the Street Railway Co. for many years. It is true that the type of bus involved in the accident, that is, fluid drive, had only recently been installed by the Street Railway Co. However, this driver had taken a course of training in driving it and there is nothing in the record that would sustain a finding that his driving of the bus, insofar as his competency and experience with this type of bus was concerned, in any way related itself

to the accident. The issue should not have been submitted to the jury.

As to G there is no evidence that the driver of the bus drove it on the wrong side of Thirty-third Street. When the bus was hit it was on the right side of Thirty-third Street in the intersection just south of the center line of Leavenworth. After it was hit by the tractor the driver of the bus lost control thereof and then, because the wheels were cramped by the blow, it rolled forward in a southeasterly direction, not because it was driven there, but because of the results of the accident. This issue should not have been submitted.

Both appellants complain that instruction No. 7, as given by the court, violates the principle announced by this court in Ellis v. Union P. R. R. Co., 148 Neb. 515, 27 N. W. 2d 921. Therein we said: "In such cases, instructions to the jury should be considered together that they may be properly understood and when, as an entire charge it appears that they do not limit recoverable negligence to that charged in plaintiff's petition, but authorize recovery for negligence generally, they will ordinarily be adjudged to be prejudicially erroneous."

This principle should, of course, be read in the light of the following: "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19.

After setting forth in its instruction No. 1 the separate grounds of negligence of which the appellee alleged the appellants were guilty, and upon which he bases his right to recovery, the court, by its instruction No. 6, then properly placed on the appellee the burden of establishing, by a preponderance of the evidence, that the appellants, or one of them, was negligent in respect to one or more of these grounds; that such negligence was the proximate cause of his injury, pain, and suffering; and

the extent and nature of any such injury, pain, and suffering and the amount of his damages.

The court then went on to give its instruction No. 7 which contains the following language: "* * * if you find from a preponderance of the evidence that either defendant or both of them was guilty of any negligence which either proximately caused or contributed to cause the accident and if you find that the plaintiff has established by a preponderance of the evidence the other things required of him to be established as set out in Instruction No. 6, then you shall find for the plaintiff and against such defendant or both of them as you may find from a preponderance of the evidence was guilty of some negligence that either proximately caused or contributed to cause the accident."

We think the quotation cited in Ellis v. Union P. R. R. Co., *supra,* from Indianapolis & Cincinnati Traction Co. v. Sherry, 65 Ind. App. 1, 116 N. E. 594, is particularly applicable here. Therein we quoted the following: "Appellant's contention is that this instruction failed to limit the right of recovery to the acts of negligence alleged in the complaint, but opened wide the door and informed the jury that it might return a verdict for appellee if it found the injuries alleged in the complaint were the result of the negligence of appellant, whether alleged in the complaint or not. It is well settled that a plaintiff is only entitled to recover, in an action for damages predicated on negligence, by proof of one or more of the specific acts of negligence alleged in his complaint, and that a failure to make such proof will defeat his right of action, no matter what other acts of negligence are disclosed by the evidence. * * * The giving of this instruction violates this rule, as its reasonable interpretation would lead the jury to believe that it was its duty to return a verdict for appellee, on a finding that his injuries were caused by any negligence of appellant, regardless of the allegations of the complaint. The giving of it was therefore error."

The Layne-Western Co. contends that appellee failed to prove that the tractor, which ran into the bus, was owned by it; that the driver thereof was in its employment; and that, at the time of the accident, he was engaged in business for it, with its knowledge and direction.

We stated in Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387, that:

"A corporation is liable for the negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver.

"A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in employer's or principal's business with his knowledge and direction."

In Fidelity Finance Co. v. Westfall, 127 Neb. 56, 254 N. W. 710, we said: "Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it."

By its second amended answer the Layne-Western Co. admitted its ownership of the tractor but otherwise these matters were denied by the pleadings. The record discloses evidence from which the jury could have found that Donald McGowan, the driver of the tractor, had just taken a trailer to McGrath Welding for repair and was returning to the storage yards of his employer, the Layne-Western Co., located on South Thirteenth Street to get another. We think there is sufficient evidence in the record to sustain this issue but the matter should have been submitted to the jury. See Shaffer v. Thull, 147 Neb. 947, 25 N. W. 2d 755.

The Layne-Western Co. contends that the court's instruction No. 1 comes within the scope of the practice condemned in McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757, and therefore requires a reversal of this case. Therein we said:

"The stating of the issues in an instruction by substantially copying the pleadings of the parties is again condemned.

"If such an instruction results in prejudice to the complaining party, it is sufficient ground for a reversal."

While instruction No. 1, as given by the court, leaves much to be desired insofar as such instruction should concisely state the issues, however, other than including allegations of negligence which find no support in the evidence we do not think it contains any matters the effect of which it can be said were prejudicial. We think this contention to be without merit.

The Layne-Western Co. contends that the appellee alleged and the evidence establishes that the proximate cause of the injury to his back was occasioned immediately following the accident when he attempted to lift the fender off the tire of the Brandeis truck.

"The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Spratlen v. Ish, 100 Neb. 844, 161 N. W. 573. See, also, Williams v. Hines, 109 Neb. 11, 189 N. W. 623, and Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117.

There is evidence in the record from which the jury could have found that appellee, immediately following the accident, injured his back while attempting to lift the fender of the Brandeis truck off the tire thereof. It had been pushed there by the collision with the bus. However, there is also ample evidence from which the jury could have found that the appellee never actually attempted to lift the fender but that his back was injured as a result of the accident. Such finding would be in accord with and support the allegations of appellee's amended and supplemental petition. Therefore this contention is without merit.

What has been said with reference to the sufficiency of the evidence to establish that the injury to appellee's

back was caused by the accident can be said of evidence establishing that the injury to appellee's back was the direct cause of the necessity for an operation thereon in May 1943.

There are other assignments of error made by the appellants. They relate primarily to the court's refusal to give requested instructions which define the rights and duties of the respective drivers while traveling on or approaching a through or arterial street. Since the case must go back for retrial the same questions may not arise again in exactly the same manner and it would serve no useful purpose to discuss them here. However, discussions of these rights and duties, as they may arise in connection with any evidence adduced on retrial, will be found in Schrage v. Miller, 123 Neb. 266, 242 N. W. 649; Bergendahl v. Rabeler, *supra;* and Meyer v. Hartford Bros. Gravel Co., *supra.*

And, with reference thereto, we have stated the trial court's duty to be: "When instructions are asked by either party to a suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own motion." Strubble v. Village of DeWitt, 81 Neb. 504, 116 N. W. 154.

For the reasons stated the judgment of the trial court is reversed, the verdict of the jury is vacated and set aside, and the cause is remanded to the district court for retrial.

REVERSED AND REMANDED.

ALWINE MEIER, APPELLANT, V. CAROLINE SCHMIDT, APPELLEE.

35 N. W. 2d 500

Filed January 14, 1949. No. 32462.

APPEAL from the district court for Dawson County:

ISAAC J. NISLEY, JUDGE. On oral argument on motion for rehearing. See *ante* p. 383, 34 N. W. 2d 400, for original opinion. *Motion for rehearing overruled.*

W. A. Stewart, Jr., and *Thomas & Cattle,* for appellant.

Carr & Hoagland and *York & York,* for appellee.

Heard before PAINE, CARTER, MESSMORE, YEAGER, CHAPPEL, and WENKE, JJ.

CARTER, J.

The brief on rehearing raises no new questions nor cites any new authorities on the issues decided by our opinion, *ante* p. 383, 34 N. W. 2d 400. It does manifest a complete misconception of the holding of the opinion and the effect that it has upon the litigation. We shall endeavor to clarify it in this respect.

The litigation was commenced by the filing of a petition by Alwine Meier, a German national, on February 6, 1939. The defendant filed a general denial on April 1, 1942. Plaintiff filed a motion for a revivor on July 1, 1947, in which it was recited that defendant died testate on January 28, 1947. A conditional order of revivor was entered by the court and on July 9, 1947, the executor of defendant's estate filed a special appearance wherein he asserted that plaintiff was an enemy alien and that as such she had no right to sue a citizen of the United States in the courts of this state. The trial court denied a revivor of the action for the reason that it could not be prosecuted by plaintiff until the termination of the war. A notice of appeal was filed by Alwine Meier. Nowhere in the pleadings or orders of the trial court does the name of the Alien Property Custodian appear. He has not even attempted to perfect an appeal to this court. As our former opinion states, the Trading with the Enemy Act, 50 U. S. C. A., § 7 (b), specifically prohibits the prosecution of any suit or action at law or in equity by an enemy alien prior to the end of the war. Alwine Meier is an enemy alien and cannot prosecute

the action that she here attempts to prosecute.

On December 22, 1947, there was filed with the clerk of the district court, and included in the transcript to this court, a letter from the office of the Alien Property Custodian which purported to authorize one of the attorneys for plaintiff to appear and represent Alwine Meier in the present litigation and to take such measures as the Alien Property Custodian might determine. Whatever the practice may be elsewhere, one may not assert an interest in pending litigation in any such manner in this state. The filing of a letter with the clerk of the court is without legal effect and cannot properly be included in the transcript. Consequently, the Alien Property Custodian is not a party to the action and we do not deem it necessary to determine or discuss the powers conferred upon him by the Trading with the Enemy Act or the executive orders promulgated pursuant thereto. If and when the Alien Property Custodian asserts his authority by an appropriate pleading, the court will be in a position for the first time to pass upon any questions which may be raised in opposition thereto. Our opinion does not purport to pass upon the authority or powers of the Alien Property Custodian for the very simple reason that he was not in court. Consequently we referred to the Trading with the Enemy Act only for the purpose of determining that plaintiff as an enemy alien was barred from prosecuting the action for the duration of the war.

On the record presented, the opinion handed down is correct. This requires that the motion for a rehearing be overruled.

MOTION FOR REHEARING OVERRULED.

PAINE, J., not participating.

SADIE MUFF, APPELLANT, V. CARL H. BRAINARD ET AL., APPELLEES.

35 N. W. 2d 597

Filed January 14, 1949. No. 32551.

1. **Workmen's Compensation.** A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of the employment.
2. **Evidence.** The declaration of a person which is merely a narrative of a past transaction, made after the transaction to which it relates has been fully completed and shown not to have been spontaneously or involuntarily made, is not admissible in evidence as a part of the res gestae.
3. **Workmen's Compensation.** Mere exertion which is not greater than that ordinarily incident to the employment cannot of itself constitute an accidental injury within the meaning of the Workmen's Compensation Act.
4. **Evidence.** Hearsay evidence which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Fred N. Hellner, for appellant.

Lee & Bremers and *Richard W. Lee*, for appellees.

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

CARTER, J.

This is a claim for compensation under the Workmen's Compensation Act. The trial court denied the claim and the plaintiff appeals.

The evidence shows that on May 15, 1947, Charles Muff was employed by the defendant Brainard as a carpenter. On that day Muff and Brainard were working on a new house. At the time of the alleged accident Muff was on the roof and Brainard was passing boards up to him. The record shows that the boards were 8 to 20 feet long, 8 inches wide and three-quarters of an

inch in thickness. It was the usual type of lumber used for sheathing purposes. On the day following, Muff reported to Brainard that he had a hernia and Brainard in turn advised his insurance carrier of the fact. There is no evidence of an accident occurring or of any statement or outcry that anything out of the ordinary had occurred during the course of the employment. No attempt was made to show what Muff was doing or the occurrence which is claimed to constitute an accident. Muff continued to work without complaint until his regular quitting time at 4 p. m. on the day the accident is alleged to have occurred.

Sadie Muff testifies that Muff was pale, worn, and doubled over on arriving at his home after the day's work was completed and that she observed the hernia at that time. She testifies that Muff did not have the hernia when he went to work that morning. The evidence shows that Muff borrowed a truss from a neighbor and continued working for several months. On February 21, 1948, Muff was operated on for the correction of the hernia. The operation was apparently successful and the patient was on the way to recovery when he suffered a pulmonary embolism and died very suddenly. We think the evidence sufficient to support a finding that the pulmonary embolism directly resulted from the hernia operation.

The plaintiff offered in evidence the first report of the alleged accident filed with the workmen's compensation court. This report was not competent evidence to prove an accident. It was dated on May 26, 1947, a date long after the alleged accident. It was made pursuant to the requirements of the workmen's compensation court and contains the express stipulation that the "Filing of This Report is Not An Admission Liability—Only a Report of the Alleged Accident or Occupational Disease." While it might have been admissible to prove notice if that had been an issue, which it was not, it was not admissible to prove an accident arising out of

and in the course of the employment. It is hearsay evidence and inadmissible as such.

Plaintiff also offered evidence as to the contents of a report made by Muff to a representative of the defendant which purported to show the facts and details of the alleged accident. This report is clearly a narrative of past events and not competent to prove the happening of an accident.

An accident is defined by the compensation law in the following language: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151, R. S. Supp., 1947.

There was no evidence of an accident nor objective symptoms of an injury as required by the Workmen's Compensation Act. Mere exertion which is not greater than that ordinarily incident to the employment cannot of itself constitute an accidental injury. Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1; Roccaforte v. State Furniture Co., 142 Neb. 768, 7 N. W. 2d 656. An award of compensation cannot be based on possibilities or probabilities. It must be based on competent evidence that the claimed injury resulted from a compensable accident, an accident arising out of and in the course of the employment. Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592; Hamilton v. Huebner, *supra*. Declarations of a person which are merely narratives of past transactions, made after the transaction to which it relates has been fully completed and shown not to have been spontaneously and involuntarily made, are not admissible in evidence as a part of the res gestae. They are self-serving statements and not admissible as such. Milton v. City of Gordon, 129 Neb. 888, 263 N. W. 208; Hamilton v. Huebner, *supra*. Hearsay evidence is not admissible in a workmen's com-

pensation case any more than in any other type of case. The foregoing rule is no different because the death of the employee alleged to have suffered a compensable accident has made it difficult of proof. Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Shold v. Van Treeck, 88 Neb. 80, 128 N. W. 1134.

Under the foregoing rules the plaintiff has failed to prove by a preponderance of the evidence that Muff suffered an accident arising out of and in the course of his employment.

AFFIRMED.

PAINE, J., not participating.

ALBERT HILL ET AL., APPELLEES, v. JERRY D. KUSY, APPELLANT.

35 N. W. 2d 594

Filed January 21, 1949. No. 32506.

1. **Monopolies: Statutes.** Intent denotes the purpose to use a particular means to effect a certain result.
2. ———: ———. Intent is an essential element of the unlawful act or acts defined in section 59-1203, R. S. 1943.
3. ———: ———. Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed.
4. **Constitutional Law.** Mere difficulty of application in the processes of litigation is not enough to enable a court to say that a statute is unconstitutional.
5. ———. In the exercise of and within the limits of its police power, the Legislature may forbid that which it deems to be an existing evil and it may limit its prohibitions to the matters which in its judgment menace the public welfare.
6. **Injunction.** When a person has been found to have committed acts in violation of a regulatory law he may be restrained from committing other related acts.

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

Paul E. Haberlan, for appellant.

Spear & Lamme, Michael T. McLaughlin, Bernard S. Gradwohl, George R. Springborg, Walter R. Johnson, Attorney General, and *Bert L. Overcash,* for appellees.

White & Lipp, amicus curiae.

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

SIMMONS, C. J.

Plaintiffs, alleging violations of the Unfair Sales Act by defendant, brought this action and prayed for a declaratory judgment that the act (sections 59-1201, R. S. 1943, 59-1202, R. S. Supp., 1947, and 59-1203 to 59-1206, R. S. 1943) is constitutional, and for a determination of the rights, status, and legal relations of the parties in the matters set forth in their petition. They also prayed that defendant be enjoined from further advertising, offers to sell or sales in violation of the act, for damages, and for equitable relief.

Defendant demurred for the reason that the petition did not state facts sufficient to constitute a cause of action against him. The trial court overruled the demurrer and gave the defendant time to further plead. Defendant declined to do so. The trial court decreed that the act was not in conflict with any of the provisions of the Constitution of this state or of the United States and enjoined the defendant from "further advertising, offers to sell or sales in violation" of the act, and taxed costs to defendant. Defendant appeals. We affirm the judgment of the trial court.

Section 59-1201, R. S. 1943, provides that the act shall be cited as the Unfair Sales Act. Section 59-1202, R. S. Supp., 1947, defines various terms and phrases used in the act. Section 59-1203, R. S. 1943, provides: "It is hereby declared that any advertising, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or

effect, of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor, or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or substantially to lessen competition, or unreasonably to restrain trade, or to tend to create a monopoly in any line of commerce." Section 59-1204, R. S. 1943, relates to the non-liability of the owner of a newspaper for the publication of advertisements in contravention of the provisions of the act. Section 59-1205, R. S. 1943, provides: "Any person damaged, or who is threatened with loss or injury by reason of a violation of this act shall be entitled to sue in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this act." Section 59-1206, R. S. 1943, relates to sales to which the act does not apply.

Plaintiffs alleged that they and the defendant were competitors in the business of selling cigarettes at wholesale in certain cities of the state, and alleged in detail that defendant had advertised, offered to sell, and had sold cigarettes at less than cost and with the intent, effect, and result set out in section 59-1203, R. S. 1943, and by allegations removed their cause from the excepting provisions of the act. Plaintiffs further alleged that damages had resulted from defendant's acts; that defendant threatens to continue said acts; that a controversy exists between the parties as to whether or not defendant's acts constituted a violation of the act, and as to whether or not the act is constitutional and enforceable.

In substance defendant admitted by his demurrer that he had violated the act and plaintiffs were entitled to the relief prayed if the act is valid and enforceable.

By assignments of error, defendant presents these questions: "(a) Whether Sections 59-1201 to 59-1206, C. (sic) S. Neb. 1943, as amended by L. B. 474, Session of

1947, known as the 'Unfair Sales Act,' define any sort of an offense or wrongful act, even if the act itself is constitutional"; "(b) Whether the act is constitutional under the personal liberty and due process clauses of the State and Federal Constitutions"; and "(c) Whether the decree, in its present general form, can be sustained."

Defendant's contention is that the act neither states nor defines any unlawful act, is merely a statement of public policy, and contains no definite standards by which infractions can be measured and no provision to execute its alleged purpose. The attack is upon the act as a whole.

The provisions of section 59-1203, R. S. 1943, fall into two groups.

The first group contains three elements: (1) The acts of "advertising, offer to sell or sale of any merchandise, * * * at less than cost as defined in" the act; (2) the doing of one or more of those acts "with the intent, or effect, of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor, or otherwise injuring a competitor"; and (3) the doing of one or more of those acts with the intent or effect "where the result * * * is to tend to deceive any purchaser or prospective purchaser, or substantially to lessen competition, or unreasonably to restrain trade, or to tend to create a monopoly in any line of commerce."

The second group contains the legislative declaration of the results following from the first, to wit, "impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of" the act. The "unfair competition" is the result of the unlawful acts which the Legislature condemns and constitutes the ultimate unlawful act.

Section 59-1203, R. S. 1943, must be construed in connection with section 59-1205, R. S. 1943, which provides a remedy for enforcement.

Defendant, however, contends that the statute does not make intent an element of the unlawful act. This contention is based upon the phrase "with the intent or

effect" and defendant argues that the use of "or" avoids "intent" and requires only the "effect" or "result."

We have held that intent denotes the purpose to use a particular means to effect a certain result. Williams v. State, 113 Neb. 606, 204 N. W. 64. In Lynch v. Tilden Produce Co., 282 F. 54 (affirmed in 265 U. S. 315, 44 S. Ct. 488, 68 L. Ed. 1034), the court was dealing with a statute which provided: " 'Or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.' " The court in construing the words "with intent or effect" held: "Whatever is effected is the consequence of a specific design. It always requires, therefore, a rational agent to effect anything. So that the words 'intent' and 'effect,' as used in the statute, mean practically the same thing." The same construction applies here. It follows that intent is a requirement of the act. Decisions where intent is not an element of the statute are accordingly beside the issue and need not be discussed.

This conclusion brings the statute fairly within our holding in Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, wherein we held that where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. In fact, the Legislature in the act here involved placed an additional element in the act by specifically requiring that a certain result or results must follow.

Defendant further argues that the use of the word "tend" in two of the "result" provisions of the act renders the statute void, and relies on State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607. It is sufficient to point out that the same word is used in subdivision (i) of section 60-912, C. S. Supp., 1937, held constitutional in Nelsen v. Tilley, *supra.*

It further is urged that there is a lack of clarity, which

renders the act void, in the meaning of terms used in the act, such as "replacement cost," "proportionate part of the cost of doing business," and "unfairly diverting trade from a competitor." The terms may present difficulties in application when the sufficiency of evidence in fact questions is presented. Mere difficulty of application in the processes of litigation is not enough to enable a court to say that a statute is unconstitutional. McElhone v. Geror, 207 Minn. 580, 292 N. W. 414.

It next is argued that the means adopted are inadequate and bear no relation to the object sought, the argument being that the act applies to a small fraction of the business community and is discriminatory because of the limitations of the mark-up provisions as to costs, as between merchants selling classes of merchandise involving quick sales and small margins of profit and sales involving greater margins of profit. In the exercise of and within the limits of its police power, the Legislature may forbid that which it deems to be an existing evil and it may limit its prohibitions to the matters which in its judgment menace the public welfare. Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 S. Ct. 66, 57 L. Ed. 164; Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

It follows that the act is not subject to the constitutional attack here made and that the trial court did not err in overruling the demurrer.

This brings us to the contention that the injunctive language used in the decree cannot be sustained because it purports to enjoin any future violations of the act of whatever character rather than a repetition of the specific acts alleged in the petition. The decree enjoined the defendant from "further" advertising, offers to sell, or sales in violation of the act. When one has been found to have committed acts in violation of a regulatory law he may be restrained from committing other related unlawful acts. Labor Board v. Express Publishing Co., 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930. We construe

the language objected to in the decree to mean further like violations of the act. So construed it is not subject to criticism. New Haven R. R. v. Interstate Commerce Commission, 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515.

The judgment is affirmed.

AFFIRMED.

PATTY GUYETTE, BY GEORGE H. GUYETTE, HER FATHER AND NEXT FRIEND, APPELLANT, v. WILLARD E. SCHMER, APPELLEE.
35 N. W. 2d 689

Filed January 21, 1949. No. 32503.

1. **Witnesses.** In a jury case the credibility of a witness and the weight to be given to his testimony are ordinarily questions for the determination of the jury.
2. ———. Except where a party has been misled or entrapped into calling a witness, one who calls a witness impliedly recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach such witness.
3. ———. While a party who calls a witness cannot ordinarily impeach his character for veracity generally, he may show that the whole or any part of what he has sworn to is untrue, either by his own examination and the improbability of his story, or by other contradictory evidence material to the case.
4. ———. A party may rely on part of the testimony of a witness he produces, although in other parts of his testimony the witness denies some of the facts sought to be established.
5. **Trial.** The court may not properly assume as a matter of law that the evidence of a witness for the plaintiff could not be contradicted or overcome in a ruling on defendant's motion for a directed verdict.
6. ———. If the evidence produced by plaintiff fairly tends to prove the material facts necessary to make a prima facie case, the fact that inconsistencies or contradictions exist in some of the testimony of his witnesses will not justify the court in directing a verdict for defendant.
7. ———. A change in the testimony of a party from that given in a previous trial on an immaterial issue affords no basis for a ruling that the change was made from a fraudulent motive for the purpose of circumventing objections made at a previous trial or to meet the exigencies of the case.

8. **Appeal and Error.** The statement of errors required by section 25-1140.01, R. S. Supp., 1947, contemplates a more specific designation than that required in a motion for a new trial. An assignment of errors, such as is required to be set out in an appellant's brief on appeal in this court, more nearly represents the intent and purpose of this section of the statute.
9. ———. Ordinarily a violation of the requirement of the statute as to the serving and filing of a statement of errors to be relied upon on appeal can be protected against in the manner provided in the statute itself; that is, by designating such additional witnesses, exhibits, and trial proceedings as the situation may require.
10. ———. The judgment or final order appealed from will not be affirmed for a failure to serve and file the required statement of errors unless such failure is shown to have prejudiced the rights of the appellee.
11. **Trial.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. The latter is entitled to have every controverted fact resolved in his favor and be given the benefit of every inference that can be reasonably deduced from the evidence.

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

Bertrand V. Tibbels, for appellant.

Mothersead & Wright and *Robert G. Simmons, Jr.,* for appellee.

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

CARTER, J.

This is an action for damage suffered by a 13-year-old girl in a collision between a truck driven by the defendant and a saddle horse ridden by the girl. The trial court directed a verdict for the defendant at the close of plaintiff's case and the plaintiff appeals.

The evidence shows that on January 1, 1947, at or about 3:30 p. m., Patty Guyette was riding her horse in a southerly direction from the city of Mitchell on her way home. As she crossed the Mitchell bridge she

was riding at a gallop when she heard and observed the approach of defendant's truck from the rear. She immediately reined in her horse and had reduced its speed to a slow trot when the horse was struck from behind by the truck. Patty Guyette, whom we shall hereafter refer to as the plaintiff, was injured and the horse damaged to such an extent that it had to be destroyed.

Plaintiff testifies that she was riding on the right side of the bridge approximately 2 feet from the west railing. She says the horse was traveling straight south at a slow trot and that the horse did not shy or otherwise invade the highway on the left side of the center. Because of the nature of the injuries she sustained, plaintiff has no recollection of what occurred after the horse was struck by the truck.

The bridge is 675 feet long and 22 feet 4 inches wide. While the evidence varies, the accident occurred in the center or a little south of the center of the bridge. About 782 feet south of the south end of the bridge was an east and west road commonly referred to in the evidence as the river road. The evidence shows that at a point 225 feet west of the intersection of the river road with the north and south highway, and consequently about 1,150 feet southwest from the point of the accident, one Strong was driving east at the time of the collision. It is the effect of the testimony of Strong which largely influences the result of this appeal.

Strong testifies that when he was at the point above described, a point lower than the level of the bridge, he saw the truck strike the horse, it appearing to him that the horse was turning a somersault. He testifies that the horse was on the west side of the bridge when it was struck. He was unable to fix the speed at which the truck was traveling. Due to the fact that he killed his motor when he stopped at the stop sign on the river road and was unable to start it promptly, he did not

arrive at the scene of the accident until several minutes after it had occurred.

The evidence shows that the horse was badly injured, evidently paralyzed in the hind quarters. In its efforts to regain its feet the horse moved its front feet about, but was otherwise unable to move. The evidence most favorable to the plaintiff is that after the accident the rear of the horse was close to the west rail and that its head assumed various positions because of its efforts to rise. All the witnesses testify that there were no evidences of an open wound or bleeding on the horse. Blood stains were found on the west rail of the bridge and on the pavement within 2 feet of the west rail. The evidence shows that the injuries sustained by the girl resulted in considerable loss of blood.

Several witnesses, who were familiar with and had ridden the horse, testified that it was gentle, was not afraid of highway or street traffic, and had no habit of shying at objects on or along the road. There is a statement by one witness that the horse had a tendency when being reined in to swing his hind quarters to one side to the extent of a foot or so.

We think the evidence of the witness Strong was competent. The distance from which he viewed the accident and the fact that he was below the level of the bridge go to the credibility of the witness and the weight to be given his testimony. We do not concur with the contentions advanced by the defendant that objects the size of the truck and the horse described in this record could not be observed from a distance of 1,150 feet, or that under some circumstances a witness might not be able to determine their position on the road from that distance. It becomes a question for the jury to determine the weight to be given to it.

The plaintiff testifies that the horse was trotting south within 2 feet of the west rail of the bridge. Plaintiff had the same right to travel the highway as did the defendant. The defendant was bound to observe

plaintiff and her horse and to use ordinary care in the driving of the truck under the circumstances shown. He is bound to take into consideration the nature of the object he is passing on the highway and the common propensities of saddle horses in the exercise of the care which the law imposes upon him to exercise. There is evidence from which the jury could properly find that the horse was struck on the right side of the highway. We think the evidence in the record was sufficient to take the case to the jury, unless other points raised which will be hereinafter discussed call for a different conclusion.

The defendant contends that the trial court's action in directing a verdict is sustainable on the theory that a party is bound by the testimony of his own witness on the question of negligence. The record shows, in this respect, that plaintiff called one Hessler as a witness. Hessler was an occupant of the truck when the accident occurred. He testified on direct examination that plaintiff and the horse were both on the right side of the road immediately following the accident. He testified also that the blood stains were on and near the west rail of the bridge. These facts were, of course, circumstances tending to sustain plaintiff's case. On cross-examination he testified as to the manner in which the accident occurred, stating in substance that the horse was "on a walking trot and when we met it it just shied and hit the front right corner." He also testified that the truck was at all times on the left side of the highway while passing the horse and its rider. Plaintiff objected to this testimony on the ground that it was outside the purview of the direct examination. The trial court permitted the evidence to be elicited as a part of the cross-examination. We find no error in this. The extent of the cross-examination is largely discretionary with the trial court. The trial court must be allowed considerable leeway in the conduct of the trial and, unless a clear abuse of discretion is shown, this court

will not substitute its judgment for that of the trial court. DeVore v. Board of Equalization, 144 Neb. 351, 13 N. W. 2d 451; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381. But the evidence elicited on cross-examination does not defeat plaintiff's case on the theory that a party is bound by the testimony of his own witness. It brings into operation the rule announced in Trask v. Klein, *ante* p. 316, 34 N. W. 2d 396, to the effect that where a plaintiff introduces evidence sufficient to prove all the material facts of his case, and also introduces a witness who contradicts some of the facts, the latter evidence will not sustain the direction of a verdict unless it is the only evidence produced on an issue necessary to the maintenance of the cause of action. See, also, Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030.

There is a recognized distinction between impeaching one's own witness and contradicting evidence which he gives. The general rule is that one may not impeach a witness that he himself calls. "A person who calls a witness impliedly recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach such witness." Nathan v. Sands, 52 Neb. 660, 72 N. W. 1030. An exception has been provided to the foregoing rule in the following language: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265. See, also, Moore v. State, 147 Neb. 390, 23 N. W. 2d 552.

The rule last cited, however, is not controlling in a case where a party contradicts evidence given by a witness called by him. In Krull v. Arman, 110 Neb. 70, 192 N. W. 961, this court said: "At the close of the testimony the appellant asked for a peremptory instruction on the claim that, because plaintiff called the defendant as a witness, and elicited testimony from him that deceased gave him the money, plaintiff is absolutely bound by his answers, and is estopped from setting up that they are either untrue or that the witness is not credible. * * * Contradiction, however, and impeachment are not synonymous. * * * While we refrain from expressing any opinion as to the sufficiency of the evidence, the defendant on that theory alone was not entitled to have the court assume as a matter of law that defendant's evidence could not be contradicted or overcome." The court in that case cites Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 A. 361, wherein it is said: "While a plaintiff, who calls defendants as his witnesses, cannot impeach their character for veracity generally, he may show that the whole or any part of what they had sworn to is untrue, either by their own examination and the improbability of their own story or by other contradictory evidence material to the issue." This seems to be the general rule. See, 58 Am. Jur., Witnesses, § 797, p. 442; 70 C. J., Witnesses, § 1341, p. 1156; State v. Timm, 244 Wis. 508, 12 N. W. 2d 670; People v. Lee, 307 Mich. 743, 12 N. W. 2d 418; Tullis v. Tullis, 235 Iowa 428, 16 N. W. 2d 623.

The defendant urges that the evidence of Patty Guyette was discredited as a matter of law and cites Kipf v. Bitner, *ante* p. 155, 33 N. W. 2d 518; Gohlinghorst v. Ruess, *supra;* and other cases of similar import. The record dicloses that before the trial one of the attorneys for the defendant wrote out a statement reflecting the story of the accident as told by Patty Guyette, which she acknowledged to be correct in the presence of her attorney but which she did not sign. In a previous trial

of the case she admitted the truth of the statement which included a recitation to the effect that she did not remember the horse being hit or of falling from the horse. In the course of the present trial she testified that she remembered the truck striking the horse but had no recollection of what occurred thereafter. No other variance appears. This does not constitute such a change of position that the cited cases contemplate. The answer of the defendant admits that a collision occurred between the truck and the horse ridden by Patty Guyette. The change in testimony was on a wholly immaterial matter and can afford no basis for a holding that the change was made with a fraudulent motive for the purpose of circumventing objections made at a previous trial or to meet the exigencies of the case. Such inconsistencies of testimony are for the jury's consideration in determining the credibility of the witness and the weight to be given to her testimony.

The defendant contends that there is no proper bill of exceptions before the court and that the resulting presumption of the sufficiency of the evidence to sustain the judgment should be indulged and the judgment affirmed. The bill of exceptions contains the evidence of certain specified witnesses only in accordance with the provisions of section 25-1140.01, R. S. Supp., 1947. The applicable portion of this section provides: "The appellant may, in the alternative, request that the bill of exceptions include less than all of the evidence and if so, he shall be required, within three days after filing notice of appeal, to serve upon the adverse party or his attorney of record, and file with the clerk of the district court, (1) a designation of the witnesses whose testimony he deems essential, the exhibits and such trial proceedings as he desires to have included in the bill of exceptions, and (2) a statement of the errors he intends to rely upon for reversal or modification of the judgment or final order from which the appeal is taken. Within seven days after service of such designation, any

adverse party may serve upon the appellant, or his attorney of record, and file with the clerk of the district court, a designation of such additional witnesses whose testimony he deems essential, of the additional exhibits, and such other trial proceedings as he desires to have incorporated in the bill of exceptions."

The purpose of this statute was to provide a method for limiting the evidence contained in a bill of exceptions to that which was necessary to the consideration of the errors relied upon on appeal. Its purpose was to expedite appellate procedure and not to induce technicalities that would make it more hazardous. Consequently the statute should be liberally construed in order to attain the legislative intent.

The defendant urges that plaintiff did not comply with that part of the statute which requires the party appealing to serve and file a statement of the errors he intends to rely upon for a reversal or modification of the judgment or final order from which the appeal is taken. The plaintiff in the present case merely copied the grounds for reversal set forth in his motion for a new trial. The statute contemplates a more specific statement of the errors relied upon than are usually contained in a motion for a new trial. We think it means a statement of alleged errors such as is required to be set forth in an appellant's brief on appeal. In this respect the applicable statute, section 25-1919, R. S. 1943, and the rules and decisions of this court as well, require that the brief of appellant shall set out particularly each error asserted and intended to be urged on the appeal. It is important to an appellee that he be informed of the points to be relied upon where the bill of exceptions is not a complete transcript of the proceedings. Unless this provision is complied with he cannot determine whether or not all the evidence on the points to be raised on the appeal have been included. If the assignments are too general, the appellee may find it necessary as a matter of precaution to require a bill of

exceptions containing all the evidence at the trial. This would subject the appellant to the payment of the additional costs incurred because of his failure to particularly specify the errors relied upon on appeal, and cause him to lose the benefit of the alternative provisions of the statute. A judgment or final order will not, however, be affirmed on appeal for failure to particularly specify the errors relied upon unless prejudice to the opposing party has resulted therefrom. The remedy of an appellee, ordinarily, is contained in the statute, that is, to specify the additional evidence and exhibits to be included which he deems necessary to meet the errors as they are set forth. In the present case it is evident that no prejudice has resulted. The correctness of the court's ruling on the motion for a directed verdict was the primary question raised by the appeal. It is not even contended that any evidence bearing on that subject was not included in the bill of exceptions. The statement of errors required by the statute does assign the court's ruling on the motion for a directed verdict as an error to be relied upon. Under these circumstances, and in the absence of a showing of prejudice, we cannot say that no proper bill of exceptions has been presented in the present case.

A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. The latter is entitled to have every controverted fact resolved in his favor and be given the benefit of every inference that can be reasonably deduced from the evidence. Applying this rule to the evidence at bar, we conclude that the trial court was in error in sustaining defendant's motion for a directed verdict.

REVERSED AND REMANDED.

PAINE, J., not participating.

IN RE APPLICATION OF HARRY DUNN FOR A WRIT OF HABEAS CORPUS. HARRY DUNN, APPELLEE, V. JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLANT.

35 N. W. 2d 673

Filed January 21, 1949. No. 32528.

1. **Habeas Corpus.** Habeas corpus is a writ of right but not a writ of course, and probable cause must first be shown for its allowance, which rightly prevents the writ from being trifled with by those who manifestly have no right to be at liberty.
2. ———. In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine questions of fact presented, but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied.
3. ———. The sufficiency of the allegations of relator's petition to support a writ of habeas corpus allowed by virtue thereof, may be questioned before making return thereto by a motion to dissolve or quash the writ.
4. ———. Such motion admits all ultimate facts well pleaded in relator's petition, as distinguished from conclusions of law therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ dissolved or quashed.
5. **Actions.** The existence of a right is one matter; the availability of a particular remedy in which that right may be asserted is distinctly a separate matter.
6. **Habeas Corpus.** The sole issue ordinarily presented upon an application for a writ of habeas corpus by a prisoner held pursuant to judgment, sentence, and commitment in a criminal case, is the validity of the judgment, sentence, and commitment involved therein.
7. ———. In the absence of a special statute authorizing it, habeas corpus is not available as a remedy for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in a proper or authorized jail or prison under a valid existent and enforceable judgment, sentence, and commitment.

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

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Leslie Boslaugh,* for appellant.

George I. Craven, for appellee.

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

CHAPPELL, J.

Relator, hereinafter called plaintiff, filed a petition in the district court for Lancaster County against respondent, hereinafter called defendant, alleging that plaintiff was unlawfully deprived of his liberty and praying for a writ of habeas corpus and discharge from unlawful imprisonment, namely, solitary confinement in the Nebraska State Penitentiary.

Plaintiff's petition alleged in substance that on December 7, 1944, the district court for Douglas County sentenced and committed him to the Nebraska State Penitentiary for a period of 10 years from that date at hard labor, for the crime of robbery aggravated by habitual criminality. A certified copy of the judgment upon the verdict of guilty by a jury, sentence, and order of commitment was attached to the petition and made a part thereof. The validity thereof was not attacked or denied in any manner by plaintiff, but he alleged that without cause or lawful authority, and in spite of a provision therein that "no part of which said period of time is by virtue of this sentence to be spent in solitary confinement," plaintiff was and had been for some time held in solitary confinement by defendant within the penitentiary.

An order allowing the writ was entered, and the writ was issued and served, returnable June 11, 1948.

On June 10, 1948, defendant filed a motion to quash the writ for the reason that plaintiff's petition failed to state facts sufficient to constitute a cause of action against defendant or to afford plaintiff relief in habeas corpus. On June 11, 1948, the motion was argued, sub-

mitted, and overruled, at which time defendant was required to file return in 10 days, and the cause was by stipulation set for trial, consolidated with In re Application of Bortles, No. 32529, *post* p. 679, 35 N. W. 2d 679. Thereafter, defendant duly filed a return to the writ, and the causes were thus tried and submitted on their merits.

Thereafter, the trial court entered its judgment, finding generally for plaintiff, ordering him released and discharged from solitary confinement, and placed in usual and ordinary confinement with such privileges as are usually granted to usual and ordinary prisoners, subject to future good behavior.

Within proper time, defendant filed motion for new trial, alleging among other grounds therein that plaintiff's petition failed to state facts sufficient to constitute a cause of action against defendant or to afford plaintiff relief in habeas corpus, therefore the trial court erred in overruling defendant's motion to quash the writ.

Defendant's motion for new trial was thereafter overruled, and he appealed, setting forth some 11 assignments of error, among which were the aforesaid alleged errors contained in his motion for a new trial.

Many propositions of law were presented at length in the briefs and argument, but as we view the case the only question which we are required to discuss or decide is whether or not the trial court erred in its refusal to quash the writ, and in doing so we conclude that it did.

Plaintiff's petition discloses that he simply sought specific enforcement of an admittedly existent and valid judgment, sentence, and commitment. As will be hereinafter observed, habeas corpus could not provide him a remedy for that purpose.

As stated in In re Application of Tail, Tail v. Olson, 144 Neb. 820, 14 N. W. 2d 840: "Habeas corpus is a writ of right, but not a writ of course, and probable cause must first be shown which rightly prevents the

writ from being trifled with by those who manifestly have no right to be at liberty. 25 Am. Jur. 153, sec. 16. Judicial discretion is exercised in its allowance, and such facts must be made to appear in the application to the court as in its judgment will, prima facie, entitle the applicant to be discharged from custody. 39 C. J. S. 436, sec. 6; 25 Am. Jur. 238, sec. 131; 29 C. J. 14."

In McAvoy v. Jones, 149 Neb. 613, 31 N. W. 2d 740, this court recently held: "In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine the questions of fact presented. But if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied.

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

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

In Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136, it was held: "The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter."

As stated in 39 C. J. S., Habeas Corpus, § 7, p. 437: "The writ of habeas corpus ordinarily will not be granted where there is another adequate remedy." See, also, 29 C. J., Habeas Corpus, § 9, p. 17. Also, as stated in 39 C. J. S., Habeas Corpus, § 4, p. 430: "The sole function of the writ is to relieve from unlawful imprisonment, and ordinarily it cannot properly be used for any other purpose." See, also, 29 C. J., Habeas Corpus, § 5, p. 12.

It will be observed that by virtue of the provisions in section 29-2801, R. S. 1943, "persons convicted of some crime or offense for which they stand committed," are specifically excepted from those entitled to the benefit of the act, all of which means in the final analysis that the sole issue ordinarily presented upon an application for a writ of habeas corpus by a prisoner held pursuant to judgment, sentence, and commitment, in a criminal case, is the validity of the judgment, sentence, and commitment involved therein. That is true because a void judgment, sentence, and commitment is a nullity and thus a person held pursuant thereto would not be, legally speaking, within the foregoing exception. Herein, however, their validity is admitted, which gave the court only authority to "recommit" rather than "discharge such prisoner from confinement." See, sections 29-2805 and 29-2806, R. S. 1943.

As stated in People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. R. 211, under statutes similar in their applicable provisions with our own: "Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, are expressly excluded from the benefit of the act. * * * Such persons are deprived of their liberty 'by due process of law,' and are not within the purview of the Constitution, or the purposes of the writ."

In Matter of Morhous v. New York Supreme Court, 293 N. Y. 131, 56 N. E. 2d 79, speaking of the Tweed case, it was said: "That case has been recognized as a landmark in the history of the use of the writ of habeas corpus as appropriate process to inquire into the legality of a person's imprisonment even where a person is imprisoned under a judgment of a court of general jurisdiction. It vindicated the right but limited the inquiry to a narrow field." See, also, People ex rel. Hubert v. Kaiser, 206 N. Y. 46, 99 N. E. 195.

In People ex rel. Carr v. Martin, 286 N. Y. 27, 35 N. E.

2d 636, quoting from Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717, it was said: "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void."

In Long v. Minto, 81 Or. 281, 158 P. 805, affirming a judgment dismissing an application for writ of habeas corpus, it was said: "The right to prosecute the writ is open to any person whose liberty is restrained if he is not imprisoned or restrained by a judgment of a competent court of criminal jurisdiction. If it appears from the writ that the person is one of those excluded by the statute, then the writ cannot be allowed; or, if the court subsequently finds that the person for whose relief the writ is intended is one of those who are prohibited from prosecuting the writ, then the proceeding must be dismissed and the party remanded."

As stated in In re Betts, 36 Neb. 282, 54 N. W. 524: "The principle deducible from the authorities already cited is that where the party applying for a writ of habeas corpus is held in custody under a process, regular on its face, issued by a court having jurisdiction of the offense charged and of the person, if the proceedings are not void, although they may be erroneous or voidable, he cannot obtain relief by habeas corpus; but where the proceedings are wholly void, because of want of jurisdiction of the court over the subject-matter, or are illegal, as distinguishable from being merely erroneous, the writ of habeas corpus is an appropriate remedy."

In Keller v. Davis, 69 Neb. 494, 95 N. W. 1028, this court said: "The rule is certainly well settled that on an application for a writ of habeas corpus mere errors or irregularities, not jurisdictional, are unavailing and will not be considered. In re Fanton, 55 Neb. 703. The rule applicable to such proceedings may be said to be not open

to question; that the only subjects of inquiry are, the jurisdiction of the court of the person and the subject matter of the offense, and jurisdiction to pronounce the particular judgment or sentence."

In Iron Bear v. Jones, 149 Neb. 651, 32 N. W. 2d 125, this court recently said: "In Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, after review of many cases, this court said: 'These cases have determined the rules governing the use of the writ of habeas corpus in this state. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.' "

In Howard v. State, 28 Ariz. 433, 237 P. 203, 40 A. L. R. 1275, relied upon by plaintiff, the action was not habeas corpus but a contempt citation for violation of the court's order of commitment by the superintendent of state prisons. In concluding that plaintiff therein had pursued the proper remedy, it was said in the opinion: "But, it is argued, admitting the right petitioner has mistaken his remedy. When a man possesses a substantial right, the law will search diligently for some way of enforcing that right, and will not dismiss him without relief. It is plain that habeas corpus would not suffice to meet the emergency, for the petitioner admits he is rightfully within the prison, and secondly, that writ would not remedy a deprivation of proper food, even though it might the close confinement. What is it that petitioner complains of? Not that his sentence is being carried out in accordance with the decree of the court, but that the order directed by that court to the superintendent of the prison as its executive officer is being disregarded and violated by the latter.

"The situation thus stated obviously suggests the proper remedy."

The decision in Kirby v. State, 62 Ala. 51, relied upon by plaintiff, was, in the final analysis, arrived at upon the basis of illegality of relator's commitment under the habeas corpus act and other statutory provisions con-

tained in the code of Alabama, which have no similarity with our own.

Insofar as we have been able to discover, the historic remedy of habeas corpus has never been held available, in the absence of a special statute authorizing it, for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in a proper or authorized jail or prison under a valid, existent, and enforceable judgment, sentence, and commitment.

As early as 1843, in Ex parte Rogers, 7 The Jurist (Eng.) 992, an application for habeas corpus was brought by a prisoner against the gaoler to obtain discharge from that part of the prison in which he was confined and restore him to a greater liberty theretofore enjoyed, as well as the opportunity to exercise his trade. Therein it was said: "It is quite clear that we cannot entertain this application. The object of the writ of habeas corpus is, generally, to restore a person to his liberty, not to pronounce a judgment as to the room or part of a prison in which a prisoner ought to be confined."

In Ex parte Cobbett, 5 Man. Gr. & S. (Eng.) 416, the applicant for a writ of habeas corpus alleged that he was improperly confined in a certain part of the prison. In holding that habeas corpus was not available, the court said: "This court has no power to interfere in the matter. The prisoner is in custody under process issuing out of the court of Chancery. If the keeper of the Queen's prison is acting improperly in placing him in the particular part of the prison of which he complains, the ordinary means of redress for the wrong are open to him."

In People ex rel. Stephani v. North, 91 Misc. 616, 155 N. Y. S. 595, it was said: "The placing of a convict according as he may be classified as sick or well, dangerous or peaceful, sane or insane, is a detail of prison management with which no court can interfere.

"Furthermore it may be said that this is a case in which no writ should in the first instance have issued.

"A writ must issue unless it appears from the petition itself that the petitioner is prohibited by law from prosecuting the writ. Code, § 2020. In this instance the petition shows that the relator was duly convicted of the crime of murder in the second degree, and duly sentenced to Sing Sing Prison for the term of life, from which prison he was (administratively) transferred to Dannemora State Hospital as an insane person. It, therefore, appeared on the face of the petition that he was detained by virtue of a final judgment of a competent tribunal of criminal jurisdiction, in which case no writ should issue. Code, § 2016. The writ is, therefore, dismissed."

In Platek v. Aderhold, 73 F. 2d 173, the court, in affirming a judgment denying habeas corpus, said: "The prison system of the United States is under the control of the Attorney General and Superintendent of Prisons, and not of the District Courts. The court has no power to interfere with the conduct of the prison or its discipline, but only on habeas corpus to deliver from the prison those who are illegally detained there."

Affirming a like judgment, it was said in Sarshik v. Sanford, 142 F. 2d 676: "The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there. Platek v. Aderhold, 5 Cir., 73 F. 2d 173."

Likewise, in Shepherd v. Hunter, 163 F. 2d 872, it was said: "Petitioner complains of mistreatment by prison authorities. But, it is not within the province of the courts to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there. Platek v. Aderhold, 5 Cir., 73 F. 2d 173; Sarshik v. Sanford, 5 Cir., 142 F. 2d 676."

Snow v. Roche, 143 F. 2d 718, certiorari denied 323 U. S. 788, 65 S. Ct. 311, 89 L. Ed. 629, was an application for an original writ of mandamus to compel a judge of the

district court to entertain and decide an application for a writ of habeas corpus, which had been previously dismissed for failure to state facts sufficient to state a cause of action and afford petitioner the relief sought. In that opinion it was said: "The petition here contains the recital of the entire petition for the writ of habeas corpus hereinabove referred to, and we have studied it with care. In no part of such petition is the legal custody of petitioner questioned. He does not claim the deprivation of any constitutional right in the conviction of the crime for which he is incarcerated, in the commitment to respondent, or in the legality of his detention. He complains that he has been illy and inhumanely treated in the matter of food and of dental and medical treatment, and that he has been confined to the 'Isolation Block' which he sometimes refers to as the 'Hole' or 'Black Hole.' * * *

"The allegations of this petition, if taken as true, do not claim or establish the illegal detention of the petitioner, and, therefore, as it seems to us, the sphere of the writ of habeas corpus does not reach to the subject matter of his complaint. * * *

" 'The purpose of the proceeding defined by the (English) statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. * * * There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.

" 'Such use of the writ in the (United States) federal

courts is without the support of history or of any language in the statutes which would indicate a purpose to enlarge its traditional function.' * * *

"The petition on its face clearly indicates that the gist of petitioner's complaint is that the manner of his treatment is unnecessarily harsh and is painful and injurious to him. We have seen that the writ of habeas corpus is not the vehicle to carry his appeal for relief. Therefore, the petition for the writ of mandamus is denied, and the proceeding is dismissed."

Beaudin v. Landriault, 23 Que. Pr. 215, 38 Can. Cr. Cas. 12, was in principle almost identical with the case at bar. Therein, petitioner contended that she was unlawfully deprived of her liberty because in fact she was being subjected to "hard labor" in violation of the terms of her sentence and commitment, which provided that she should be imprisoned "without hard labor." The court, in its opinion, quashed the writ upon the ground that her remedy was not habeas corpus but recourse to the prison authorities, as provided in the statutes.

There are many other authorities of similar import from other jurisdictions, but to cite them would but unduly prolong this opinion.

For the reasons heretofore stated, the judgment of the district court should be and hereby is reversed and the action is dismissed.

REVERSED AND DISMISSED.

PAINE, J., not participating.

IN RE APPLICATION OF LAVERNE BORTLES FOR A WRIT OF HABEAS CORPUS. LAVERNE BORTLES, APPELLEE, V. JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLANT.

35 N. W. 2d 679

Filed January 21, 1949. No. 32529.

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

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Leslie Boslaugh,* for appellant.

George I. Craven, for appellee.

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

CHAPPELL, J.

Relator, hereinafter called plaintiff, filed a petition in the district court for Lancaster County against respondent, hereinafter called defendant, alleging that plaintiff was unlawfully deprived of his liberty, and praying for a writ of habeas corpus and a discharge from unlawful imprisonment, namely, solitary confinement in the Nebraska State Penitentiary.

His petition alleged in substance that on September 11, 1942, the district court for Dixon County sentenced and committed him to the Nebraska State Penitentiary for a period of 10 years from that date at hard labor, for the crime of automobile theft aggravated by habitual criminality. A certified copy of the judgment upon a plea of guilty, sentence, and order of commitment, was attached to the petition and made a part thereof. The validity thereof was not attacked or denied in any manner by plaintiff, but he alleged that without cause or lawful authority, and in spite of a provision therein that "no part of which (period of time) shall be in solitary confinement," plaintiff was and had been for some time held in solitary confinement by defendant within the penitentiary.

The transcript herein is individually separate from, but the proceedings, judgment, and applicable rules of law were otherwise identical with, those in In re Application of Dunn, No. 32528, *ante* p. 669, 35 N. W. 2d 673. For that reason they will be incorporated by reference and not separately set forth or repeated in this opinion.

It is sufficient for us to say that for the reasons stated therein, and herein, the judgment of the district court should be and hereby is reversed and the action is dismissed.

REVERSED AND DISMISSED.

PAINE, J., not participating.

ESTHER FIMPLE, APPELLEE, V. ARCHER BALLROOM COMPANY OF NEBRASKA, A CORPORATION, APPELLANT.
35 N. W. 2d 680

Filed January 21, 1949. No. 32476.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. **Theaters and Shows.** One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care.
3. **Negligence.** The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur.
4. ———. Such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed.
5. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not.
6. **Appeal and Error: Trial.** It is error for trial court to fail to instruct on issue of contributory negligence when raised by the pleadings and supported by the evidence.
7. ———: ———. When instructions requested are substantially given in the charge prepared by the court on its own motion it is not error to refuse to repeat them though expressed in language different from that used by the court.

8. ———: ———. Instructions are to be considered together to the end that they may be properly understood and, when so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same.

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

Dressler & Neely, for appellant.

Leonard A. Hammes and *Frank L. Frost,* for appellee.

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

WENKE, J.

Esther Fimple brought this action in the district court for Douglas County against the Archer Ballroom Company of Nebraska, a corporation. The purpose of the action is to recover damages for personal injuries which she suffered while a patron in attendance at a public dance in the Chermot Ballroom in Omaha, which was given and conducted by the defendant. The basis of the action is negligence. Plaintiff recovered a verdict and, from the overruling of its motion for new trial, defendant appeals.

Appellant's first contention is that no actionable negligence was shown. In considering this question we apply to the record the rule announced in Remmenga v. Selk, *ante* p. 401, 34 N. W. 2d 757, and discuss the facts accordingly. This rule is as follows: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom."

It is admitted that the appellant operates the Chermot Ballroom located at Twenty-sixth and Farnam Streets in the city of Omaha and that on the evening of December 31, 1946, it gave and conducted a public dance therein.

A large crowd, approximately 1,500 people, attended the dance. A charge of $1.50 per person was made of everyone in attendance, including appellee. In addition to the dance floor the ballroom has booths which those in attendance may occupy. They are not reserved but are available to whoever occupies them first. The total seating space thus provided is somewhere between 1,200 and 1,300. These booths are generally constructed to accommodate four people, each booth consisting of a table and two benches, one on each side, with a partition wall in between. These partition walls are built so that when a patron is seated they come about to his shoulder.

The management had employees who served the patrons occupying these booths. For their convenience appellant sells, and these employees serve, bottled mix such as Coca Cola, Dr. Pepper, etc., together with glasses filled with ice.

A section of these booths is located east of the dance floor. That is the area herein involved. The booths in this area are located in tiers going up from the dance floor and running north and south.

Appellee, with her escort, came to the dance about 9 p. m. There they met another couple who, by previous arrangement, had gone to the dance earlier and had occupied a booth in the area east of the dance floor. At that time the booth immediately to the south of theirs was occupied by a group of four young men.

These four young men were former students of the same high school in Omaha. They had all been in the service but were discharged therefrom. On this occasion they were getting together to renew their friendships and to meet friends who might be attending the dance.

After appellee arrived she did not dance but continuously occupied a seat in their booth. The couple with them danced and would, from time to time, return to the booth. She and her friends ordered some soft drinks but did not spike these drinks. In fact, appellee had

not drunk any intoxicating liquor before she came to the dance nor did she drink any after getting there. About 10 p. m. her escort left their booth. However, she remained therein until about 10:30 p. m., when she was injured just as she was leaving. This incident will be more fully set forth hereinafter.

When appellee arrived at the booth she and her friends were going to occupy, the four young men in the booth immediately to the south of theirs were intoxicated. After her arrival this group continued to buy mix and ice and spike these drinks with liquor. When spiked they would either drink them themselves or give them to others. As time passed they became more intoxicated. They also became very boisterous in their conduct and language. This consisted of loud and profane language, scuffling among themselves and with others, breaking glasses, and, on one occasion, the throwing of a whisky bottle. Over this period, from 9 to 10:30 p. m., the conduct of these young men continuously became worse.

About 10:30 p. m. the appellee, being alone in her booth, started to leave. She got out of the booth but leaned over the table therein to pick up her purse. As she leaned over the table she was hit on the right side of her nose by a bottle. This bottle was either tossed or thrown by one of the young men in the booth immediately to the south. This blow caused serious injuries. Appellee was taken to a hospital. The young men left the ballroom shortly thereafter.

It is true that appellant's witnesses told quite a different story but it will not be necessary to here relate the facts they testified to as the conflict in the testimony was for the jurors and they decided it by their verdict.

With reference to the duty of proprietors of public places of amusement we have said: "One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the in-

surer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care." Welsh v. Jefferson County Agricultural Society, 121 Neb. 166, 236 N. W. 331. See, also, Emery v. Midwest Amusement & Realty Co., 125 Neb. 54, 248 N. W. 804, and Hughes v. Coniglio, 147 Neb. 829, 25 N. W. 2d 405.

In the case of Hughes v. Coniglio, *supra,* we went on to say: "The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm."

As stated in Southern Enterprises v. Marek, 68 S. W. 2d 384, and affirmed in Marek v. Southern Enterprises, 128 Tex. 377, 99 S. W. 2d 594: "* * * the defendant owed her the duty to exercise ordinary care to protect her from the wrongful acts of other patrons present provided defendant knew of such misconduct or had reasonable grounds to anticipate it."

And in Moone v. Smith, 6 Ga. App. 649, 65 S. E. 712: "This duty was to use ordinary care and diligence to protect the plaintiff, while he was in the defendants' place of business lawfully engaged, from injury,—injury either from the unsafe condition of the premises themselves, from their own conduct, or from that of their employees, or injury from any vicious or improper persons who were in the room either as customers or otherwise. The defendants had invited the plaintiff into their place of business, for his amusement and their benefit. The plaintiff had accepted the invitation of the defendants, and confided in their implied promise that

he would be protected while in this place of amusement controlled by them, in so far as they could protect him by the exercise of reasonable care and diligence."

And in Quinn v. Smith Co., 57 F. 2d 784: "* * * that proprietors of bathing pools owe to their patrons a duty to exercise due care, not only in providing a safe and proper place as such, but in policing and supervising the place to protect those coming there from wanton and unprovoked assault and injuries at the hands of other persons there."

See, also, Rowell v. City of Wichita, 162 Kan. 294, 176 P. 2d 590; Daniels v. Firm Amusement Corporation, 158 Misc. 251, 285 N. Y. S. 557; and 52 Am. Jur., Theaters, Shows, Exhibitions, Etc., § 52, p. 296.

Under these principles the facts of this case presented a question for the jury. The court, by its instructions, submitted this issue of fact to the jury on the basis of appellant's common-law duties.

However, the court, in its instruction No. 2 wherein it was defining to the jury the duties of the appellant, included the following as a part thereof: "The defendant and its servants were not insurers of the defendant's guests if someone was injured as the result of a patron or patrons of its amusement place being injured by intoxicated persons who might be attending the entertainment program unless upon notice or knowledge that some one who was boisterous and in an intoxicated condition they fail to take reasonable precautions to prevent such member present from injuring someone else." The court, in its instruction No. 5, correctly informed the jury that: "An operator of a place of public amusement is not an insurer of the safety of his patrons and those in attendance at a public dance on New Year's Eve, or at any other time, * * *." Nor does he become so, as provided in instruction No. 2, "* * * upon notice or knowledge that some one who was boisterous and in an intoxicated condition they fail to take reasonable precautions to prevent such member present from in-

juring someone else." The appellant could, of course, become liable if it failed to take ordinary and reasonable precautions to prevent such patrons from injuring someone else present, under the foregoing situation, provided such failure was a proximate cause of the injury, but it did not become an insurer by reason thereof as stated in instruction No. 2 given by the court.

Appellant contends that the appellee, by her petition, based her action on the appellant's violation of the provisions of a city ordinance relating to dance halls; that she proved her case accordingly; and that the trial court erred when it submitted the action to the jury on the basis of its duties at the common law.

In her petition appellee pleaded the following part of Ordinance No. 14924, Article VI, of the city of Omaha, relating to "Dance Halls": "It shall be unlawful for any person, maintaining or operating any public dance hall, or any person or association conducting or giving any public dance, * * * to permit persons to frequent any public dance hall or public dance who are under the influence of liquor, or to permit smoking, profanity, or boisterous conduct in said public dance halls, or public dances. * * * and it shall be unlawful for any person, having charge of or conducting any public dance halls or conducting any public dances, to permit any person to engage in any indecent or disorderly conduct or in any lewd or lascivious behavior in any public dance hall or at any public dance." She further alleged that what appellant did, of which she here complains, was "* * * all in violation of the ordinances of the City of Omaha." Upon the trial she offered, and the court admitted in evidence, that part of the ordinance pleaded.

With reference thereto we will first consider the appellant's contention that the ordinance cannot be made the basis of a suit for damages because it was enacted solely for the benefit of the city of Omaha and the public at large. In support thereof it cites our cases of Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W.

995, 68 L. R. A. 425, and Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382. In the case of Frontier Steam Laundry Co. v. Connolly, *supra,* we announced the rule as follows: "* * * where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence." However, the court went on to say: "It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case."

Without discussion of the actual situations involved in the two cases cited we think it is self-evident that the requirements of the aforesaid ordinance applies to both the public at large and to the individual patrons of the dance.

In Hoopes v. Creighton, 100 Neb. 510, 160 N. W. 742, L. R. A. 1917C 1146, Ann. Cas. 1917E 847, we held:

"The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. * * *

"The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence."

And in Dorrance v. Omaha & C. B. St. Ry. Co., 105 Neb. 196, 180 N. W. 90, that: "* * * such a violation is evidence of negligence, which the jury are entitled to

consider upon the question whether actionable negligence existed, * * *."

"Violations of ordinances and traffic regulations promulgated by a city constitute evidence of negligence which a jury may properly consider along with all the other evidence and circumstances of the case in determining questions of negligence. Such violations are not negligence per se." Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396.

" 'As a general rule it may be said that negligence may consist in the neglect of some duty imposed by statute as well as by the careless or negligent performance of some obligation imposed by law or contract. Liability for damages because of the violation of a statute or ordinance imposing some duty on a person is not affected by the fact that it is made a misdemeanor, and the fact that the statute imposes a penalty for its violation will not prevent an action for damages. * * *.' 29 Cyc. 436." Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E 1292.

The rule as stated in Restatement, Torts, § 286, p. 752, is as follows:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

"(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and

"(b) the interest invaded is one which the enactment is intended to protect; and,

"(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,

"(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

We find this contention of appellant to be without merit.

Having arrived at the conclusion that the requirements of the ordinance are for the benefit of the individual patron of the dance as well as the public at large, the next question that arises is whether or not, the case having been pleaded and tried thereunder, the court was in error in submitting it to the jury on the basis of the appellant's common-law duties.

Ordinarily the trial court should submit a case to the jury according to the theory upon which it is brought and tried. However, since the duties of the appellant, which appellee here claims appellant violated, were actionable both at the common law and under the ordinance it was not error for the court to submit the issues on either basis or both. But regardless of the basis upon which submitted, when an ordinance has been properly received in evidence, the court should instruct the jury as to the legal effect of any violation thereof in accordance with the principles hereinbefore set forth.

Appellant contends that appellee assumed the risk of which she here complains and cites as applicable to that contention cases involving the assumption of risk theory as applied to the batted or thrown ball in baseball. See, Emhardt v. Perry Stadium, Inc., 113 Ind. App. 197, 46 N. E. 2d 704; Ivory v. Cincinnati Baseball Club Co., 62 Ohio App. 514, 24 N. E. 2d 837; Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S. W. 2d 318; and Hummel v. Columbus Baseball Club, 71 Ohio App. 321, 49 N. E. 2d 773. Or as applied to the flying puck in hockey as to those in attendance who are familiar with the game. See Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164.

The principle announced in those cases is not applicable to the situation here. The batted or thrown ball and the flying puck are incidents inherently characteristic of those games of which everyone familiar with and attending that type of sport is fully aware. However, we do

not think it can be said that the tossed or thrown bottle is an incident inherently characteristic of the activities of a crowd attending on the occasion of the ballroom sport of dancing of which anyone in attendance and familiar with dancing should in any way be aware, even though it be the occasion of a large gathering on New Year's Eve at a public dance. Appellee did not assume or incur this risk by becoming a patron of the dance. See Klause v. Nebraska State Board of Agriculture, *ante* p. 466, 35 N. W. 2d 104.

Appellant pleaded appellee's negligence and there is evidence in the record from which the jury could have found that the appellee was, by reason of her conduct, negligent.

"It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not." Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665. See, also, In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; and Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63.

This principle is applicable to the defense of contributory negligence for, as stated in McGrath v. Nugent, 133 Neb. 237, 274 N. W. 549: "It is error for trial court to fail to instruct on issue of contributory negligence when raised by the pleadings and supported by the evidence."

It is true that the court gave no instructions in the usual manner submitting the issue as to appellee's contributory negligence, if any, but did, by its instruction No. 4, submit the issue as to her conduct in inviting familiarities with these young men as a complete defense. This was in accordance with appellant's requested instruction No. 7 and more favorable than it was entitled to on this issue. Appellant is therefore in no position to complain that this was prejudicial to its rights.

However, by its requested instruction No. 8, the appellant also called to the court's attention the fact that appellee failed to warn appellant's employees of the condition of these young men, which had continued for

at least an hour and a half, and that she failed to withdraw to a position of safety.

There is evidence in the record that appellee had been a former employee of appellant and had worked in this ballroom as a waitress; that she was familiar with the various employees, their duties, and how the place was conducted; that she permitted the condition of the young men to develop without complaining thereof to the management; and that she failed to withdraw from the vicinity of the disturbance for at least an hour and a half.

While the instruction offered is not in proper form we have said: "If, as contended by counsel for defendant, the tendered instruction is defective in form, it was the duty of the court to prepare and give a proper instruction upon the point covered by the request. Pospisil v. Acton, 118 Neb. 200, 224 N. W. 11." Carlson v. Roberts, 133 Neb. 166, 274 N. W. 473.

We think what was said in Moone v. Smith, *supra,* is here applicable. The Georgia court therein said: "It is also insisted, that the allegations of the plaintiff show that the plaintiff himself might have avoided any injury, by the exercise of ordinary care and diligence; that, hearing and seeing that the men were drunk and fighting, it was his duty, if he reasonably apprehended danger therefrom, to leave the saloon. We are not prepared to hold that a person who is lawfully in a place of amusement or public entertainment is required to leave because of the unlawful, vicious, or dangerous conduct of other persons therein. He might be authorized to remain, relying upon the proprietor and his servants to quell the disturbance and to protect him from any hurtful consequences. The question of contributory negligence is peculiarly one for the jury; * * *."

We think, under the evidence as disclosed by the record, the failure of appellee to warn of the condition of which she was aware for at least an hour and a half and her failure to withdraw therefrom until the end of that time presented a question of fact for the jury as to

whether her conduct, in this regard, was negligent and, if so, whether or not it was a proximate cause of her injury. Having come to that conclusion, it was error for the trial court not to have submitted it under our statutory doctrine of comparative negligence and its failure to do so was prejudicial to the appellant's rights.

Since the matter must go back for retrial it should be mentioned that the question of appellee inviting familiarities with these young men should be submitted on the same basis.

Appellant complains of the admission of certain evidence relating to the sale of extra ice along with the bottles of mix and of evidence showing the construction of the tables in the booths, that is, that they were constructed with a shelf or drawer underneath. It associates misconduct of counsel in connection therewith. Appellant is not in position to complain of the admission of evidence establishing these facts for it offered evidence to the same effect. However, even if it had not, we do not think it was error to receive this evidence. Evidence establishing that mix and ice were being sold in this establishment on the evening in question and what actually was being done with it afterward by the parties buying it is competent to show how the place was being conducted. It was also competent to show what the particular patrons herein involved, during the period of time they were in the ballroom immediately before the incident occurred, were doing with the mix and ice they bought. Since the evidence was competent counsel had the right to question in regard thereto and misconduct could not arise from so doing.

Appellant complains of certain instructions given by the court and of others which it requested and the court refused to give. Most of these claimed errors are covered by the principles hereinbefore announced and further discussion thereof would serve no useful purpose.

" 'When instructions requested are substantially given in the charge prepared by the court on its own motion,

it is not error to refuse to repeat them, though expressed in language different from that used by the court.' Curry v. State, 5 Neb. 412." Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

The foregoing applies to requested instruction No. 3 insofar as it correctly states the law applicable.

Appellant, in referring to instruction No. 5½, says: "There was no obligation or requirement that the defendant was required to use ordinary and reasonable care in the operation of the dance hall, * * *. On the contrary the Chermot management was in effect made liable as an insurer of the plaintiff's safety * * *."

Of course, "Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same." Wright v. Cameron, 148 Neb. 292, 27 N. W. 2d 226.

As to the latter part of the contention it was covered by instruction No. 5 given by the court. However, in view of our discussion of instruction No. 2 given by the court wherein it sought to define the appellant's duties, we are of the opinion that the instructions failed to properly inform the jury that the appellant's duty, under the circumstances here, amounted to exercising ordinary and reasonable care to prevent appellee's injury.

As to requested instruction No. 9 we do not think it correctly reflects the law here applicable.

Other errors assigned and complained of will not be discussed as they are not material in view of our holding herein.

For the reasons stated in the opinion we find the judgment of the trial court must be reversed, the verdict of the jury vacated, and the cause remanded for retrial. It is so ordered.

REVERSED AND REMANDED.

PAINE, J., not participating.

LOUIS GREENBERG, APPELLEE, V. FIREMAN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, CALIFORNIA, APPELLANT.
LOUIS GREENBERG, APPELLEE, V. NATIONAL RESERVE INSURANCE COMPANY OF ILLINOIS, APPELLANT.
LOUIS GREENBERG, APPELLEE, V. MINNEAPOLIS FIRE AND MARINE INSURANCE COMPANY OF MINNEAPOLIS, MINNESOTA, APPELLANT.

35 N. W. 2d 772

Filed January 28, 1949. Nos. 32464, 32465, 32466.

1. **New Trial.** The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial.
2. ———. The motion for a new trial is a statutory remedy, and a new trial can be granted by a court of law only upon the grounds, or some of them, provided for by the statutes.
3. ———. The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered.
4. ———. The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading.
5. ———. Mere trifling errors are not sufficient to authorize the granting of a new trial.
6. ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
7. ———. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
8. ———. As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case.
9. ———. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

10. ———. The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied.
11. ———. While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record.
12. ———. Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. If a party desires a review of that determination, the showing thereon must be preserved in the record.
13. ———. That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury.
14. **Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
15. **New Trial.** The ruling of the court on a motion for a new trial is subject to review here.
16. **Appeal and Error: New Trial.** Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining.
17. ———: ———. Rules of law will be applied to those assignments of error here with the same requirements whether the decision granted or denied a new trial.
18. ———: ———. An order granting a new trial will be scrutinized here with the same care as one denying a new trial.
19. ———: ———. There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.
20. ———: ———. Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from

the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment.

21. ———: ———. If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.

22. ———: ———. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned.

23. ———: ———. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule applies to the district court when reviewing its own proceedings on motion for a new trial.

24. **Witnesses.** An expert or skilled witness may be properly reexamined as to matters concerning which he was cross-examined.

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

Fraser, Connolly, Crofoot & Wenstrand and *W. H. Wright,* for appellants.

Eugene D. O'Sullivan, and *Beber, Klutznick, Beber & Kaplan,* for appellee.

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

SIMMONS, C. J.

This appeal involves three separate actions which were brought against three insurance companies to recover for damages to a stock of merchandise by fire. The defense in all three cases was that the fire was brought about by the act, design, and procurement of the plaintiff. The fire occurred June 30, 1940. The

petitions were filed May 6, 1941. The actions were consolidated for trial, and are consolidated here on appeal. Trial began during the February 1942 term of the court on February 9, 1942, and resulted in a verdict for the defendants on March 6, 1942, on which judgments for the defendants were entered that day. Motions for a new trial were filed March 9, 1942. On November 3, 1942, at the October 1942 term of the court, the motions for a new trial were heard and granted. Thereafter at the October 1947 term of court and on January 19, 1948, the matters again went to trial, resulting in a verdict on January 29, 1948, for plaintiff. Motions for new trial were filed February 6, 1948, and overruled February 26, 1948.

The first two grounds for the motions of February 6, 1948, were that the court erred in vacating and setting aside the verdict of the jury rendered on the first trial of the actions, in which there was a verdict for the defendants, and in granting a new trial. This appeal by the defendants challenges the correctness of the court's ruling on those matters. We accordingly are presented the specific questions of the scope of the power of the district court to hear a motion for a new trial filed within time, and to set aside a verdict and judgment at a term subsequent to that in which the verdict and judgment were rendered and entered, and the scope of our power and the procedure to review that action. We find that the trial court erred in granting the new trial and order the reinstatement of the judgments for the defendants.

It is the defendants' contention that while an order of the trial court will not be disturbed here unless it clearly appears that no tenable ground existed therefor, yet, if it appears that no tenable ground existed, the action of the trial court constitutes an abuse of discretion and should be reversed, and that no ground exists here.

It is the plaintiff's contention that unless it clearly and unequivocally appears that no tenable ground existed

to sustain the motion that the decision granting the new trial will be sustained on appeal, and that the burden is upon the complaining party to show that there was an abuse of discretion and that defendants have not met that burden. Plaintiff further contends that it is the correctness of the order as a whole that is controlling.

These contentions and arguments based on them have caused us to re-examine and restate the rules that govern the district court in considering motions for a new trial in law actions involving jury trials, and likewise the rules that apply here in considering assignments of error based thereon. It is appropriate that this be done now in view of the provisions of section 25-1315.03, R. S. Supp., 1947, providing that an order granting a new trial is an appealable order. It is recognized that there is lack of clarity and consistency in our many decisions dealing with these questions, and that the rules here stated modify and in some instances overrule prior decisions.

The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. Tomer v. Densmore, 8 Neb. 384, 1 N. W. 315; Weber v. Kirkendall, 44 Neb. 766, 63 N. W. 35; Bailen v. Badger Import Co., 99 Neb. 24, 154 N. W. 850.

The motion for a new trial is a statutory remedy, and a new trial can be granted by a court of law only upon the grounds, or some of them, provided for by the statutes. Risse v. Gasch, 43 Neb. 287, 61 N. W. 616.

The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered. Weber v. Kirkendall, *supra;* Bradley v. Slater, 55 Neb. 334, 75

N. W. 826, on rehearing, 58 Neb. 554, 78 N. W. 1069; Netusil v. Novak, 120 Neb. 751, 235 N. W. 335; First Nat. Bank v. Broyles, 122 Neb. 414, 240 N. W. 546; Hamaker v. Patrick, 123 Neb. 809, 244 N. W. 420. Accordingly, we are not here dealing with a case involving the inherent power rule.

The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading. Tomer v. Densmore, *supra;* Tingley v. Dolby, 13 Neb. 371, 14 N. W. 146; Bush v. Bank of Commerce, 38 Neb. 403, 56 N. W. 989; Bee Bldg. Co. v. Dalton, 68 Neb. 38, 93 N. W. 930; Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139; Trute v. Holden, 118 Neb. 449, 225 N. W. 238.

Mere trifling errors are not sufficient to authorize the granting of a new trial. Parsons v. Chicago & N. W. Ry. Co., 110 Neb. 836, 195 N. W. 477. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. Snyder v. Jennings, 15 Neb. 372, 19 N. W. 501; Weber v. Kirkendall, *supra.* As stated by the statute they are errors "affecting materially the substantial rights of such party." § 25-1142, R. S. 1943.

The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. The word "discretion" is one of variable meanings depending on its use. In Tingley v. Dolby, *supra,* we quoted with approval this definition by Lord Mansfield: "Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular." As used in the connection here presented it means that the court in its ruling must be guided and governed by applicable law. It means the

application of statutes and legal principles to all of the facts of a case. Shopiro v. Shopiro (Cal. App.), 153 P. 2d 62.

A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. Tingley v. Dolby, *supra;* Missouri Pacific Ry. Co. v. Hays, 15 Neb. 224, 18 N. W. 51; Wagner v. Loup River Public Power District, *ante* p. 7, 33 N. W. 2d 300.

The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist the court has no discretion in the matter and the motion must be denied. Tingley v. Dolby, *supra;* Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069.

While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record.

Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. Sang v. Beers, 20 Neb. 365, 30 N. W. 258. If a party desires a review of that determination, the showing thereon must be preserved in the record. That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury. Risse v. Gasch, *supra;* Central City Bank v. Rice, 44 Neb. 594, 63 N. W. 60.

Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep

the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. In Bee Bldg. Co. v. Dalton, *supra,* we condemned a contention that, sustained, would have permitted a party to take his case from one court to another until fortune favored him with a judge who was in accord with his view of the law and the construction of the evidence. By the same reasoning a party should not be permitted to take his cause from one jury to another until he finds one that will accept his version of the facts. A party is not to be subjected to the expense of litigation which settles nothing. The integrity and maintenance of the jury system require that such be the rule. The public does not maintain the courts and the expense of jury trials for experimental investigations, but rather to determine controversies. Hence it is no answer to a claim of prejudicial error in granting a new trial to say that the party is not harmed because he has a second chance to establish his rights.

The ruling of the court on a motion for new trial is subject to review here. School District v. Bishop, 46 Neb. 850, 65 N. W. 902; Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287. Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining. Rules of law will be applied to those assignments of error here with the same requirements whether the decision granted or denied a new trial. An order granting a new trial will be scrutinized here with the same care as one denying a new trial.

There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.

Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appel-

lant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment.

If, as in the instant case, the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. Under these circumstances the appellant is not required to establish a negative. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.

By that process the questions to be determined here are presented in a practical manner. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to our right to notice and consider plain errors not assigned. Such a procedure fully protects the rights of the parties. Substantially it is the procedure which the parties have followed in the instant case.

The bill of exceptions of the first trial is here. The record shows that plaintiff conducted a shoe and clothing business in South Omaha. The store, about 20 x 75 feet in area with a basement, was in the congested business area on the principal street. Plaintiff's lease was expiring and on Saturday, June 29, 1940, he was beginning to move to a new location. In that process a quantity of empty boxes, paper, etc., accumulated in the rear of the store. Plaintiff was conducting his business as usual that day, while also having employees move some merchandise. Some shelving had already

been moved. The store closed for business at 10 p. m. Plaintiff and his wife, and two of plaintiff's employees, remained in the store until midnight when the two employees went home. The testimony of plaintiff and his wife is that they remained in the store until 1 a. m., working and getting goods ready for moving the following day, and that they left the building and went home by auto at that time and plaintiff remained there until notified of the fire the next morning. It is undisputed that fire was discovered in the store about 2:30 a. m., and thereafter spread rapidly. The defendants offered the testimony of four people who said that they were in front of the store at 2:30 a. m., and discovered the fire. They testified that just before they saw the fire a man came out of the store, got into a car in which a lady was sitting, and drove rapidly away. One or more of the witnesses positively identified the man who left the store at that time as the plaintiff. This evidence was denied and an effort made to show that two of these witnesses undertook to sell their silence before they related to the authorities what they said they had seen. The evidence is that the fire when discovered was burning in the rear of the room near the accumulated paper and cartons and spread rapidly throughout the store. The building was a one-story structure with an enclosed attic. It was the plaintiff's theory that the fire started from defective wiring in the attic and that the lower fire in the storeroom was ignited by falling material. It was defendants' theory that the fire started from below and spread to the attic. The trial was of several days' duration and the questions of fact exhaustively investigated.

The plaintiff argues here that the verdict was unwarranted by the evidence; that no motive for arson was established; that plaintiff's every act contradicts any inference of arson; that the physical facts do not support an inference of arson; that the testimony of the witnesses who swore they saw plaintiff leaving the store was en-

tirely discredited; and that the trial court was justified in setting the verdict aside.

We have examined the record. Without further discussing the evidence that went to the jury, it presented questions, the determination of which was within its jurisdiction. The jury's decision is controlling unless prejudicial error occurred in the trial.

It further is argued that the actions, demeanor, and statements of counsel and witnesses for the defendants were heard and observed by the trial court, and that the trial court had the right to consider those matters in determining the granting or denying of a new trial. The fault with that reasoning is that it is for the trial jury to weigh those matters in reaching a verdict. Those considerations are not for the court in exercising its judgment on the motion for a new trial.

Plaintiff advances two rulings upon the admission of evidence which it is contended constitute prejudicial error.

Defendants offered the testimony of a chemist who was asked, "* * * are there inflammable materials which burn and leave no odor or give no smell at the time they are burning?" He answered, "Yes." The evidence was admitted without objection. Before this evidence was offered and received plaintiff had asked the battalion fire chief on cross-examination if he had found "inflammable material or anything" on the premises, and had received an answer that he had not. Obviously the defendants were merely meeting the inference arising from the evidence that plaintiff had already introduced. Be that as it may, the rule is that where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. Fisk Tire Co. v. Hastings Warehouse & Storage Co., 131 Neb. 401, 268 N. W. 86. The rule applies to the district court when reviewing its own proceedings on motion for a new trial.

Finally, plaintff contends that there was prejudicial

error in the admission of an answer to a question propounded to the investigator for the Omaha Fire Department. It was his duty to check supposed incendiary fires and fires of unknown cause. He had visited the scene of the fire and made such an investigation. The question was: "Now, Mr. O'Sullivan asked you what opinion you gave. What is your opinion now * * * as to whether this fire was incendiary, and on what do you base it?" Objection was made that it invaded the province of the jury and called for pure speculation and conclusion of the witness. The witness was permitted to answer and said, "After investigation, of course, it's like—it's as much incendiary, to my notion, as any that I ever worked on." Motion to strike the answer as stating a conclusion and opinion of the witness was overruled.

Plaintiff contends this constituted prejudicial error for the reason that it permitted the witness to express his opinion on the ultimate fact to be determined by the jury; it permitted the witness to express his opinion upon a subject where expert opinion is not admissible; it was not limited to facts in evidence; and it permitted the witness to make a voluntary comparison.

It is necessary that other parts of the evidence be stated which were received prior to this question and answer. On cross-examination of the battalion fire chief, plaintiff asked and received an affirmative answer to this question: "Now, it is true that you didn't find a single thing that would indicate that this was a set fire * * * ?" Plaintiff on cross-examination of the investigator asked about whether he found inflammable or highly combustible liquids or containers for such liquids on the premises. Plaintiff further asked him if it was not true that he had reported to the battalion chief "* * * the fact that you found nothing at all wrong, and nothing that would suggest to you that the fire was of incendiary origin, * * *" and received the answer that he might or might not have made such a statement. Pressed further

on cross-examination the witness answered that the investigation was not over and he wouldn't make up his mind at that time. On redirect the witness stated that he did say to the battalion chief that he did not find any benzene or gasoline.

Then, on redirect, came the question and answer about which objection is made. The witness was asked, "Why do you say that" and over objection was permitted to state his reasons, one of which was the finding of the witnesses who said they saw the plaintiff leaving the building at the time of the fire. On motion his answer was stricken. Plaintiff then moved to strike all of the witness' testimony "as to his opinion of the fire" because it was an opinion and conclusion, and without sufficient foundation. The motion was overruled. Plaintiff then asked on recross if he had not testified at a previous hearing that he didn't find a single thing to indicate that it was a "set fire" and that he found no inflammable material or anything there. The witness answered that he so testified.

It is noted that the previous questions went not only to the fact of no inflammable substances being found, but also to whether or not anything was found that would "indicate" a set fire and anything that would "suggest" that the fire was of incendiary origin. These questions obviously called for the witnesses mentally to note what they had found at the scene of the fire, to resolve the question of incendiary origin, and to express that conclusion. Had there been an affirmative answer, the conclusion and opinion of the witnesses would have been expressed or implied in the answer. In fact the answers elicited carried with them the implied conclusion of the witnesses that at that time it was their conclusion that the facts found would not support a determination of incendiary origin. The questions obviously had that purpose. It also is obvious that the investigator so construed the questions when he answered that he could not make up his mind at that time—an answer that was

received without objection. It likewise is obvious that the parties themselves so construed the questions, for defendants said, "Mr. O'Sullivan asked you what opinion you gave" and plaintiff did not object to that premise. In short, plaintiff opened the subject and produced evidence of the expert witnesses as to their opinions and conclusions at the time of the fire. The precise question then is this: Was it prejudicial error for the court to permit the defendants to put in evidence the opinion of the witness at a later date when the plaintiff had opened the question and offered and caused like evidence of the opinion of the witness and another to be received.

An expert or skilled witness may be properly re-examined as to matters concerning which he was cross-examined. 32 C. J. S., Evidence, § 560, p. 376; 70 C. J., Witnesses, § 854, p. 699; Fitzgerald v. Omaha & C. B. St. Ry. Co., 97 Neb. 856, 151 N. W. 931.

Plaintiff having sought and secured the benefit of the witness' opinion at the time of the fire cannot predicate error upon the defendants having thereafter sought and secured the benefit of the witness' opinion at a later date.

No prejudicial error appears from the record in the first trial which resulted in the verdict for the defendants. Defendants accordingly are entitled to keep the benefit of that verdict. It follows that the trial court erred to the prejudice of the defendants in setting aside the verdict in the first trial and granting a new trial.

This conclusion renders unnecessary the determination of the questions presented by the defendant as to the allowance of attorneys' fees.

The judgment of the district court is reversed with directions to set aside the verdict and judgment for the plaintiff rendered and entered as a result of the second trial, and to re-enter judgment for the defendants on the verdict rendered at the first trial.

REVERSED AND REMANDED WITH DIRECTIONS.

PAINE, J., not participating.

VIOLA BASTIAN, APPELLANT, v. WILLIAM F. WEBER ET AL., APPELLEES.

35 N. W. 2d 791

Filed January 28, 1949. No. 32512.

1. **Appeal and Error.** The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court.
2. ———. A correct decision of the district court will not be disturbed on appeal because the court gave a wrong or insufficient reason therefor.
3. ———. The rule has no application where it is the decision that is attacked as distinguished from the reason given for the decision.
4. **Estoppel.** To constitute an equitable estoppel, there must exist a false representation or concealment of material facts, with actual or constructive knowledge by the party against whom estoppel is claimed, without knowledge or means of knowledge by the party to or from whom made, and reliance thereon by the party to or from whom made to his prejudice.
5. **Contracts.** In order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement.

APPEAL from the district court for Wayne County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Mark J. Ryan and *Budd B. Bornhoft,* for appellant.

H. D. Addison, for appellees.

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

YEAGER, J.

This is an action by Viola Bastian, plaintiff and appellant, against William F. Weber, George Hollman, and Alice Hollman. Albert P. C. Bastian and Ernest Woehler were made additional parties defendant by answer and cross-petition of the defendant William F. Weber.

William F. Weber is the only defendant who has made an appearance here, and on the issues presented no consideration of any right of the other parties is required. He will be referred to hereinafter as appellee.

The action as instituted was in ejectment. Appellant alleged that she was the owner of the legal title and entitled to the possession of the north half of Lot 14 and all of Lot 15 in Block 4, Original Town of Wayne, Wayne County, Nebraska, but that the defendant, appellee, unlawfully keeps her out of possession thereof. She prayed for judgment accordingly.

To the petition appellee filed an answer in which he denied all allegations of the petition except that he was in possession of the premises. He asserted that he was rightfully in possession.

In addition to his answer the appellee filed an equitable cross-petition. In consequence the action was tried to the court as in equity.

In the cross-petition appellee set out that he and plaintiff were married April 7, 1932, and that on August 4, 1932, the parties as husband and wife went into possession of the real estate in question as their home and they continued to use it as their home until about June 1947 when appellant abandoned the premises to appellee; that he continued to occupy the premises up to the time of the filing of the cross-petition; that during the time in question appellee made permanent improvements on the premises which included remodeling the house and making two apartments out of it, painting, repairing, and placing thereon another building all of the value of approximately $2,000.

It is further set out that on the separation of the parties a division of property was made and that it was agreed that appellee was to have possession of the premises in question as long as he desired and that by reason of the statements, promises, acts, and the agreement made by appellant she is estopped to deny defendant's right to

possession of the said premises and that to deny such right would be a fraud upon him.

It is further set out that some of the rights and interests of appellee in the premises grow out of the marital relationship previously existing between the parties.

He prayed for dismissal of the petition, a determination of his property rights in the premises, and for other equitable relief.

The reply admitted the preexisting marital relationship but otherwise was a general denial of the allegations of the cross-petition.

Following a trial findings were made and decree entered pursuant thereto. The court found that appellant was the owner of the premises by virtue of adverse possession; that a divorce decree entered in favor of appellant and against appellee in the state of Oregon on September 16, 1947, was valid and that by reason thereof no homestead rights attached in favor of appellee to the premises; that appellant was bound by her acts, conduct, and statements and by reason thereof she is estopped to deny appellee's right to occupancy and possession of said premises as long as he desires to reside therein; that appellee's right of occupancy should be decreed and that appellee should be required to pay taxes and special assessments against the premises and keep them in good condition and to keep fire and windstorm insurance thereon in an amount not less than that carried at the time of trial, until the further order of the court, but that he should not be required to pay special assessments contemplated by a foreclosure action entitled City of Wayne v. Rodgers et al.

The decree provided: "IT IS THEREFORE CONSIDERED, ADJUDGED, ORDERED AND DECREED BY THE COURT that the petition of the plaintiff be dismissed at plaintiff's cost and that defendant's right of occupancy and possession of the premises involved, to-wit: * * *, be decreed in said defendant according to the above findings of the court."

It is from these findings and this decree that appellant has taken her appeal.

There is but one assignment of error. It is as follows: "The court erred in holding that the plaintiff was estopped to deny defendant's possession."

Full examination of the record and of the briefs discloses that this assignment presents the only question for determination on this appeal.

The appellee sets forth as the issues tried and decided the following:

1. Has the defendant a homestead right in the premises involved?

2. Was plaintiff's Oregon divorce decree valid?

3. Were the defendant's homestead rights in the premises terminated by the Oregon divorce decree obtained by plaintiff on constructive service?

4. Did the trial court have a legal right to determine the property rights of these divorced parties in the premises involved?

5. Was plaintiff entitled under all the facts to possession of the premises as against the defendant who was in possession?

As to the first and third of these the finding and decree were against the appellee and therefrom he has taken no appeal or cross-appeal and has not in his brief predicated assignment of error thereon. The decree therefore in those respects has become a valid and binding adjudication.

In Meade Plumbing, Heating & Lighting Co. v. Irwin, 77 Neb. 385, 109 N. W. 391, this court said: "It follows, then, that the finding and judgment against Irwin was erroneous, but as we find nothing in the record showing a cross-appeal, and his brief assailing the decree was not filed in due season, he is not entitled to have the decree reviewed." The decision in this case was reversed in a later opinion appearing as 77 Neb. 391, 111 N. W. 636, but this conclusion was not disturbed. In the later opinion it was held that there was a proper cross-appeal noted in

the brief which though filed out of time would be considered sufficient in view of the fact that appellant did not object to service or filing and did not move to have it stricken.

Rule 1d of the Revised Rules of the Supreme Court is as follows: "The filing of an appeal shall vest in an appellee the right to a cross-appeal. The cross-appeal need only be asserted in appellee's brief in the manner provided by Rule 8b 4."

Rule 8b 4 is as follows: "Where the brief of appellee presents a cross-appeal, it shall be set forth in a separate division of the brief. This division shall be headed 'Brief on Cross-Appeal' and shall be prepared in the same manner and under the same rules as the brief of appellant."

Rule 8a 2 (4) is as follows: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

The statute which relates to assignments of error and contemplates controlling and implementing rules by this court is the following: "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court, may, however, at its option, consider a plain error not specified in appellant's brief." § 25-1919, R. S. 1943.

The appellee not having complied with these essential requirements of statute and Supreme Court rules, this court cannot with propriety consider the question of

whether or not the court erred in the determination of these two issues.

The appellee in an effort to avoid the force of this conclusion places reliance upon the rule that a correct decision will not be disturbed on appeal because the court gave a wrong or insufficient reason therefor.

That this is a well-recognized and a proper rule to be invoked where applicable there can be no question. See Longnecker v. Longnecker, 90 Neb. 784, 134 N. W. 926, and Kanaly v. Bronson, 97 Neb. 322, 149 N. W. 781.

The concluding paragraph of the opinion in Kanaly v. Bronson, *supra,* is the following: "The trial court gave a different reason for the decision below; but, since his judgment is free from error, the reason given for rendering it is immaterial on appeal." The judgment here in the two respects under consideration must be taken as free from error since from it no appeal was taken. The rule therefore has no application here.

To say that the rule has application here would require us to say that within the meaning of Nebraska statutes the court declared what amounted in law to a homestead right in the appellee notwithstanding the exact opposite declaration of the findings and decree.

All that the findings and decree purport to do is to give a right of possession and use on condition. They declare no right of appellee as an incident of or growing out of the marriage relationship or growing out of occupancy by the parties during the existence of the marriage relationship.

The second of the issues as set forth by appellee, if it may be considered an issue, must receive the same treatment as the first and third since from the findings and decree in relation thereto there is no appeal, cross-appeal, or assignment of error. We think properly, though there was a finding that the divorce decree was valid, it may not be considered an issue since the invalidity of the divorce decree was never directly or indirectly attacked

by any pleading relating to the instant cause of action or cross-action.

As to the fourth denominated issue there is no question requiring determination. The appellant in her reply brief concedes the right of the court to determine the property rights of these parties as divorced persons in the premises involved.

Having held that in the face of the record presented the appellee may not be heard to assert any right to possession of the premises as a homestead, it becomes necessary to ascertain whether or not he has any possessory right on any other basis.

The district court found in him a right of possession and announced a basis for the finding as follows: "The court further finds that the plaintiff is bound by her acts, conduct and statements and by reason thereof, is estopped to deny defendant's right to the occupancy and possession of said premises as long as he desires to reside therein."

A résumé of the facts upon which this finding and decree must stand, if it may be allowed to stand, is the following:. The parties were married on April 7, 1932. Title was acquired to the premises in question by appellant on August 4, 1932. The purchase price of $1,000 was paid by Albert P. C. Bastian, father of the appellant. Appellee considered the premises as the separate property of appellant up to the time she left for Oregon. Bastian took a mortgage signed by appellant and appellee but it was never paid. Later it was released and he took another mortgage from appellant alone. This has never been paid. The house was occupied within a short time after its purchase as the homestead of the parties. It has been continuously occupied by appellee from that date forward but in April 1946 appellant left and took up residence in the state of Oregon. On September 16, 1947, appellant procured a divorce from the appellee in the state of Oregon. The evidence preponderantly shows that during the time the parties occu-

pied the premises appellant paid all taxes either directly or through her father. The house was divided into two apartments and a small building placed on the rear of the lot. There is some dispute about the payment of the costs of these improvements and additions and also of repairs and upkeep but the record again preponderantly shows that if any part of it was paid by appellee he has received in rentals for the apartment and the added building much in excess of his expenditures. He received all of the rental income and the appellant none. The parties had separate properties and business operations which they operated separately and independently of each other.

On June 5, 1947, appellant wrote a letter to appellee. The letter contains the following: "The best I do is say you go your way and take everything you have accumulated in the past years and what you own and I will take what I have and each go our own way. I do not want any part of any thing you own. * * * You can live in the house as long as you wish as you have been doing as long as you keep up the taxes and expense of the house. When ever you decide different, then the apt. can be rented. And I will keep the expenses up. Of course I still will keep the house, as Dad bought it for me. The bonds you have bought are yours and I want no part of them. * * * Just let me alone and if there are any papers or anything you want me to sign back to you just send the papers to Mark Weatherford a lawyer here and he will take care of them. I will gladly sign all the bonds to you also the 80 is yours and I will take my name off of it as I never wanted my name on it either. Dad will give you the bonds and any cash you have in the safe. * * * I hope you will get a divorce, if not I will. As it will be best, to settle things."

It was on the facts which we think are fairly reflected in this résumé that the court concluded that the appellant was estopped to assert a right of possession to the premises in question.

We have found nothing therein which would give rise to an estoppel. In American Surety Co. v. Smith, Landeryou & Co., 141 Neb. 719, 4 N. W. 2d 889, by quotation from Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218, it was said: "To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice."

It cannot be said that there was a false representation or concealment of material facts by the appellant. The appellee had full knowledge of all pertinent facts. There was nothing on which appellee relied or acted to his prejudice.

In his brief appellee does not argue that within the legal meaning of the term there was an estoppel. He suggests that the intendment of the decree was that appellant was precluded as distinguished from estopped from depriving appellee of possession of the premises.

Appellee urges as reasons for this preclusion, first, that appellee has some homestead rights or rights growing out of the marriage relationship, and second, that appellant is bound by the letter offering to allow him to use and occupy the premises.

The first of these as has already been pointed out must be resolved against him. The second must also be resolved against him. The theory could be sustained only if there were an offer by appellant and unconditional acceptance by the appellee.

This court has said: "That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement." Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; Cooper v.

Kostick, 112 Neb. 816, 201 N. W. 674; Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122.

Here was a bare offer to allow appellee to use and occupy real estate in which he had no interest after the entry of the Oregon divorce decree. No consideration was exacted as a condition precedent to use and occupation. The offer was never formally accepted. There is no evidence that appellee considered that appellant was bound by the offer until after the divorce when she sought to have him vacate the premises.

On the other hand there is convincing documentary evidence that when and after the offer was made appellee did not consider and treat it as a binding offer with an acceptance by him.

After the letter by appellant of June 5, 1947, appellee wrote appellant four letters. They are not dated but the context shows that they were written later than June 5, 1947. In one, exhibit No. 24, the following appears: "Rec'd notice from sheriff. * * * Now I suppose I well have to move out of the house is that right. If that is it I am going to and fight it, which Addison said I could. If not I well not be near. If you will put down in a statement about me living in the house as you did in your letter I won't said a word. * * * If you still mean it about me living in the house O. K." In exhibit No. 25 the following appears: "And do I have to move out of the house. * * * If I dont here from you Addison say I better sue for the right of the house to live in cause there is a homestead act in Neb, and I have been here over 10 yr. I don't want to, I just want a place to live in, And I well take care of it. like I have. * * * I don't want any of your thing or property, just a place to live."

The excerpts from these letters indicate quite clearly that there was no offer and acceptance by which an agreement came into being entitling appellee to the use and occupancy of the premises in question.

We conclude therefore that the district court erroneously decreed that appellee was entitled to the use and occupancy of the premises in question, and also that a judgment in ejectment in favor of appellant and against appellee was erroneously denied.

The decree of the district court to the extent that it grants the appellee the right to use and occupancy of the premises is reversed and the cause remanded with directions to enter judgment in ejectment in favor of appellant in conformity with the prayer of her petition.

REVERSED AND REMANDED WITH DIRECTIONS.

PAINE, J., not participating.

ALEX KRAFT, APPELLANT, v. EDNA M. WERT, APPELLEE.
35 N. W. 2d 786

Filed January 28, 1949. No. 32504.

1. **Automobiles: Negligence.** The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight.
2. ———: ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
3. ———: ———. When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. **Witnesses: Automobiles.** Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony.

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

Miles W. Johnston, for appellant.

Davis, Stubbs & Healey, for appellee.

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

WENKE, J.

Alex Kraft brought this action in the district court for Lancaster County against Edna M. Wert. The purpose of the action is to recover for injuries to plaintiff's person and for damages to his property caused by an accident that happened on July 10, 1946, which accident he claims was due to defendant's negligence. The defendant filed a cross-petition wherein she claims damages to her property by reason of the same accident, which she alleged was caused by plaintiff's negligence. The jury returned its verdict for the defendant on plaintiff's petition and for the plaintiff on defendant's cross-petition. Plaintiff filed a motion for new trial and from the overruling thereof he appeals.

Appellant's first two assignments of error relate themselves to the sufficiency of the evidence to support the verdict of the jury as it relates to the appellant's cause of action.

The evidence establishes, without dispute, that the accident happened on July 10, 1946, between the hours of 5:45 and 6:00 p. m. at an intersection of two county roads located at a point about four miles north of Lincoln. It was occasioned when the car of appellee, a 1936 Plymouth sedan and being driven by her, ran into the right rear of the appellant's truck, a Model A Ford with a fuel tank, which was being driven by him. The tank, at the time of the accident, contained 300 gallons of gasoline and 150 gallons of distillate fuel. The collision occurred in the northeast quarter of the intersection.

Neither road was an arterial or through highway,

consequently there were no stop signs at the intersection. The east-west road was graveled and had a traveling surface approximately 22 feet wide. The north-south road had a dirt surface and had about the same width of traveling surface. Both roads were dry and the weather was normal with a clear sky. Appellee was, at the time, traveling from the east toward the west while the appellant was traveling from the south toward the north. The intersection was a dangerous corner because of a high embankment located at the southeast corner thereof. Both drivers were fully familiar with that fact.

After the collision the truck turned over. It traveled a distance of about 93 feet north before coming to a stop. When it came to a stop it was on the traveled portion of the north-south road, on its wheels, and facing east. The car stopped just north of the northwest quarter of the intersection, upright, and facing toward the north.

Without setting out any of the detailed facts with reference thereto we think there is evidence from which the jury could have found that the appellee was driving at an excessive rate of speed, considering the nature of this corner; that while so doing she failed to maintain a proper lookout to her left for approaching cars; and that such conduct on her part was a proximate cause of the accident.

What has been said of appellee is likewise true of the appellant's conduct in driving his truck, for there is evidence from which the jury could have found: That appellant drove his truck into and across this intersection at a speed of somewhere between 35 and 45 miles an hour; that the truck, after being hit, turned over and finally stopped about 93 feet north of where it was hit; that it was standing upright when it stopped and facing east; that appellant last looked to his right, or toward the east, at a point somewhere between 37½ to 40 feet south of the center of the intersection; that he thereafter never again looked in that direction; that when he looked

to the east he had a vision of between 200 and 300 feet but saw no car approaching; and that appellee's car must have at that time been within the range of his vision.

We think the last statement is justified for the following reasons: Appellant admits he approached, entered, and crossed the intersection while traveling at a speed of somewhere between 15 and 20 miles per hour; that after he looked to his right the evidence shows he traveled slightly over 50 feet before being hit; that in order for appellee's car to travel the distance of appellant's vision toward the east, that is, between 200 and 300 feet, and the point of the collision appellee's car would have had to travel somewhere between 75 and 100 miles per hour; and that there is no oral evidence in the record or facts and circumstances that would sustain any such finding of speed. In fact, it is apparent that appellant simply did not see appellee's car although it must have been in plain sight.

We said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: " 'The duty of the driver of a vehicle * * * to look for vehicles approaching on the highway implies the duty to see what was in plain sight.' Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36, citing Kemmish v. McCoid, 193 Ia. 958, 185 N. W. 628."

It seems so self-apparent to us, from a review of the evidence, that both drivers were traveling at an excessive rate of speed, considering the nature of the corner, without keeping a proper lookout or, if they did, in failing to see what was in plain sight that it would be difficult to understand how the jury could have come to a different conclusion than it did. The record certainly presented a question of fact for the jury as to whether appellee was guilty of negligence and appellant of contributory negligence insofar as those issues related themselves to the right of appellant to recover on his cause of action.

Appellee contends that under our holdings she was

entitled to a directed verdict. We do not think this contention to be correct. It is true that appellant admitted that he looked to his right, or east, when between 37½ and 40 feet south of the center of the intersection; that he did not again look to his right before the collision occurred; and that he had vision to his right of from 200 to 300 feet but did not see the appellee's car although, as we have already pointed out, it must have been traveling within the range of his vision.

We stated in Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, that: "If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law."

However, section 39-728, R. S. 1943, provides in part: "In all other cases the vehicle reaching the intersection first shall have the right of way." Here there is evidence from which the jury could have determined that appellant reached the intersection first in such a manner that he, in fact, had the right of way. Under this situation we think the following from Whitaker v. Keogh, *supra*, applies: "The proper rule is that when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question."

We think the question of appellant's negligence, if any, and the effect thereof was properly for the jury.

Appellant further complains of two instructions given by the court with reference to section 39-728, R. S. 1943.

This statute provides: "Motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. In all other cases the vehicle reaching the intersection first shall have the right of way."

The court gave the following instruction with reference thereto: "You are instructed that the right of way which is given to one under the statute is not an absolute *right of way* which may be exercised under all conditions, but if to the one to whom the right of way is granted, in the exercise of ordinary care, it appears that to insist upon the right of way would probably result in a collision, it would be the duty of such person to use ordinary care to avoid a collision even to the extent of yielding his right of way, and his failure to do so, under those circumstances, would be evidence of negligence." (Emphasis ours.)

Appellant offered the identical instruction given except that his requested instruction contained the word "right" in place of the words "right of way" which we have italicized in the instruction given.

While there is a difference in meaning between the words "right" and "right of way" in that the former is much more extensive in its application and would be inclusive of "right of way," we think that as here used they would have a similar meaning and any distinction would be without a difference. We think the instruction given is more specific, as to the question here involved, and therefore preferable to the one requested.

Appellant, in his requested instruction No. 2, set out section 39-728, R. S. 1943, and claims that the court erred when it gave the following instruction with reference thereto: "* * * and that when two vehicles *approach or enter* an intersection at approximately the same time, the driver of the vehicle on the left shall

yield the right of way to the vehicle on the right, but that the driver of any vehicle travelling at an unlawful speed shall forfeit any right of way which he might otherwise have under the provisions of the law." (Emphasis ours.)

Appellant contends that the court, in attempting to interpret the statute for the jury by its instruction No. 7, used the words "approach or enter," which we have italicized in the instruction, in place of "reach" as used in the statute and in so doing committed error for the reason that the words so used do not have the same meaning as "reach." We cannot agree with this contention, even though it could be said that this language was intended to be an interpretation, for we think the statement "that when two vehicles approach or enter an intersection at approximately the same time" correctly interprets and means the same as "when said vehicles shall reach the intersection at approximately the same time," as contained in the statute.

However, the language used is the same as contained in section 39-751, R. S. 1943, which, as far as here material, is as follows: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right * * *. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder."

Appellant also contends that the court erred in its interpretation of section 39-742, R. S. 1943, by the giving of instruction No. 13.

This statute provides, as far as here material, as follows: "It shall be unlawful for more than three persons over the age of twelve years to occupy the front or driver's seat of any motor vehicle while such vehicle is in motion on the highway. 'Occupied,' as used herein, shall include the holding of one person upon the lap of another."

The court gave the following instruction: "The jury is instructed that the Statutes of the State of Nebraska provide with reference to the number of persons who may occupy a front seat of a vehicle that it shall be unlawful for more than three (3) persons over the age of 12 years to occupy the front, or driver's seat. In this connection you are instructed that it is not a violation of the Statute if three persons over 12 years of age and one or more persons under 12 years of age should occupy such a seat of a vehicle."

The evidence shows that in addition to appellee the front seat of her car was occupied by Mr. and Mrs. Kenneth Stewart. The Stewarts were holding a child of about two years of age on their laps.

The court submitted the following issue as to appellee's negligence: "* * * that she was operating said automobile at said time and place with two adult persons and one minor in addition to herself in the front seat of her automobile so crowding her that she could not safely operate said automobile with due regard to the safety of others."

We think this instruction correctly interprets the statute and properly advised the jury and could have in no manner misled them or in any manner prejudiced appellant's rights as to this issue.

Appellant complains of the fact that appellee, and the witness Kenneth Stewart, were permitted to testify as to their opinion of the speed that appellant's truck was traveling just before the accident. These two witnesses were in the front seat of appellee's car and saw appellant's truck approach from the left. They admitted seeing it travel but a short distance before the collision, however both witnesses saw what happened to it and where it went after the accident. Both witnesses had had driving experience and the qualifications upon which they based their opinions had been shown.

The situation here is comparable to that in Koutsky v. Grabowski, *ante* p. 508, 34 N. W. 2d 893, except that

here the truck was coming at right angles from the left while in the foregoing case the car was coming from the rear. Therein we said:

"Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony.

"A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same."

We think the same principle is applicable here and the evidence was properly received.

From an examination of all the matters complained of we find nothing in the record that requires a reversal and the verdict and judgment of the trial court should be affirmed. It is so ordered.

AFFIRMED.

PAINE, J., not participating.

JESSE B. KENNEDY ET AL., APPELLEES AND CROSS-APPELLANTS, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

35 N. W. 2d 781

Filed January 28, 1949. No. 32484.

1. **Eminent Domain: Damages.** The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury and this court will not ordinarily interfere with the verdict if it is based upon the testimony.
2. **Trial.** When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong.
3. **Witnesses.** The jury are the judges of the credibility of witnesses and of the weight of their testimony.

4. **Eminent Domain: Interest.** If on appeal from an award in condemnation the amount recovered exceeds the amount awarded by the appraisers, the owner of the property condemned may have interest from the time of the taking, but if the condemner deposits with the county judge the amount of the award for the use of the owner before going into possession of the premises, and if by the appeal the amount of the award is not increased, the owner may recover interest on the judgment entered on appeal only from the date of the rendition thereof.
5. **Eminent Domain: Costs.** If on appeal from an award in condemnation proceedings, as prescribed by sections 23-325 to 23-332, R. S. 1943, the amount recovered is less than the amount awarded by the appraisers, the owner of the property condemned is liable for all costs in the district court.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

John E. Newton, Harold S. Salter, James H. Anderson, Attorney General, and *Clarence S. Beck,* for appellant.

George W. Leamer, for appellees.

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

BOSLAUGH, J.

This case was instituted by the Department of Roads and Irrigation of the State of Nebraska, appellant, to acquire by condemnation through the power of eminent domain for state highway purposes a part of the land in Dixon County owned by Jesse B. Kennedy and Ethel Kennedy, appellees.

Appraisers were appointed and an award made by the appraisers in the manner provided by law on the 7th day of April, 1947, for the appellees in the sum of $6,067.60. An appeal was taken to the district court and the trial there resulted in a verdict for appellees for $385 as the value of 3.434 acres actually taken and $5,000 as damages to the remainder of the land of the appellees. The judgment in favor of the appellees is $5,385 with interest at six percent per annum from the date of the judgment, and the costs in the district court

were taxed to them. This appeal is from that judgment.

Appellant does not complain of the verdict and judgment of $385 for the land taken, but does object to the $5,000 allowed appellees as damages to the remainder of their 383 acres of land.

The issue presented by the appellant is the damage the appellees have sustained to their land by reason of the location and construction of the highway in question, and the assignments of error of the cross-appeal are in reference to the time when interest on the amount recovered should commence and whether the district court was right in taxing the costs accrued in that court to the appellees.

The 383 acres of land owned by appellees laid in an "L" and was part of Section 21, Township 30 North, Range 6 East, of the 6th P. M., Dixon County, Nebraska, towit: The south half, the southeast quarter of the northeast quarter, and about 23 acres in the south part of the northeast quarter of the northeast quarter, the north line of which was on a diagonal running generally northwest to southeast, and also a parcel of land in Section 22 of about a city block, subdivided into lots of the city of Ponca, and lying immediately east of the farm. The land condemned was 3.434 acres of the north 63 acres, consisting of a long narrow strip 86.1 feet wide, extending from the east border of the land of appellees towards the northwest for a considerable distance and then curving gradually until where it leaves the land it is running due north. It commences on the east at about the upper two-thirds of the southeast quarter of the northeast quarter of Section 21 and leaves the farm in the northwest corner of the 23 acre tract which is a part of the northeast quarter of the northeast quarter of Section 21.

The land of the appellees was one unit and had been and was used as such since it was purchased and occupied by them in the spring of 1943. The land was used for raising grain and other feed crops, grazing, and as a stock raising and stock feeding farm. The appellees fed as

many as 100 cattle and 200 hogs each year. There were many large and valuable improvements on the land, such as a nine-room modern residence, wash house, fuel house, summer house, sleeping house, large hay shed and stock shed combined, large barn, corncribs, granary, double garage, three feed yards, a sewer system for the residence with an outlet in a creek to the south of the buildings, a water system consisting of a reservoir, pipes, etc. which supplied running water in the residence, barn, hog house, and for the farmstead generally. The water was pumped with power supplied by electricity. The water system and possibly the sewer system were affected adversely to some extent by the construction of the highway. These buildings and improvements are in the northeast corner of the farm and the highway is located south of and near them. The shortest distance between the highway and the nearest building is 29 feet, and in one location the highway passes through one of the feed yards, the center of the highway being about the center of the feed yard, and the only place to build a new feed yard to replace the one through which the highway passes is to the west of the only available windbreak. The line fences on the farm are woven wire (or "hog wire" as stated in the record), some of which are 26 inches with two barbed wires above, and some 32 inches with three barbed wires above, except on the north near the buildings where there is a high board fence. Some of the cross fences are woven wire with barbed wires above. One of the seven hydrants of the water system is in the borrow pit, from which dirt was excavated. The value of the buildings and improvements is not less than $15,000.

The highway separates the buildings and improvements from all the balance of the farm except there are about 10 or 11 acres to the north of it. There are 12 or 13 acres south of the highway and north of a creek on the land. It will be necessary for appellees to construct a fence and gates on each side of the highway. There is a box culvert 4 feet wide, 6 feet high, and about 30 feet

long under the highway, intended as a passageway for stock. The evidence shows a dispute as to whether this is sufficient or practical. There is no other way to cross the highway except through gates and on the surface of the highway. There is a borrow pit to the north adjacent to and parallel with the highway, nearly its full length on the land of appellees. It contains an area of 2.560 acres, and this has been excavated to a maximum depth of 14 feet and an average depth of 4½ feet, and much of the pit will be used for drainage purposes.

In Northeastern Neb. R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604, this court said: "The question of the amount of damages sustained by a land owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county, and the supreme court ordinarily will not vacate or modify the verdict, if it is based upon the testimony in the case." There is a sharp conflict in the evidence as to the damage to the owners because of the location and construction of the highway through their land. The evidence of the witnesses for the appellees is that the land before the taking of a part thereof was of a fair and reasonable market value of $125 per acre, and after the taking of a part thereof was of a fair and reasonable market value of $100 per acre. The witnesses for the appellant testified that the fair and reasonable market value of the land before the taking of a part thereof for the highway was $91.30 per acre and $91 per acre respectively, and that the market value of the land was not decreased and the land was not damaged by the location and construction of the highway thereon, except one of its witnesses said the damage to the land was $1,000. It cannot be said that the testimony was not conflicting or that it was not pertinent to the issue, and it was for the jury to say what conclusion should be drawn therefrom. "* * * when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong." Grimm v. Elkhorn Valley Drainage District, 98

Neb. 260, 152 N. W. 374. "The jury are the judges of the credibility of witnesses and of the weight of their testimony." Newman v. Department of Public Works, 124 Neb. 684, 248 N. W. 94. In Remmenga v. Selk, *ante* p. 401, 34 N. W. 2d 757, the court recently said: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." The witnesses gave testimony as to the difference in the fair market value of the land before and after the location and construction of the highway. They differed widely on the question of the loss in the value of the land, but they were qualified to testify and their testimony was relevant to the issue. In Wahlgren v. Loup River Public Power District, 139 Neb. 489, 297 N. W. 833, it was held: "In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.

"The determination of the qualifications of witnesses to testify as to damages in condemnation proceedings is one resting in the sound discretion of the court."

There is nothing substantial shown in the record to discredit any witness. It cannot be found that the verdict is not supported by the evidence, that it is clearly wrong, or that it is not based upon the evidence in the case.

The submission of this case to the jury was more favorable to the appellant than the record justifies. The trial court instructed the jury to determine whether special benefits accrued to the remainder of the property of appellees as a result of the location of the highway through their land and if the jury found they did, then it was required to reduce the damages to the remainder of the land by the amount of the special benefits. There is no evidence in the record of any special benefits to the

land of appellees because of the location and construction of the highway. Prudential Ins. Co. v. Central Neb. Public Power and Irrigation District, 139 Neb. 114, 296 N. W. 752, 145 A. L. R. 1; Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168.

The judgment of the district court is for the amount of the verdict with interest at six percent per annum from the date of its rendition, the 10th day of February, 1948. The appellees by cross-appeal allege error in this respect and assert that interest on the amount of the judgment should have been allowed and ordered from the date of the commencement of the condemnation, the 7th day of April, 1947.

These proceedings were brought and prosecuted by the authority of section 39-603 and sections 23-325 to 23-332, R. S. 1943.

The award of the appraisers to the appellees was the sum of $6,067.60. The briefs of the appellant and of the appellees state that the appellant deposited the amount of the award with the county judge of Dixon County, as provided by the statute. The appellant and the appellees took separate appeals to the district court and the two transcripts filed were docketed as separate cases in that court. These were later by agreement consolidated and have since been treated as one case. The trial in the district court resulted in a verdict for the appellees for $5,385. This was $682.60 less than the award of the appraisers. The action of the trial court in awarding interest on the amount of the verdict only from the date of the rendition of the judgment was correct because the award of the appraisers was in excess of the amount of the recovery in the district court.

Langdon v. Loup River Public Power District, 142 Neb. 859, 8 N. W. 2d 201, states the rule as follows: "The proper and approved practice shall be, for the purpose of preserving the right of the landowner to interest, for the court, after verdict, to compute and add the interest to the judgment in those cases where the

verdict exceeds the award of the appraisers." See, also, Central Neb. Public Power and Irrigation District v. Fairchild, 126 F. 2d 302.

The rule in this state is that if on appeal from an award in condemnation proceedings the damage exceeds that found and awarded by the commissioners or the appraisers, the owner of the property condemned may have interest thereon from the time of the taking; but if the condemner deposits with the county judge the amount of the award for the use of the owner before going into possession and occupying the premises, and if by the appeal the amount of the award is not increased, the owner is not entitled to interest from the time of the taking but may recover interest on the judgment entered on appeal only from the date of the rendition thereof. Sioux City R. R. Co. v. Brown, 13 Neb. 317, 14 N. W. 407; Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168.

The assignment of error by the appellees in reference to the allowance of interest in this case cannot be sustained.

Appellees also complain that the court required them to pay all the costs which accrued in the district court. They rely upon the statements made in Burlington & Missouri River R. R. Co. v. Spere, 24 Neb. 125, 38 N. W. 35, and Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168, in reference to the taxation of costs. What was said in those cases in reference to the taxation of costs is not applicable to or authority in this case because it is controlled and limited by a statute not involved in either of those cases. Each of those cases was brought under the statute providing for the condemnation of property by railroad companies, which is now section 74-308 et seq., R. S. 1943. The statute originally contained the following provision: "* * * and in no case shall said corporation be liable for the costs on such appeal, unless the owner of such real estate shall be adjudged entitled, upon the appeal,

to a greater amount of damages than was awarded by said freeholders." R. S. 1866, c. 25, § 97, p. 224. This provision was amended before the case of Burlington & Missouri River R. R. Co. v. Spere, *supra,* and in reference thereto the court in that case said: "It was found that the practical application of this statute was liable to work great injustice to the land owner in the taxation of costs, because, while he might be willing and anxious to receive the award made by the commissioners, yet, if the railroad company appealed and the verdict was less than the amount of the award, the land owner would not only lose the interest on the money, but must pay the costs of the appeal. This in many cases was a great hardship. The new statute was passed in 1883, and took effect June 1st of that year. The provision is remedial in its nature, and was designed to relieve the hardships occasioned by the former statute, so far at least as not to make the land owner liable for all costs."

The appellant is authorized by section 39-603, R. S. 1943, to appropriate real estate for its use "* * * in the manner provided for appropriation and condemnation of real estate by counties for public use as prescribed by sections 23-325 to 23-332, * * *." Section 23-329 contains a provision in legal effect identical with that in the statute in reference to railroad condemnations before that statute was amended. It is as follows: "* * * and in no case shall the county board be liable for the costs on such appeal unless the owners of such real estate shall be adjudged entitled on appeal to a greater amount of damages than was awarded by the commission of freeholders."

Appellees did not increase their recovery on the appeal in the district court in this case and by the mandate of the quoted provision were chargeable with all costs of the case in that court and the court was correct in requiring them to pay all the costs which accrued in the district court. The statute required the appellant to pay the costs of the first assessment; the court properly

taxed the costs in the district court to the appellees; and the costs of this appeal should be taxed to the appellant.

AFFIRMED.

ETHEL PETTIJOHN, APPELLANT, v. COUNTY OF FURNAS ET AL., APPELLEES.

35 N. W. 2d 828

Filed February 11, 1949. No. 32501.

1. **Taxation.** Before lands can be legally sold at private sale, under the provisions of section 77-1814, R. S. 1943, the treasurer must file with the county clerk a return of the public sale as provided in section 77-1813, R. S. 1943; otherwise an attempted private sale is invalid.
2. **Judgments.** Where a court has jurisdiction over the person and of the subject matter of an action, such person may not collaterally attack the judgment rendered therein unless the judgment is absolutely void.
3. ———. The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit but also any other matter properly involved which might have been raised and determined therein.
4. **Taxation.** Owners and others interested in realty, sold under decree foreclosing a valid tax sale certificate where foreclosure was commenced more than two years subsequent to the issuance of the tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.

APPEAL from the district court for Furnas County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Morrison & Hanson, for appellant.

G. E. Simon, Perry & Perry, and *P. W. Phillips,* for appellees.

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

CARTER, J.

This is a suit to redeem from a tax foreclosure sale. The trial court denied relief to the plaintiff and she appeals.

The record shows that on April 11, 1939, the county purchased tax sale certificates Nos. 207 and 208 covering the two tracts of land involved in the present litigation. On November 14, 1944, the county commenced a tax foreclosure suit in which the plaintiff in the present case was made a party defendant and personally served with summons. She defaulted and on January 29, 1945, a decree of foreclosure was entered against the present plaintiff. On April 17, 1945, pursuant to the decree and published notice, the sheriff offered the land for sale at public auction. The county bid in the property at the sale, the sale was confirmed, and a sheriff's deed delivered to the county. Subsequent thereto, and on January 29, 1946, the county conveyed the property to the defendant James by deed, James having been in possession of the property since that date. On March 17, 1947, the plaintiff tendered the amounts found to be due in the tax foreclosure action, with interest and costs, which amounts were refused by the clerk of the district court and the county treasurer. On March 22, 1947, this suit was commenced to secure a redemption of the property.

Plaintiff contends that there can be no valid administrative private sale of real estate by the county treasurer for taxes unless a return of the public sale has first been filed with the county clerk. This is the general effect of sections 77-1813 and 77-1814, R. S. 1943. In Medland v. Linton, 60 Neb. 249, 82 N. W. 866, this court in dealing with the same sections of the statute said: "Before lands and lots can be legally sold at private sale, under the provisions of the section quoted, the treasurer must file with the county clerk a return, showing the lands and lots sold at public auction, to whom sold, and for what sum; and any attempt to sell real property for taxes at private sale without compliance with the provisions of

said section invalidates the sale so attemped to be made." See, also, State v. Helmer, 10 Neb. 25, 4 N. W. 367; Gallentine v. Fullerton, 67 Neb. 553, 93 N. W. 932.

It is here contended that the county treasurer failed to file a return of the public sale with the county clerk, as the statute requires. We do not think that the plaintiff can properly raise that question in this case. It is elementary, we think, that one who undertakes to foreclose a tax sale certificate is required to plead and prove that all steps have been taken which are necessary to the issuance of a valid tax sale certificate. It was alleged in the petition for the foreclosure of tax sale certificate No. 207 in part as follows: "That the real estate herein described was not sold at said sale for want of bidders, and that thereafter, as provided by law, and the resolution aforesaid, said real estate was sold on April 11, 1939, by the said treasurer, at private tax sale, to this plaintiff, for the sum of $138.65, and said treasurer duly, regularly and legally issued to this plaintiff, county tax sale certificate No. 207, on said real estate." Similar allegations were made as to tax sale certificate No. 208.

In the decree entered in the tax foreclosure action, it was said in part: "* * * the Court finds generally in favor of the plaintiff and against the defendants in all causes of action herein, * * *; that the allegations of plaintiff's petition are true; * * * that the separate and several parcels of land described in plaintiff's petition were subject to taxation for the several years and installments as alleged in the several causes of action; that same were duly and regularly advertised for sale for delinquent taxes, all as by law provided; that the plaintiff duly, legally and regularly became the owner of each and all of the tax sales certificates mentioned and described in said causes of action herein; that thereafter, the plaintiff duly, regularly and legally paid the subsequent taxes on each of said properties as alleged; that the plaintiff is the owner and holder of the tax sale certifi-

cates and claims for subsequent taxes paid, and is entitled to foreclose the same."

In the tax foreclosure action plaintiff was required to allege and prove the regularity of all proceedings necessary to the issuance of a valid tax sale certificate. The court found that all such proceedings were regular. Plaintiff was a party defendant in that action and was personally served with summons. Clearly she has had her day in court and cannot now collaterally attack the decree of the district court finding, in effect, that all proceedings, including the treasurer's return of the public sale, were in all respects regular.

The court had jurisdiction over the person of the plaintiff and of the subject matter of the action. Under such circumstances the decree of the district court was a final determination of the issues before it and such decree is not subject to collateral attack. In Douglas County v. Barker Co., 125 Neb. 253, 249 N. W. 607, this court announced this rule in the following language: "It is quite obvious, under the rule above announced, that appellant's contentions as to the alleged failure of the county treasurer to offer the property for sale for taxes for three consecutive years before it can be included in a foreclosure action cannot be sustained. The claimed failure of the county treasurer to offer the land at a public tax sale at his office, etc., are matters for consideration, if at all, prior to the entry of the decree of foreclosure and sale." See, Logan County v. Carnahan, 66 Neb. 685, 92 N. W. 984, on rehearing, 66 Neb. 693, 95 N. W. 812; Frank v. Carpenter, 137 Neb. 357, 289 N. W. 538; City of Scottsbluff v. Kennedy, 141 Neb. 728, 4 N. W. 2d 878. It is clear therefore that any irregularity in the tax foreclosure action must have been asserted in that action by this plaintiff, and that she is now precluded from collaterally attacking the former decree where the court had jurisdiction of the subject of the action and of the person of plaintiff. Connely v. Hesselberth, 132 Neb.

886, 273 N. W. 821; Stanton v. Stanton, 146 Neb. 71, 18 N. W. 2d 654.

Plaintiff also urges that there was a material alteration of the tax sale certificates which nullifies their effect. In this respect the record shows that the property upon which the taxes had become delinquent was incorrectly described in the tax sale certificates issued to the defendant county. The attorney for the county corrected them by drawing a line through that part of the description which was erroneous and adding the correct description in red ink in its stead. This was done prior to the commencement of the tax sale certificate foreclosure and the change made was evident at and following the filing of the petition.

What we have heretofore said about collateral attack is applicable here. The plaintiff here was a defendant in the tax sale certificate foreclosure and was personally served with summons. If she had any defense to the action she was obliged to assert it there. The finding of the court that the tax sale certificates were properly and lawfully made, and entitled to be foreclosed, constitutes a final adjudication of that issue in so far as the parties to that action are concerned. This court has said: "The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein." Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108. See, also, Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The theory of the plaintiff is that there was no public administrative sale of the property, that the private sale was invalid, and, consequently, that the only valid sale was the judicial sale held pursuant to the tax foreclosure. If this were true, the two-year period for redemption provided for in the Constitution would not

commence to run until the date of the judicial sale and plaintiff's tender would have been within time. But the decree of the district court in the tax sale certificate foreclosure precludes such a finding. It held the administrative private sale to be regular and the tax sale certificates valid. The two-year period of redemption fixed by the Constitution commenced to run on the date of the administrative private sale and had terminated prior to the date of the judicial sale. All right to redeem ceased, therefore, when the trial court confirmed the judicial sale of the property. This court has stated the applicable rule as follows: "The correct rule is that owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale." Connely v. Hesselberth, *supra*. See, also, County of Madison v. Walz, 144 Neb. 677, 14 N. W. 2d 319; County of Lincoln v. Provident Loan & Investment Co., 147 Neb. 169, 22 N. W. 2d 609.

We conclude that the judgment of the trial court was in all respects correct and the judgment is affirmed.

AFFIRMED.

PAINE, J., not participating.

WILLIAM HEIDER, APPELLANT, v. DONALD L. STOUGHTON ET AL., APPELLEES.
35 N. W. 2d 814

Filed February 11, 1949. No. 32560.

Workmen's Compensation. Section 48-116, R. S. 1943, has no application to the relation of a bona fide vendor and vendee.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Gray & Brumbaugh, for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem,* for appellees.

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

CHAPPELL, J.

This is a compensation case wherein one judge of the workmen's compensation court granted plaintiff an award against Donald L. Stoughton and William Lamphier, jointly and severally, for temporary total disability and total loss of sight in his right eye. However, the award dismissed the action as to Huntley Wrecking Company. That award, upon rehearing requested by plaintiff, was affirmed by the compensation court en banc, and, upon appeal therefrom by plaintiff, was affirmed by the district court. Plaintiff's motion for new trial was overruled, and he appealed to this court. Hereinafter, Donald L. Stoughton and William Lamphier will be designated as defendants, and Huntley Wrecking Company as the defendant.

The award against defendants is concededly not involved here in any manner. The sole question presented is whether or not the district court erred in affirming the final award of the compensation court en banc dismissing plaintiff's action as against the defendant, claimed by plaintiff to be also liable as employer, by virtue of section 48-116, R. S. 1943. We conclude that the judgment of the trial court should be affirmed.

In Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1, it was held: "The statute requires that this court, where it is found that the findings of fact are not conclusively supported by the evidence as disclosed by the record, consider the cause here de novo upon the record." We so consider the case at bar.

In Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592, it was said: "It has long been the policy of this court to give a liberal construction to the Work-

men's Compensation Act so that its beneficient purposes may not be thwarted by technical requirements of interpretation. * * * However, it must be remembered that the rule of liberal construction of the Workmen's Compensation Act applies to the law and not to the evidence offered to support a claim by virtue of the law."

In other words, the foregoing rule does not dispense with the necessity that claimant prove his right to compensation under the statute by a preponderance of the evidence, nor does it permit a court to award compensation where the requisite proof is lacking. Chambers v. Bilhorn, Bower & Peters, Inc., 145 Neb. 277, 16 N. W. 2d 173.

In the light of the foregoing, we have examined the record to determine whether or not plaintiff established by a preponderance of the evidence that the defendant was liable because it created and carried into operation a "scheme, artifice or device to enable * * * it to execute work without being responsible to the workmen" for compensation benefits, as provided in section 48-116, R. S. 1943. In doing so, we conclude that plaintiff failed to assume the burden imposed upon him.

As we view the record, the evidence sustained the following findings and conclusions: The defendant, among other things, was engaged in the retail of miscellaneous uncut salvage lumber at its yard in Omaha. Defendants were engaged in the purchase of such lumber, breaking and sawing same into cut fuel lengths, and thereafter selling it by truckload to their own customers. They had their own power saw, tools, truck, and employees for that purpose. Such employees were exclusively employed, controlled, directed, supervised, and paid by defendants.

By agreement, defendants purchased such uncut salvage lumber from the defendant, cut and loaded same in its yard, and paid the defendant one dollar per truckload therefor as it left the yard. Subsequently, such

cut fuel lumber was sold by defendants to householders at a substantial profit, all of which was received by and belonged exclusively to defendants. Plaintiff was one of defendants' employees, who, while reducing such lumber into cut fuel lengths for defendants, was struck in the eye by a piece of wood, causing temporary total disability and total loss of sight in his right eye.

The defendant had no authority, right, or power to control, direct, or supervise the business of defendants or the duties and work of their employees. It was not an employer contractually or otherwise in any sense of the term.

There was no competent evidence in the record which could sustain a finding that the defendant created or carried out any scheme, artifice, or device to enable it to execute work without being responsible to the workmen. Rather, the defendant was simply a bona fide vendor of merchandise to a bona fide vendee who paid the defendant therefor with no financial consideration whatever moving from defendant. True, the defendant got the lumber removed from its yard, but that result naturally would follow from every sale of merchandise, and thus would be of no controlling importance. It cannot be logically concluded that section 48-116, R. S. 1943, should have any application to the relation of a bona fide vendor and vendee.

Cases relied upon by plaintiff are not controlling here. They are clearly distinguishable not only upon the facts but also upon the law applicable thereto. Rather, the case at bar is controlled by such primary principles as those appearing in O'Brien v. Barnard, 145 Neb. 596, 17 N. W. 2d 611, and Pestlin v. Haxton Canning Co., 274 App. Div. 144, 80 N. Y. S. 2d 869, involving the relationship of a bona fide lessor and lessee, and Andrews v. Gross & Janes Tie Co., 211 Ark. 999, 204 S. W. 2d 783, involving the relationship of a bona fide vendor and vendee, as distinguished from the relationship of employer and employee. To discuss such authorities at

length would but unduly prolong this opinion.

For the reasons heretofore stated, we conclude that the judgment of the district court should be and hereby is affirmed.

AFFIRMED.

MARVIN FRANK, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.

35 N. W. 2d 816

Filed February 11, 1949. No. 32432.

1. **Indictments and Informations.** The information in a criminal case should contain a plain and concise statement of the charge against defendant, but all such necessary details may be set out therein, if without prejudice to substantial rights of defendant, as will enable the court to pass upon the question of whether or not it is sufficient to charge a criminal offense, and on the other hand be sufficient to inform defendant of all such facts as will correctly identify the entire transaction for which he is held to answer.
2. ———. When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements therein, they may be treated as surplusage and be entirely rejected.
3. **Criminal Law.** It is better practice for the trial court in its instructions to state in concise and informal language the material elements which must be proved beyond a reasonable doubt to authorize conviction of an offense, rather than to copy the information verbatim in the instructions, but it is not reversible error to do so unless the information contains some allegation prejudicial to defendant.
4. **Witnesses: Criminal Law.** A prosecuting attorney in a criminal case is a competent witness, but his function as prosecutor and as a witness must be disassociated. Therefore, if it is discovered before trial that he is a necessary witness, he should withdraw from any active participation as attorney and have other counsel prosecute the case.
5. ———: ———. It is improper in a criminal prosecution for the court to allow one who testifies as a witness to the principal facts to also as attorney conduct the trial in the examination of witnesses or argument to the jury, or to conduct himself

in any manner inconsistent with his position as a witness or his interest as an officer of the state.

6. ———: ———. In such a case, whether or not he conducts himself in a manner consistent with his position as a witness or his interest as an officer of the state is primarily a question for the trial court to decide, but defendant has the right by competent evidence to appropriately have the record disclose the facts and circumstances relating thereto.

7. ———: ———. In cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and the accused is not restricted to proof of general reputation of prosecutrix for truth and veracity, but may adduce direct evidence of the general reputation of such witness for morality and may also adduce direct evidence not too remote in time of specific immoral or unchaste acts and conduct by her with others.

8. ———: ———. Such evidence is admissible not only for the purpose of being considered by the jury in deciding the weight and credibility of the testimony of prosecutrix but also as inferring the probability of consent, and to discredit her testimony relating to force and violence used by defendant in accomplishing his purpose and claimed resistance thereto by prosecutrix.

9. Rape. Upon a charge of assault with intent to commit rape, the two essential elements of an assault and an intent to commit the act charged must always co-exist and be established by the state beyond a reasonable doubt before defendant can be found guilty thereof.

10. ———. The intent of accused must be not only to have intercourse with prosecutrix, but to do so by force, without consent, and notwithstanding her resistance.

11. ———. Coupled therewith must be an effort by accused to carry out or accomplish such intent by the execution of an overt act amounting to an assault upon prosecutrix, i. e., an attempt with force and violence to overcome her resistance.

12. ———. Force by accused, as distinguished from mere preparations, requests, and solicitations which are insufficient, and appropriate resistance thereto by prosecutrix, in cases wherein consent is an issue, are essential constituent parts of the offense, therefore consent or failure to resist when opportunity appears is an absolute defense in such cases and the jury should be so instructed.

13. ———. Resistance by prosecutrix must be in good faith, to the utmost or limit of her ability, with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such

resistance as long as she has the power to do so.

14. ———. Where assault with intent to commit rape is charged, the testimony of prosecutrix must be corroborated by facts and circumstances established by other competent evidence to justify conviction.

15. ———. Where in such cases prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination on the part of defendant to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix.

16. **Criminal Law.** Ordinarily, it is prejudicial error for the trial court to instruct the jury in a criminal case that they should not reject the testimony of any witness unless they first find it irreconcilable with other testimony which they find to be true, because when applied to the state's witnesses, the rule imposes a burden upon a defendant which he is not required to assume.

ERROR to the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded.*

Frank J. Reed, for plaintiff in error.

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

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

CHAPPELL, J.

An information filed in the district court for Kimball County charged in substance that on or about April 21, 1947, in said county, defendant, "a male person of the age of eighteen years and upwards," did feloniously assault Clara Buddecke, "a female child of the age of seventeen years," with the intent to commit rape upon her, which acts of defendant were contrary to the form of the statutes made and provided, and against the peace and dignity of the State of Nebraska. Upon defendant's plea of not guilty thereto, a jury found him guilty. His motion for new trial was overruled, and on December 27, 1947, he was sentenced to imprisonment in the State

Reformatory for Men at Lincoln for a period of five years from that date.

Thereupon, defendant prosecuted error to this court, assigning many errors, but, since the judgment is reversed and the cause remanded, only the following contentions require discussion and decision, to wit: (1) That it was prejudicial error to allege the age of defendant and the age of prosecutrix in the information and include the same verbatim in instruction No. 2 given by the trial court; (2) that the trial court erred in permitting the county attorney to sit at the counsel table and participate in trial of the case before and after he had taken the witness stand as a witness for the state, and erred in sustaining the state's objections to defendant's evidence and offer to prove that the county attorney, after testifying, resumed his seat at the counsel table and continued to participate in the action as prosecuting attorney; (3) erred in the rejection of certain evidence offered by defendant; (4) erred in giving instructions Nos. 6, 9, and 10; and (5) that the state's evidence was insufficient to sustain the verdict and judgment. We conclude that the foregoing third and fourth contentions, and the last part of the second contention, should be sustained.

The material allegations of the information were in the equivalent words of section 28-409, R. S. 1943, and thus amply sufficient to charge the crime of assault with intent to commit rape. Defendant did not contend otherwise either in brief or argument, but rather with reference to the first contention argued that setting forth the respective ages of the prosecutrix and defendant therein and copying the information verbatim in instruction No. 2 given by the trial court, was prejudicial error. We cannot so hold.

It will be noted that in the prosecution of cases wherein assault with intent to commit rape is pleaded, sections 28-408 and 28-409, R. S. 1943, must be considered as in pari materia. Davis v. State, 31 Neb. 247, 47 N. W.

854; Hall v. State, 40 Neb. 320, 58 N. W. 929; Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 Ann. Cas. 351.

Viewed in that light, the information herein did not allege that prosecutrix was previously chaste as required in such cases, although it alleged that she was but seventeen years of age. Hubert v. State, 74 Neb. 220, 104 N. W. 276, adhered to on rehearing, 74 Neb. 226, 106 N. W. 774.

In such a situation, the state was required to prove beyond a reasonable doubt that defendant committed an assault upon prosecutrix with the intent to commit a rape upon her by force, without consent, and notwithstanding her resistance. Defendant was thus given the benefit of the defense of consent and want of resistance. It will be readily observed, then, that the allegations of age in the information were at most mere surplusage which could not have been prejudicial to defendant but rather beneficial to him.

It was held in Hase v. State, 74 Neb. 493, 105 N. W. 253: "Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected." See, also, sections 29-1501 and 29-1604, R. S. 1943.

In Kirchman v. State, 122 Neb. 624, 241 N. W. 100, it was held: "The defendant, in a felony case, should find in the indictment (or information) a plain and concise statement of the charge against him. Yet all such necessary details may be set out therein, if without prejudice to the substantial rights of the defendant, as will enable the court to pass upon the question of whether it is sufficient to charge a criminal offense, and, on the other hand, be sufficient to inform the defendant of all such facts as will clearly identify the entire transaction for which he is held to answer.

"It is the better practice in a criminal case for the trial court to charge the jury, in concise and informal

language, as to the material facts which must be proved beyond a reasonable doubt to authorize a conviction, rather than to copy the information or indictment into its instructions."

Our conclusion is that while it is the better practice not to copy the information verbatim in the instructions, it is not reversible error to do so unless the information contains some allegation prejudicial to defendant. Under the circumstances here, we fail to see how either the information or instruction No. 2 could have been prejudicial to defendant. Both prosecutrix and defendant appeared at the trial and testified in open court regarding their respective ages, which also were apparent to the jurors who saw them and heard them testify. Discussion of a related situation will be found in Harris v. State, 80 Neb. 195, 114 N. W. 168.

Upon suggestion of the county attorney made in open court two days before the trial, a special prosecutor was appointed by the court to represent the state, as provided by statute. Thereafter, over objection of defendant, the county attorney's name was endorsed upon the information as a witness for the state. As disclosed by the court's journal entry, the county attorney took no part in the trial except as a witness and the special prosecutor alone appeared as counsel for the state during the trial. The record discloses that he alone examined all witnesses and made the opening and closing arguments to the jury. Concededly, the county attorney examined no witnesses and made no argument.

The record does not disclose that defendant ever objected to the competency of the county attorney as a witness. With reference to the second contention, defendant simply argued that it was prejudicial error for the trial court to permit the county attorney to sit at the counsel table and participate in the trial, and to sustain the state's objections to defendant's evidence and offer to prove what the county attorney did in that connection.

As a matter of course, an attorney participates in a

trial when he in some manner actively takes part in and conducts the same as an attorney. Roberts v. State, 100 Neb. 199, 158 N. W. 930, Ann. Cas. 1917E 1040, is authority for the proposition that it is improper in a criminal prosecution to allow one who testifies as a witness to the principal facts in the case to also as attorney conduct the trial in the examination of witnesses and argument to the jury, or to conduct himself in any manner inconsistent with his position as a witness or his interest as an officer of the state. In other words, although a competent witness, his function as a prosecuting attorney and as a witness must be disassociated. Therefore, if it is discovered before the trial that he is a necessary witness he should withdraw from any active participation as attorney for the state and have other counsel prosecute the case. See, 58 Am. Jur., Witnesses, § 155, p. 111; 28 R. C. L., Witnesses, § 57, p. 469; and Annotation, 149 A. L. R., p. 1305, authoritatively citing Roberts v. State, *supra;* State v. Ryan, 137 Kan. 733, 22 P. 2d 418; Zeidler v. State, 189 Wis. 44, 206 N. W. 872; McCormick v. McCormick, *ante* p. 192, 33 N. W. 2d 543, and Kausgaard v. Endres, 126 Neb. 129, 252 N. W. 810. The two last cited cases were civil in character, but as stated in Zeidler v. State, *supra,* "If such practice is to be discouraged in a civil case, certainly it is to be deplored in a criminal case."

A county attorney, being a quasi-judicial public officer, in whom the public has reposed confidence, his evidence is ordinarily given greater weight than that of an ordinary witness, and the natural tendency in such cases is for defendant to question the fairness of a trial when he becomes a witness for the state. Therefore, he should, when that becomes necessary, so conduct himself as to foster and demonstrate the fact that he is not actively participating as a prosecutor, but only as a witness, truthfully and impartially giving competent testimony.

Since, as hereinafter observed, the judgment is reversed for other reasons, it should be said the record

discloses that the county attorney in fact recognized his disqualification, and at his suggestion had a special prosecutor appointed to represent the state. The most that could be gleaned from the record now before us was that he sat at the counsel table with the special prosecutor and assisted him in the preparation and details of the trial as any other witness or interested officer of the state would have a right to do. As held in Roberts v. State, *supra,* that alone would not require reversal if in doing so he conducted himself in a manner consistent with his position as a witness or his interest as an officer of the state. It logically follows, however, that if in doing so he otherwise conducted himself in a manner inconsistent with such position, it would be prejudicial error, and although primarily a question for the trial court to decide, defendant would have a right by competent evidence to appropriately have the record disclose the facts and circumstances relating thereto which the trial court herein erroneously refused to permit.

In the third contention, defendant complained that the trial court confined evidence adduced in defendant's behalf to the general reputation of the prosecutrix for morality and erroneously sustained defendant's objection to and overruled defendant's offer to prove by direct evidence specific unchaste or immoral acts and conduct by her with others, thus precluding him from adducing such evidence relating to the immoral character of prosecutrix.

In an appraisal of our conclusions in this opinion, it must be remembered at all times that this case was one to be tried and one which was tried as if prosecutrix had reached the age of consent.

In that connection, in Redmon v. State, *ante* p. 62, 33 N. W. 2d 349, this court recently concluded that in cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and that direct evidence of the general reputation of the prosecutrix for sexual morality may be shown by defend-

ant, who is not restricted to proof of general reputation of the witness for truth and veracity.

Therein, it was also concluded not only that cross-examination of the prosecutrix should be as unrestrained and searching as is consistent with rules of law, but that it was also prejudicial error to exclude any direct competent evidence not too remote in time, showing specific immoral or unchaste acts and conduct by her with others, not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony generally, but for the purpose of inferring the probability of consent and discrediting her testimony relating to force or violence used by defendant in accomplishing his purpose and her claimed resistance thereto. See, also, State v. Wood, 59 Ariz. 48, 122 P. 2d 416, 140 A. L. R. 361, and annotations p. 364; 3 Wigmore on Evidence (3d ed.), § 924a, p. 459, § 979, p. 537. Concededly, there is authority to the contrary, but the foregoing is the modern realist rule, and we deem it the better one.

We conclude that not only the exclusion of such evidence was prejudicial error, but that also instruction No. 6 given by the trial court relating thereto, was prejudicially erroneous in that it did not correctly state the rule.

At this point it should be said that instruction No. 6 also told the jury in part: "In order to find that any efforts of the defendant toward holding sexual intercourse with said Clara Buddecke was against the will of said Clara Buddecke, you must believe from the evidence that said Clara Buddecke offered such resistance to such efforts as you believe seemed reasonable to her under all the circumstances shown in the evidence, including that of her belief as to what success such resistance might reasonably bring about toward causing the defendant to cease such efforts." The foregoing statement was also prejudicially erroneous in that it did not correctly state the rule.

With reference thereto, the nature of the offense charged becomes paramount. Two essential elements

must always co-exist to constitute the crime of assault with intent to rape. They are an assault, and an intent to commit the act charged.

The intent of accused in cases like that at bar must be to have intercourse with prosecutrix by force, without consent, and notwithstanding her resistance, and without such an intent there can be no assault with intent to commit rape.

In other words, it must appear that defendant had the intent and purpose not only to have intercourse with prosecutrix but he must also have intended to use whatever degree of force would be necessary to overcome her resistance and accomplish his objective. Such intent is to be determined from all the facts and circumstances which, taken together, must be of so conclusive a nature as to establish that element beyond a reasonable doubt.

Further, intent alone is not enough. Coupled therewith must be likewise established an effort by accused to carry out or accomplish such intended purpose by the execution of an overt act amounting to an assault upon prosecutrix, i. e., an attempt with force and violence to overcome her resistance. Thus force by accused, as distinguished from mere preparations, requests, and solicitations which are insufficient, and appropriate resistance thereto by prosecutrix in cases wherein consent is an issue, are essential constituent parts of the offense. Therefore, consent or failure to resist when opportunity appears is an absolute defense in all such cases, and the jury should be so instructed.

Resistance by prosecutrix must be in good faith, to the utmost or limit of her ability, with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so. In other words, an assault with intent to commit rape includes every essential element of the crime of rape, except the actual accomplishment of that crime, but as a matter of course, if the crime of rape is

accomplished, it includes the lesser offense of assault with intent to commit rape.

The foregoing propositions are discussed at length and authoritatively supported by 44 Am. Jur., Rape, §§ 21 and 22, p. 915, §§ 24 and 25, p. 917; 52 C. J., Rape, § 35, p. 1026, § 40, p. 1028, § 42, p. 1030, §§ 43 and 44, p. 1031; Garrison v. The People, 6 Neb. 274; Krum v. State, 19 Neb. 728, 28 N. W. 278; Johnson v. State, 27 Neb. 687, 43 N. W. 425; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Davis v. State, *supra;* Hall v. State, *supra;* Dunn v. State, 58 Neb. 807, 79 N. W. 719; Liebscher v. State, *supra.*

We turn then to the fourth contention involving given instruction No. 9, relating to the necessity and character of corroboration, and instruction No. 10, relating to credibility. In Prichard v. State, 135 Neb. 522, 282 N. W. 529, it was said: "Be this as it may, where an assault with intent to commit rape is charged, the law requires that the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence, in order to constitute conviction. See Roberts v. State, 106 Neb. 362, 183 N. W. 555."

It has long been the rule in this jurisdiction that: "Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix." Aller v. State, 114 Neb. 59, 205 N. W. 939. See, also, Lewis v. State, 115 Neb. 659, 214 N. W. 302.

The trial court in instruction No. 9, after stating the rule regarding the necessity and character of corroboration, said: "Direct testimony of a witness other than the prosecutrix, to the effect that the act charged was committed, is sufficient corroboration."

The foregoing statement, while correct in principle, had no application under the evidence adduced and

thereby misled the jury by erroneously assuming that there was such comprehensive testimony in the record. Therefore, inclusion of that sentence in the instruction was prejudicially erroneous.

Instruction No. 10 given by the trial court, relating to credibility of the witnesses, included the statement: "You have no right to reject the testimony of any of the witnesses without good reason, and you should not do so unless you find it irreconcilable with other testimony which you may find to be true."

A similar statement was recently held to be prejudicially erroneous in Wilson v. State, *ante* p. 436, 34 N. W. 2d 880, wherein it was held: "In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.

"An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgment of a substantial right of the defendant."

While the circumstances herein relating to the purported application of the instruction are not identical with those in the foregoing case, the basic rules promulgated therein are applicable here and the quoted qualification being erroneous, should not have been included in the instruction, because, when applied to the state's witnesses, the rule imposed a burden upon defendant which he was not required to assume.

Defendant in the fifth contention questioned the sufficiency of the state's evidence to sustain the verdict and judgment. In that connection, we have examined the record, and without specifically reciting its sordid details, decide that there was competent evidence from which the jury could have reasonably concluded: That three young men, including defendant, in conformity

with a preconceived plan, accosted prosecutrix at 10:30 p. m. on a side street, forced her into a car, and drove rapidly away to a city park. There they manhandled her, removed some of her underclothing, forced her out of the car, and pulled her over to a haystack nearby. Another car then entered the park some distance away so, deciding that it was not a safe or proper place, they put prosecutrix back in the car, and drove out into the country and down a lane, across a wheat field into a ravine. There they forced her out of the car, threw her to the ground, and while two of the young men held her the other assaulted her, completing an act of intercourse by force and against her will, thereafter he and another held her while a second one likewise assaulted her, and completed the sexual act, after which he assisted in holding her while the third attempted the act but was unable to do so. They then put her in the car and drove back to town, letting her out a half block from her home.

At home the mother and sister noticed the condition of her clothing, whereupon she was questioned and tearfully told substantially the foregoing story to them. Her coat was littered with hay, the shoulder straps were torn from her clothing, the buttons were torn from her blouse, and there was blood on her slip and blouse.

Two of the young men, this defendant and Roger Swanson, later made admissions to the county attorney to the effect that the foregoing were substantially the facts. The third young man, Gerald Donoghue, who was unable to complete the act, was the first to talk with the county attorney, and at the trial testified as a witness for the state. However, it should be said that his testimony relating to force, resistance, and consent, was generally favorable to defendant.

The defendant and Roger Swanson admitted the sexual acts but denied that any force was used by any one at any time, or that proxecutrix resisted, contending that she consented thereto. They also denied that admissions

were made by them in the manner as testified by the county attorney.

In the light of the foregoing, we are required to apply the well-known rule that: " 'Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury.' " Luster v. State, 142 Neb. 253, 5 N. W. 2d 705.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded.

REVERSED AND REMANDED.

PAINE, J., not participating.

SIMMONS, C. J., dissenting.

I concur in the court's judgment of reversal. I would go further and dismiss as we did in the recent cases of Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627; Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897; and Selvage v. State, 148 Neb. 409, 27 N. W. 2d 636.

I trust we have not yet reached the point in our criminal law where it is necessary only to accuse in order to convict. This defendant may or may not have been guilty of some offense against the laws of this state. As I see it, the evidence of the state falls far short of meeting the tests or establishing the elements of the crime charged. This dissent goes to defendant's contention that the evidence of the state is insufficient to support a verdict of guilty. This question was raised at the end of the state's case-in-chief and at the close of all the evidence.

I accept the statement of the law as made by the court that "Force by accused, as distinguished from mere preparations, requests, and solicitations which are insufficient, and appropriate resistance thereto by prosecutrix, in cases wherein consent is an issue, are essential constituent parts of the offense, therefore consent or failure to resist when opportunity appears is an absolute

defense in such cases and the jury should be so instructed" and "Resistance by prosecutrix must be in good faith, to the utmost or limit of her ability, with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so."

The complaint is based upon section 28-409, R. S. 1943, providing that "Whoever assaults another with intent to commit a murder, rape, sodomy or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than fifteen nor less than two years."

By the provisions of section 28-408, R. S. 1943, rape is defined as follows: "Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; * * * shall be deemed guilty of rape, * * *."

Under this charge the state was required to establish by competent evidence beyond a reasonable doubt that the defendant assaulted the prosecutrix with intent, forcibly and against her will, to rape her. Hall v. State, 40 Neb. 320, 58 N. W. 929; Garrison v. The People, 6 Neb. 274. Willingness or lack of it is a condition or state of mind. Consent is an evidence of willingness. Resistance is an evidence of unwillingness. State v. Schwab, 109 Ohio St. 532, 143 N. E. 29. The resistance must not be a pretense but must be in good faith and real. Rahke v. State, 168 Ind. 615, 81 N. E. 584. See, also, Selvage v. State, *supra*.

As to available means to a female of resistance we have said that nature has given her hands and feet with which she can strike and kick, teeth to bite, and a voice to cry out. Oleson v. The State, 11 Neb. 276, 9 N. W. 38, 38 Am. R. 366.

The failure to make outcry where others are in the vicinity and outcry would have been available should be considered in determining the question of consent or

nonconsent. People v. Rich, 237 Mich. 481, 212 N. W. 105.

In Cascio v. State, *supra,* we held: "In determining the sufficiency of the evidence in the case at bar, *we are required to observe the rule that mere general conclusions of the prosecutrix, without relating the very threats and acts justifying submission because of fear or constituting the required actual force and resistance, are of themselves insufficient to sustain a conviction of the accused,*" and "* * * it must be the rule in such cases that where the testimony of the prosecutrix as to the particular acts allegedly constituting the offense may all be true and still the act not have been against her will, *or if her testimony in that regard is so inconsistent, contradictory, improbable, or incredible as to be self-destructive, and the corroborating evidence is of a doubtful character or wholly lacking in probative force or value,* a judgment of conviction will be set aside for want of sufficient evidence to sustain it."

In the Whomble, Cascio, and Selvage cases we held the evidence insufficient to sustain a conviction and dismissed the action. The evidence in this case is even less sufficient than the evidence in those cases.

The testimony of the prosecutrix here consists largely of "mere general conclusions" and is not a statement of the "very threats and acts justifying submission because of fear or constituting the required force and resistance" and is insufficient under the rule announced in the Cascio case. Her testimony is "so inconsistent, contradictory, improbable, or incredible as to be self-destructive" under the rule stated in the Cascio case. The corroborative evidence of the witness Gerald Donoghue is not only of "doubtful character or wholly lacking in probative force or value," as stated in the Cascio case, but here the witness either fails to corroborate the prosecutrix or contradicts her on material evidentiary matters.

The evidence of the county attorney purporting to state admissions made by the defendant finally resolved

itself to be a recital of his own phraseology and interpretation of what the boys told him.

I do not find in the evidence the sustaining strength for the general conclusions which the court holds the jury could have resolved from it.

In view of the conclusions of the prosecutrix in her testimony and that of the county attorney as to screaming, resistance, fighting, etc., it is important to point out what the evidence does not show. There is no evidence of threats or fear. While the county attorney testified that defendant told him the prosecutrix was "screaming" yet the prosecutrix positively stated that at no time did she cry out. There is no evidence of a mark, scratch, bruise or abrasion on any part of the body of the prosecutrix. There is no evidence of an examination by a physician and accordingly no evidence as to what such an examination might have revealed. There is no evidence of bruises, scratches or marks on the bodies of the boys such as might appear if there had been hitting, scratching, kicking or biting.

I would hold the state's evidence insufficient to sustain a conviction, and dismiss.

ROGER SWANSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
35 N. W. 2d 826

Filed February 11, 1949. No. 32431.

ERROR to the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded.*

Frank J. Reed, for plaintiff in error.

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

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

CHAPPELL, J.

An information, filed in the district court for Kimball County, charged in substance that on or about April 21, 1947, in said county, defendant, "a male person of the age of Seventeen years," did feloniously assault Clara Buddecke, "a female child of the age of seventeen years," with the intent to commit rape upon her, which acts of defendant were contrary to the form of the statutes made and provided, and against the peace and dignity of the State of Nebraska. Upon defendant's plea of not guilty thereto, a jury found him guilty. His motion for new trial was overruled, and on December 27, 1947, he was sentenced to imprisonment in the State Reformatory for Men at Lincoln for a period of five years from that date.

Thereupon, defendant prosecuted error to this court, assigning many errors, but since the judgment is reversed and the cause is remanded, only the following contentions require discussion and decision, to wit: (1) That it was prejudicial error to allege the age of defendant and the age of prosecutrix in the information and include the same verbatim in instruction No. 2 given by the trial court; (2) that the trial court erred in overruling defendant's objection to the county attorney's competency as a witness; (3) erred in the rejection of certain evidence offered by defendant; (4) erred in giving instructions Nos. 6, 9, and 10; and, (5) that the state's evidence was insufficient to sustain the verdict and judgment. We conclude that the foregoing third and fourth contentions should be sustained.

This case, although tried separately, grew out of the same incident as that involved in Frank v. State, *ante* p. 745, 35 N. W. 2d 816.

It will be noted that the information herein not only failed to allege that prosecutrix was previously chaste, but also described defendant as "a male person of the age of Seventeen years," as distinguished from one "of the age of eighteen years or upwards," which allegation was

not prejudicial but beneficial to defendant in that it required the state to prove beyond a reasonable doubt that defendant committed an assault upon prosecutrix with the intent to commit a rape upon her by the use of force, without consent, and notwithstanding her resistance. Defendant was thus given the benefit of the defense of consent and want of resistance. Therefore, the first contention would be controlled by the same principles as those appearing in the discussion and conclusion with reference to the first contention in Frank v. State, *supra.*

The third and fifth contentions, as well as instructions Nos. 6 and 10, given by the trial court, and claimed prejudicially erroneous in the fourth contention, are all identical in principle and respectively controlled by rules of law discussed and conclusions reached with regard thereto in Frank v. State, *supra.*

With reference to defendant's second contention, the record discloses that after the county attorney had partially prepared the case for trial, a special prosecutor was appointed by the trial court to try the case, and the county attorney's name was endorsed upon the information as a witness for the state. The special prosecutor appeared at the trial as counsel representing the state, and prosecuted the action as such. There is no evidence in this record, or offer by defendant to adduce any evidence, that the county attorney conducted himself during the trial in any manner inconsistent with his position as a witness or his interest as an officer of the state.

When the county attorney attempted to testify as a witness for the state, defendant simply objected to his competency as a witness, which the trial court overruled, stating, "The witness hasn't taken any part in the trial of this case." As will be observed by the authorities cited in Frank v. State, *supra,* the court's ruling was not erroneous.

Instruction No. 9, given by the trial court herein, stated the rule regarding the necessity and character of corroboration, but as a part of the same instruction,

cautionary in character with regard to the effect of testimony given by the county attorney relating to admissions made to him by defendant, the trial court therein erroneously assumed, as an established fact, that all such admissions had been made by defendant, which was generally denied not only by defendant but by Marvin Frank, another witness for defendant. Whether or not the admissions were made as testified by the county attorney was also a question for the jury to decide. For the foregoing reasons, instruction No. 9 was prejudicially erroneous.

For the reasons heretofore stated, and those stated in Frank v. State, *supra,* and incorporated herein by reference, the judgment of the trial court should be and hereby is reversed and the cause is remanded.

REVERSED AND REMANDED.

PAINE, J., not participating.

SIMMONS, C. J., dissenting.

For the reasons stated in my dissent in Frank v. State, *ante* p. 745, 35 N. W. 2d 816, I concur in the judgment of the court and would go further and dismiss.

The charge arises out of the same events which are involved in Frank v. State, *supra.* The same assignments of error generally are made here as in the Frank case. The case was tried the month following the Frank case.

Here the witness Gerald Donoghue did not testify for the state, so that whatever corroborative value there was in his testimony in the Frank case is lacking here.

Here the evidence of the prosecutrix has even less probative value than it had in the Frank case.

Here the county attorney did not relate much of his testimony in the Frank case and by qualifications weakened that which he did give.

Subject to these changes, my dissent in Frank v. State, *supra,* is applicable here.

LEONARD M. MORRIS ET AL., APPELLEES, V. AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, NEW YORK, A CORPORATION, APPELLANT.

35 N. W. 2d 832

Filed February 11, 1949. No. 32549.

1. **Insurance.** In an action on a policy which provides that the insured should furnish proof of loss within a specified time after the loss accrued, it is necessary for the insured to prove at the trial that this requirement was performed or that it was waived by the insurer.
2. ———. A fire insurance company waives the right to demand formal proof of loss if, after notice of the loss, it investigates the loss, enters into negotiations with the insured for a settlement thereof, and makes an offer of compromise, even though the negotiations do not result in a disposition of claims of the insured.
3. ———. A provision in an insurance contract that the insured may apply up to ten percent of the amount of the policy to cover private structures appertaining to and located on the premises described therein means that if the insured suffers damage to or destruction of any such structure on the premises by any of the causes stated in the policy, he may, at his option, recover therefor in an action on the policy the amount of his actual damage not to exceed in any event ten percent of the amount of the policy.
4. ———. Section 44-380, R. S. 1943, has no application to a stipulation in an insurance contract that the insured may apply up to ten percent of the amount of the policy to cover private structures appertaining to and located on the premises described therein.
5. ———. A policy of fire insurance on a dwelling "including building equipment and fixtures," while on the premises, covers a screen door belonging to the house, if located on the premises, though not in use on the house at the time of its damage or destruction by fire.
6. ———. The language in such a policy including "outdoor equipment pertaining to the service of the premises," if the property of the owner of the dwelling, while on the premises described in the policy, covers a garden hose and shovel the property of the owner of the premises kept and used thereon.

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

Lyle Q. Hills, for appellant.

Ralph R. Bremers, for appellees.

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

BOSLAUGH, J.

This case was instituted by Leonard M. Morris and Inger M. Morris, appellees, to recover from American and Foreign Insurance Company of New York, appellant, on two policies of fire insurance issued by it to the appellees, the damage and loss alleged to have resulted to them because of a fire causing damage to a residence, the destruction of a garage, and several items of personal property claimed by appellees to be covered by the policies. Appellees had judgment in the municipal court of the city of Omaha, Nebraska, the court of original jurisdiction. Appellant prosecuted an appeal to the district court for Douglas County, Nebraska. A trial was had to the court without a jury and a finding made and judgment rendered for appellees. This case is here on an appeal from that judgment and the order of the court denying the motion for a new trial.

Appellant issued to appellees two policies of insurance, each in the sum of $2,500, indemnifying the appellees against damage by fire of their frame house situated on the east 43 feet of Lots 13 and 14, Block 23, Carthage Addition to the city of Omaha, Nebraska, known as 4901 Cuming Street, including building equipment and fixtures and outdoor equipment pertaining to the service of the premises while located on the premises. The policies each contain the provision that the assured may apply up to ten percent of the amount of the policies to cover private structures appertaining to the premises and located thereon. The policies were in force at the time of the fire, 2 a. m., October 28, 1946. The fire was in and confined to the garage on the premises and its contents. The garage was a total loss. A screen door for the house,

75 feet of garden hose, and a large shovel in the garage at the time of the fire were destroyed, and the evidence is without dispute that these had a value of $10, $15 and $4 respectively. The paint on the south side of the house was destroyed by the heat of the fire and resulted in a condition making it necessary to scrape and re-paint the affected area. The amount of the damage to the house was stipulated to be $72.50. Appellees produced evidence that the value of the garage immediately before the fire was $425 to $450. Appellant offered no evidence as to the value of the garage before it was damaged by the fire, but did show an estimate of an experienced contractor and builder that the reasonable cost of replacing it with a comparable new building was $364. The adjuster for appellant adopted a figure to replace the garage of $433.75. He deducted for depreciation $120.13, and claimed the balance $313.62 as the amount of loss because of the destruction of the garage. To this he added the damage to the house, $72.50, and by this reasoning determined to his satisfaction that the total $386.12 was the amount of the loss of appellees because of the fire.

The policies sued upon each contain the provisions "* * * within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss," and "The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company * * *," and "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with * * *."

The appellant pleaded and contends that appellees failed to comply with the requirement concerning proof of loss and this was a condition precedent to their right to maintain a suit on the policies. The appellees did not furnish any proof of loss as the policies required. This obligation imposed upon appellees is reasonable and

enforceable. It was incumbent upon appellees to establish that this stipulation was complied with or to disclose some legal reason exempting them therefrom. German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. S. R. 459; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Thomas v. Prudential Ins. Co., 131 Neb. 274, 267 N. W. 446; Clark v. State Farmers Ins. Co., 142 Neb. 483, 7 N. W. 2d 71.

The fire occurred about 2 a. m. October 28, 1946. Mrs. Morris was one of the owners of the insured property. That day she notified the Omaha Loan & Building Association of the fire and damage to and destruction of the property. She talked with the man in charge of the insurance department of the association and who had handled the insurance matters for the appellees. This association had a mortgage on the property. The party with whom she talked told her to contact the insurance company. This she did and later that day Mr. Kelly came to her home to talk with her about the fire loss she had reported. Mr. Kelly, an insurance adjuster, was employed to adjust this loss. Mrs. Morris showed him where the damage was and Mr. Kelly made a complete examination and told her he would send someone out to make an estimate of the loss and damage. Appellant had a contractor and builder inspect the location of the fire the following day and he made and furnished to appellant his estimate. He did this at the request of Mr. Kelly. About a week after the fire the appellees went to the office of Mr. Kelly to talk with him about their loss and its adjustment. They had an estimate of their damage and talked with him about an adjustment and settlement. They argued about whether appellees should take any depreciation on the garage and whether they were entitled to a new building. Kelly finally arrived at a figure of $386.12, which he offered appellees as a settlement of their loss. He told them to think it over and let him know. Appellees told Kelly that they were not satisfied with the figure he submitted and they were

going to put the matter in the hands of their attorney.

The provision for proof of loss was for the benefit of the insurance company and could be waived by it. The appellant by the facts just referred to waived compliance by the appellees with the requirements of the policy as to furnishing proof of loss. If a fire insurance company, after notice of loss, investigates it and enters into negotiations with the assured looking to a settlement and the negotiations fail because of inability to agree as to the amount of the loss, the insurer thereby waives the right to demand formal proof of loss stipulated in the policy. "Proof of loss, under the repeated holdings of this court, had been waived by the appearance of the adjuster, and the negotiations already had for the purpose of ascertaining such loss and proof thereafter furnished became immaterial." Herpolsheimer v. Citizens Ins. Co., 79 Neb. 685, 113 N. W. 152. See, also, Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883; Teasdale v. City of New York Ins. Co., 163 Iowa 596, 145 N. W. 284, Ann. Cas. 1916A 591; 29 Am. Jur., Insurance, § 1142, p. 858. The defense based upon the failure of appellees to furnish proof of loss cannot prevail in this case.

The policies in question each "does insure Leonard M. and Inger M. Morris * * * to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss * * *." An attached rider recites "this policy covers the following described property, all situated on East 43′ of Lots 13 and 14, Block 23, Carthage Add'n, being #4901 Cuming St., City of Omaha, State of Nebraska. *1. $2500 on the composition roof frame * * * residence, including building equipment and fixtures and outdoor equipment pertaining to the service of the premises * * * while located on the above described premises * * *, and "The insured may apply up to ten per cent (10%) of the amount specified for Item 1 to cover on private structures appertaining to

the above described premises and located thereon."

The house and the garage were on the premises when the insurance policies were written and at the time of the fire.

The appellees claim that because of the language of the policies that the insured may apply up to ten percent of the $5,000 of insurance to any loss suffered on any private structure appertaining to and located on the premises described therein, and because of the provisions of section 44-380, R. S. 1943, the valued policy law, they are entitled to recover $500 for the total loss of the garage destroyed by fire. The district court sustained this view of the contracts and of the law.

The language of the policies in this aspect is not burdened with ambiguity or uncertainty, and clearly means that if the insured suffers damage to or destruction of any private structure pertaining to and located on the premises (except structures used for mercantile, manufacturing or farming purposes) by any of the causes described in the policy of the insured, he may at his option recover the amount of his actual loss not to exceed in any event ten percent of the principal amount of the policy. If the actual loss of the insured is less than ten percent of the amount of the policy, he may only exact payment of the amount of his loss. If his loss is ten percent or more than ten percent of the amount of the policy, then he may recover only ten percent of the amount thereof. Section 44-380, R. S. 1943, has no application to or influence upon this provision. That statute provides that "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, * * * and the property insured shall be wholly destroyed, * * * the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." The only real property insured by the policies here in question was the house described therein. The garage was

not mentioned. Its value in any view of the evidence was less than ten percent of the amount of the policies. Appellees were only entitled to recover the actual value of the garage at the time of the fire and this according to the record in this case was less than $500. The action of the court permitting appellees to have judgment for that amount as their loss because of the destruction of the garage cannot be upheld.

Appellees also have a valid claim against appellant for the damage to the house, stipulated to be $72.50, the destruction of the screen door, the value of which was without dispute shown to be $10 because it was within the language of the policies "building equipment and fixtures," the garden hose and shovel, the value of which by the undisputed evidence was $19, because these were "outdoor equipment pertaining to the service of the premises" and were the property of the owners of the dwelling.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STEPHEN KNIHAL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

36 N. W. 2d 109

Filed February 25, 1949. No. 32471.

1. **Evidence.** A photograph, when offered in evidence as proving a thing to be as represented in the picture, is not admissible as original or substantive evidence.
2. ———. To be admissible such a picture must be verified by a witness or witnesses whose testimony it serves to explain or illustrate.
3. **Appeal and Error.** Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal.
4. **Witnesses.** The maxim, "He who speaks falsely on one point will speak falsely upon all," deals with the weight of evidence and the credibility of witnesses.

5. **Trial.** It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, "He who speaks falsely on one point will speak falsely upon all."
6. **Cases overruled.** Joseph v. State, 128 Neb. 824, 260 N. W. 803; Lee v. State, 147 Neb. 333, 23 N. W. 2d 316; and prior decisions to the extent indicated in the opinion are overruled.
7. **Trial: Criminal Law.** An instruction in a criminal case that "You have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," held to be erroneous.

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

Eugene D. O'Sullivan, John T. Marcell, Arthur J. Whalen, Ernest S. Priesman, Eugene D. O'Sullivan, Jr., and *Warren C. Schrempp,* for plaintiff in error.

James H. Anderson, Attorney General, *Clarence S. Beck,* and *Homer L. Kyle,* for defendant in error.

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

SIMMONS, C. J.

Plaintiff in error, hereinafter referred to as defendant, was charged by information with murder in the second degree in the killing of one Martin Urn. He entered a plea of not guilty. Upon trial he was found guilty of manslaughter. Motion for new trial was made and overruled. Defendant was sentenced to imprisonment for a period of three years. Defendant brings the cause here by petition in error. We reverse the judgment of the district court, and remand the cause.

We recite the evidence only insofar as is necessary to an understanding of the assignments of error.

The state's evidence is to the effect that the defendant operated a tavern in South Omaha where beer and intoxicating liquors were served by the drink. The tavern room was 23 feet wide and 40 feet in length. It faced north. Along the west wall was a back bar. In front of that was a serving space, and then, making a

solid barrier extending about 30 feet from the north wall, a cigar case, a long front bar, and a cooler. The front bar was 3½ to 4 feet in height.

During the evening of January 17, 1947, the defendant was in his place of business and tending bar. The deceased, Martin Urn, was at the bar. One Shymkawicz came into the tavern. He had been drinking, and a police officer testified that he was drunk. An argument arose between the defendant and Shymkawicz over the change of another customer who came in with Shymkawicz. Before it ended the defendant took a double-barreled shotgun from the back bar and Urn was shot. The state's witnesses do not agree as to what happened leading up to the firing of the shot. Shymkawicz testified that he entered the tavern, ordered wine, went to the lavatory, returned to the bar, and took a sip of his drink. Then the discussion over the change began. One witness denied that Shymkawicz was served. Shymkawicz said the defendant took the shotgun from a niche in the back bar, put "a shell" in it, and put it back on the back bar. Shymkawicz testified that he thought defendant was bluffing then. There were two shells, one exploded and one unexploded, in the gun after the shooting. The discussion continued. The defendant again picked up the gun, ordered Shymkawicz out and said, " 'You son-of-a-gun I will blow your head off.' " Shymkawicz ran out. The shot which killed Urn was fired.

Shymkawicz testified that he was not profane, was not abusive, and was on good terms with the defendant; that he had not been in the tavern earlier that evening; and that the entire matter happened in about 3 minutes. There was no corroboration as to the loading of the gun. One state's witness testified that Shymkawicz came into the tavern, was ordered out, began to use vile and abusive language to the defendant, and accused defendant of vile offenses; that defendant reached for the gun and Shymkawicz left; that Shymkawicz returned several minutes

later and again used vile language; and that defendant became quite excited, and the shot was fired.

A police officer testified that after the shooting defendant said, " 'I shot the wrong man.' "

The main charge of the gun struck Mr. Urn in the head; he fell backward and was dead when the police arrived. Two pellets struck Shymkawicz and another bystander was slightly wounded in the ear.

The defendant's testimony is that Shymkawicz on previous occasions had been refused service of liquor and asked to stay out of the tavern; that on the evening in question he became abusive and profane when the defendant refused to serve him; that he continued it in discussing the change due another patron; that defendant called the police; that Shymkawicz left saying, " '* * * I am coming back; I am going to get you' "; that Shymkawicz came back, shaking his fist, calling names, and challenging defendant to put him out; that defendant took the gun to scare Shymkawicz and it discharged; that defendant did not put a shell or shells in the gun; that defendant did not know it was loaded; and that he did not intentionally shoot anyone. Defendant denied that he told the police officer he had shot the wrong man.

The defendant assigns as error the admission in evidence of three photographs. The testimony of the photographer was that the pictures were taken at the tavern about an hour after the shooting; that they were true reflections of the objects intended to be photographed; and that one of the pictures included the defendant. There was no further foundation evidence and no evidence related to the pictures descriptive of what they showed, other than the pictures themselves.

Exhibit 5 shows what appear to be a man in the foreground with his back to the camera, a back bar with bottles, a mirror, pictures, etc., a front bar, cigar case, cash register, and what appear to be the legs of a person on the floor. Between the bars and facing the camera

is a man wearing a white jacket and holding what appears to be a shotgun in a port position.

Exhibit 6 shows what appears to be a man with his arms outstretched lying on his back on the floor. There are black blotches about the mouth and below the right ear and a large black blotch surrounding the head.

Defendant objected to the admission of exhibits 5 and 6, challenging competency, relevancy, and materiality, and for specific other reasons.

Exhibit 7 was received in evidence when first offered without objection and is here subject to the rule that "Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon in the supreme court on appeal." Fisk Tire Co. v. Hastings Warehouse & Storage Co., 131 Neb. 401, 268 N. W. 86.

As a general rule photographs are admissible in evidence only when they are verified or authenticated by some other evidence. 20 Am. Jur., Evidence, § 730, p. 609. Photographs are generally inadmissible as original or substantive evidence. They must be sponsored by a witness or witnesses whose testimony they serve to explain and illustrate. 32 C. J. S., Evidence, § 709, p. 613.

Wigmore states as follows: "We are to remember, then, that a document purporting to be a map, picture, or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper,—testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony,—or it is nothing. It may, sometimes, to be sure, not be offered as a source of evidence, but only as a document whose existence and tenor are material in the substantive law

applicable to the case,—as where, on a prosecution for stealing a map or in ejectment for land conveyed by deed containing a map, the map is to be used irrespective of the correctness of the drawing; here we do not believe anything because the map represents it. But whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier." 3 Wigmore on Evidence (3d ed.), § 790, p. 174. "The use of maps, models, diagrams, and photographs as testimony to the objects represented rests fundamentally (as already noted in § 790) on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method. It follows, then, that the map or photograph must first, to be admissible, be made a part of some qualified person's testimony. Some one must stand forth as its testimonial sponsor; in other words (as commonly said), it must be verified. There is nothing anomalous or exceptional in this requirement of verification; it is simply the exaction of those testimonial qualities which are required equally for all witnesses; the application merely takes a different form. A witness must have had observation of the data in question (ante, § 650), must recollect his observations (ante, § 725), and must correctly express his observation and recollection (ante, § 766). Here, then, is a form of expression ready prepared pictorially; he must supply the missing elements; in brief, it must appear that there is a witness who has competent knowledge, and that the picture is affirmed by him to represent it." 3 Wigmore on Evidence (3d ed.), § 793, p. 186. "A map or photograph cannot be received anonymously; it must be 'verified' by some witness." 3 Wigmore on Evidence (3d ed.), § 794, p. 186.

These rules have been followed in O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856; Strasser v. Stabeck, 112 Minn. 90, 127 N. W. 384; Haven v. Snyder, 93 Ind. App.

54, 176 N. E. 149; Baustian v. Young, 152 Mo. 317, 53 S. W. 921, 75 Am. S. R. 462; Bretall v. Missouri Pacific Ry. Co. (Mo. App.), 239 S. W. 597; Hurlburt v. Bussemey, 101 Conn. 406, 126 A. 273; Coach Co. v. Lee, 218 N. C. 320, 11 S. E. 2d 341; Adamczuk v. Holloway, 338 Pa. 263, 13 A. 2d 2.

Under the limited foundation given it is patent that these pictures became substantive evidence. They spoke for themselves. 3 Wigmore on Evidence (3d ed.), § 790, p. 174; Reed v. Davidson Dairy Co., 97 Colo. 462, 50 P. 2d 532. As to who and what they showed, they did not have behind them the testimony of any witness supported by the sanctity of an oath, nor were they subject to the tests of cross-examination. The admission of exhibits 5 and 6 was error. Considering the nature of the scenes and objects portrayed, the error was prejudicial. Under these circumstances questions of admissibility which might arise after a proper foundation is laid should not now be determined.

Defendant requested an instruction on the maxim, "Falsus in uno, falsus in omnibus." The trial court refused to give the instruction. Defendant assigns this as prejudicial error.

Of the maxim, Wigmore said: "The maxim, 'He who speaks falsely on one point will speak falsely upon all', is in strictness concerned, not with the admissibility, but with the weight of evidence. The jury are told by it what force to give to a falsity after the evidence has shown its existence. * * * It may be said, once for all, that the maxim is in itself worthless;—first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life; and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper

force, and secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves." 3 Wigmore on Evidence (3d ed.), § 1008, p. 674. In section 1009, Wigmore states that the earliest appearance of the maxim in our law seems to be in Hampden's Trial, 9 How. St. Tr. 1053, 1101, where it was quoted in examination of a witness.

The source of the maxim is not clear. Broom's Legal Maxims does not discuss it. The Supreme Court of Ohio in Mead v. McGraw, 19 Ohio St. 55, said that it is derived from the civil law and points out that under the civil law, justice was administered by fixed tribunals charged with the determination of both law and fact, to which class under our system belong courts of equity and admiralty. The Supreme Court of Missouri in State v. Anderson, 19 Mo. 241, held that the rule was adopted from chancery and has little to do with jury trials. The Supreme Court of North Carolina in State v. Williams, 47 N. C. 257, refers to it as a maxim which emanated from the civil law and which was assumed to be a rule of evidence in the common law courts, without referring to the "authorities or the legal analogy, or to the principle and 'reason of the thing' growing out of the difference between the trial of facts by a jury, 'a casual tribunal' selected for that particular trial, and the trial of facts by a fixed tribunal" such as the "Ecclesiastical Courts, and the Courts of Admiralty, and the Courts of Equity, which are fixed tribunals"; and that in the law of England there has not been even a suggestion that the rule was one of evidence to be enforced in the common law courts. Jones on Evidence (Pocket Edition), section 903, page 1163, suggests a civil law, equity, and admiralty source and states that the maxim is one growing out of the old rule of law that one indicted and convicted of willful perjury was not a competent witness in any case.

In The Santissima Trinidad and the St. Ander, 7 Wheat. 283, 20 U. S. 283, 5 L. Ed. 454, the Supreme Court of the

United States held that where a party speaks in respect to a fact to which he cannot be presumed liable to mistake, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood and courts are bound to apply the maxim. That was an admiralty case.

In Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51, we followed and applied the rule of The Santissima Trinidad case. That was a case in equity.

In Buffalo County v. Van Sickle, 16 Neb. 363, 20 N. W. 261, we applied the rule in reviewing a trial to the court and limited it to false statements knowingly and willfully made.

In Kay v. Noll, 20 Neb. 380, 30 N. W. 269, we had the rule in a case involving the giving of an instruction in a jury trial. At least from that case forward the maxim as stated in various ways has been before us in many cases. The contentions of error in giving and in refusing to give an instruction based upon the maxim, which we have considered, are sufficient to justify the views of the Supreme Court of Mississippi that the doctrine is "always dangerous" in trials. Bell v. State, 90 Miss. 104, 43 So. 84.

We have heretofore announced these rules as to the giving of an instruction based on the maxim.

"Where the condition of the testimony is such as to justify an instruction based upon the legal maxim, *falsus in uno, falsus in omnibus,* and a proper instruction is requested, it is error for the court to refuse to give it." Joseph v. State, 128 Neb. 824, 260 N. W. 803.

" * * * such an instruction is, however, not required in all cases but only where from the evidence the jury may be justified in believing that a witness has willfully testified falsely to any material fact in the case, and further where the same witness has testified as to some other material issue in the case than that upon which he is directly impeached." Lee v. State, 147 Neb. 333, 23 N. W. 2d 316.

It is clear from the above rules that the trial court is required first to weigh the testimony and reach certain conclusions as a preliminary to the giving of the instruction. But we have held that "It is for the jury to determine whether a false statement by a witness was willful and intentional, or made through mistake and honestly." McCormick Harvesting Machine Co. v. Seeman, 49 Neb. 312, 68 N. W. 482. We have also held that "An instruction, by which the jury was sought to be directed that the evidence of certain witnesses was entitled to greater weight than that of others concerning a disputed fact, invades the province of the jury, (and) is erroneous, * * *." Crabtree v. Missouri Pacific Ry. Co., 86 Neb. 33, 124 N. W. 932, 136 Am. S. R. 663. We have also held that "It is reversible error for the court, in its charge to the jury, to give undue prominence to a portion of the testimony by special reference thereto—to state to the jury what weight shall be given it, and comment on its strength or probative force." Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139.

There are many objections noted in the books to the implications which follow from the giving of an instruction based on the maxim. One of the serious objections is that the jury readily may get the implication that the trial judge considers that some one or more of the witnesses may have willfully testified falsely. It would not be difficult in most cases for the jury to sift the witnesses and find out which witness or witnesses the judge had in mind. The jury then is distracted from the issues of fact in the case to the issue of what witnesses are in the mind of the judge. More seriously, the instruction under those circumstances constitutes the expression of the opinion of the judge as to the credibility of the witnesses and the weight to be given to their testimony. In determining weight and credibility the jury has had thrown into the scales the opinion of the judge, which is not evidence. An instruction

based on the maxim singles out one reason among the many that a jury may weigh as to why a witness' testimony may not be credited.

The Supreme Court of Missouri has said: "It is hard to frame an instruction founded on the maxim which safeguards against every possible misleading implication without cutting down the doctrine"; and that this accounted for the confusion noted in the instructions reviewed. State v. Willard, 346 Mo. 773, 142 S. W. 2d 1046. Lord Esher, M. R., said about maxims in Yarmouth v. France, 19 Q. B. D. 647, 17 E. R. C. 217: "They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Without further reviewing the authorities we hold that it is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim. Our holdings in Joseph v. State, *supra;* Lee v. State, *supra;* and prior decisions to the extent in conflict herewith are overruled. Accordingly, defendant's assignment of error is not sustained.

The court gave the jury an instruction on the credibility of witnesses and the weight to be given their evidence. The instruction contained this sentence: "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true." The giving of this instruction, among others, was assigned as error in the motion for a new trial and in the petition in error. It is not particularly assigned as error by defendant in his brief here. We consider the instruction to be a plain error which we may notice under Rule 8 a 2 (4) of this court.

In Wilson v. State, *ante* p. 436, 34 N. W. 2d 880, we held that "An instruction in a criminal case the effect of which is to infringe upon the right of a jury

as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgment of a substantial right of the defendant." In that case we had this identical instruction before us. There there was no evidence in contradiction of evidence offered by the state in proof of the commission of the alleged offense. We there held that the testimony of no witness is surrounded with such sanctity as to require it to be accepted by the jury as true in the absence of controversion by other witnesses or conflict with other testimony, and held that the giving of the instruction was prejudicial error. Here the witness Shymkawicz testified that defendant said before the gun was fired, "I will blow your head off." So far as we can determine from the record that testimony was neither directly corroborated by other witnesses nor denied by the defendant. The effect of the instruction was to tell the jury that it should not reject the evidence as untrue. Applied to that evidence the instruction was prejudicial under the Wilson case.

The witness Shymkawicz testified that the defendant put a shell in the gun just prior to its being fired. The defendant denied that he did so. The police officer testified that defendant said after the shooting, "I shot the wrong man." Defendant denied the statement. There are other contradictions in the record. When applied to the testimony of the witness Shymkawicz and the police officer, the effect of the instruction is to tell the jury that it should not reject their testimony, unless it found the testimony irreconcilable with the testimony of the defendant, and even then should not do so unless it first found that the testimony of the defendant was true. The instruction put a burden of proof on the defendant. The defendant in a criminal case does not carry that burden. Bourne v. State, 116 Neb. 141, 216 N. W. 173. See, also, Frank v. State, *ante* p. 745, 35 N. W. 2d 816. We conclude that the giving of the instruction was prejudicial error.

Defendant's third assignment of error is that the trial court committed error in failing to instruct the jury properly and fully upon the defendant's theory of the case. This assignment is based upon the present record and the details of the testimony. A reversal granting a new trial being required which will involve a new record, we do not deem it necessary to determine these assignments.

For the reasons given herein, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ALBERT E. GOEDERT, APPELLANT, v. JAMES M. JONES, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.
36 N. W. 2d 119

Filed February 25, 1949. No. 32550.

1. **Habeas Corpus.** A person convicted under the provisions of section 28-736, R. S. 1943, is not entitled to the issuance of a writ of habeas corpus on a petition alleging that he broke custody and escaped jail for the reason that he was awaiting trial on a charge of burglary which he alleged was illegal, and which was subsequently dismissed.
2. ———. If the facts set forth in the petition for writ of habeas corpus disclose the relator is not entitled to relief, then the writ should be denied.

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

Albert E. Goedert, pro se, for appellant.

James H. Anderson, Attorney General, and *Walter E. Nolte,* for appellee.

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

MESSMORE, J.

The relator filed an application for a writ of habeas corpus in the district court for Lancaster County against

James M. Jones, warden of the Nebraska State Penitentiary as respondent, to obtain his release from the penitentiary. From an order denying the writ and dismissing the petition, the relator has appealed.

The relator alleged in his petition for a writ of habeas corpus that he was convicted of breaking out of and escaping from the county jail of Dawson County, Nebraska, while he was being held under a charge of burglary. The relator further alleged that the offense upon which he was being held was not a felony; and that the charge was illegal and was subsequently dismissed.

Section 28-532, R. S. 1943, defines the crime of burglary and provides for punishment by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months.

Section 29-102, R. S. 1943, provides in part: "The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary."

Under the provisions of section 29-102, R. S. 1943, if the maximum penalty is one year or more in the penitentiary, the crime is a felony. See Rains v. State, 142 Neb. 284, 5 N. W. 2d 887.

Section 28-736, R. S. 1943, provides in part: "If any person confined * * * in any jail, either awaiting trial in any felony complaint lodged against him * * * shall break such custody and escape therefrom, or attempt to do so, he shall upon conviction be punished by confinement in the penitentiary for a period of not less than one year nor more than ten years."

The offense of breaking custody and escaping from jail by the relator was complete when he escaped. He did not appeal from the conviction. The disposition made of the burglary charge later is not material or relevant here.

The instant case is governed by the case of Stinehagen

v. Olson, 145 Neb. 653, 17 N. W. 2d 674, which held: "Under the provisions of section 28-736, R. S. 1943, a sentence committing a person to the penitentiary, even though it might be reversed on appeal or set aside on habeas corpus, would, nevertheless, be effective to sustain a conviction for breaking custody and escaping therefrom while confined under it."

If the petitioner shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be denied. See In re Application of Tail, Tail v. Olson, 145 Neb. 268, 16 N. W. 2d 161.

The sentence of imprisonment imposed upon the relator for breaking custody and escaping from jail in Dawson County while awaiting trial on the charge of the crime of burglary precludes his discharge from confinement in the state penitentiary, and the judgment of the district court is affirmed.

AFFIRMED.

FRANK MANTELL, APPELLANT, v. JAMES M. JONES, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.

36 N. W. 2d 115

Filed February 25, 1949. No. 32507.

1. **Appeal and Error.** In the absence of a bill of exceptions and a motion for a new trial a judgment will be affirmed where the pleadings state a cause of action or defense and support the judgment rendered.
2. **Criminal Law.** A prima facie case is one which is established by sufficient evidence to require evidence to be adduced on the other side to overthrow it.
3. ———. In a criminal action a prima facie case is made when sufficient facts have been adduced to entitle the State to have the case go to a jury.
4. **Constitutional Law.** An act of the Legislature declaring a prima facie case or a statutory presumption of guilt of a defined criminal offense upon proof of certain facts is valid and not subject to attack on constitutional grounds if in the light of the common

circumstances and experiences of life there is a rational connection between the facts thus to be proved and the ultimate fact to be presumed.

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

Frank Mantell, pro se, for appellant.

Walter R. Johnson, Attorney General and *Leslie Boslaugh,* for appellee.

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

YEAGER, J.

This is an appeal by Frank Mantell from a judgment of the district court for Lancaster County, Nebraska, denying his release from the penitentiary of the State of Nebraska on a writ of habeas corpus. James M. Jones, warden of the penitentiary, is respondent and appellee.

As petitioner the appellant filed a lengthy petition for writ of habeas corpus in the district court for Lancaster County, Nebraska. In it he declared that for many reasons he was unlawfully restrained of his liberty. To the petition the appellee filed an answer and return.

A trial was had to the court and evidence taken whereupon a judgment was rendered denying the writ and release of appellant from the penitentiary. No motion for new trial was filed.

An appeal was taken from the judgment but the evidence was not preserved and presented to this court with the appeal. There is, therefore, no question of fact which was determined by the district court before this court for review.

Since there is no bill of exceptions and no motion for a new trial, the questions properly before this court for consideration and determination are the following: Was the appellant convicted for a violation of an unconstitutional statute? Do the pleadings support the judgment?

The applicable rule as to the second question is that in the absence of a bill of exceptions and a motion for new trial the judgment will be affirmed where the pleadings state a cause of action or defense and support the judgment rendered.

In In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85, it was said: "When it is sought to review the judgment of the district court, no motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had."

If the statute under which appellant was informed against, tried, and convicted was not unconstitutional clearly the judgment of the district court from which this appeal is taken must be sustained.

There was a proper petition for a writ of habeas corpus in which was set forth the information on which appellant was tried and convicted. To the petition the respondent therein, appellee here, filed an answer and return. The return recited the judgment of conviction. The judgment responded to and was sustained by a denial contained in the answer and return to the allegations of the petition. Therefore it must be said that in the pleadings a defense was stated and that the judgment supports the defense pleaded.

As to the first question appellant contends that he was informed against, tried, and convicted under section 28-522, R. S. 1943, which section he contends is unconstitutional. He contends that it is violative of the Fourteenth Amendment to the Constitution of the United States in that it deprives of liberty without due process and equal protection of the law. The section is the following:

"Any person who steals or attempts to steal an automobile or motorcycle, of any value, or who receives or

buys or conceals an automobile or motorcycle, of any value, knowing the same to have been stolen, with intent thereby to defraud the owner; or who conceals any automobile or motorcycle thief, knowing him to be such, shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not less than one year nor more than ten years. The possession of such property without the consent of the owner and without a certificate of registration issued to the possessor as required by law, shall be prima facie evidence of guilt. The possession by any person of a motor-driven vehicle with engine numbers removed or mutilated so as to make identification difficult, shall be prima facie evidence of theft of such vehicle or receipt of such vehicle knowing the same to have been stolen; and the burden of proof of ownership shall fall on the person or persons in whose possession such vehicle may be."

The information does not state that it was under this section of the statute that appellant was prosecuted but we think it sufficiently appears that this was true.

It is to be observed that it is not urged that the portion of the section definitive of the acts condemned and fixing the penalty for such acts is in itself unconstitutional. The contention is in substance that the section is unconstitutional for the reason that the last quoted sentence makes proof of the acts condemned prima facie sufficient if there is evidence that the accused has possession of the property without the consent of the owner and without a certificate of registration therefor. In other words the contention is that the statute is unconstitutional because it says that evidence of this quality and character amounts to a prima facie case of guilt of the acts condemned.

"Prima facie case" has been variously defined: In Black's Law Dictionary (3rd ed.), p. 1414, it is defined as follows: "A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A

prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side."

In 49 C. J., Prima Facie, p. 1346, it is defined in different words but in the same substance.

In criminal cases it means a state of facts sufficient to entitle the State to have a case go to a jury (State v. Hardelein, 169 Mo. 579, 70 S. W. 130), or in other words, that amount of evidence which is sufficient to counterbalance the general presumptions of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it and render it improbable, or to prove facts inconsistent with it. State v. Hardelein, *supra;* Commonwealth v. Kimball, 24 Pick. (Mass.) 366; People v. Haack, 86 Cal. App. 390, 260 P. 913; Sellers v. State, 11 Okl. Cr. 588, 149 P. 1071; Caffee v. State, 11 Okl. Cr. 485, 148 P. 680.

The theory of appellant appears to be that the Legislature may not constitutionally declare what evidence may be deemed and taken as prima facie proof of a charge in a criminal action.

The authority relied upon by appellant does not support the theory. The case upon which he relies is Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519. In a concurring opinion in this case by Mr. Justice Black, it was said: "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, * * * stand as a constitutional barrier against thus obtaining a conviction, * * *. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded

by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained."

It will be observed that the opinion was there condemning a statute which authorized juries to convict without evidence and not one such as the one here which declares only that a prima facie case is made where certain named and defined incriminating evidence does appear.

The opinion did not condemn the right of the Legislature to declare a statutory presumption where such a presumption would reasonably flow from such proof as was contemplated by the act. The thing condemned was a presumption having no rational connection between the fact or facts proved and the ultimate fact presumed. In that connection in the majority opinion it was said:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

In Yee Hem v. United States, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, the court, in construing a statute which provided that proof of possession of smoking opium was sufficient to authorize conviction of the offense of concealing smoking opium unless the defendant explained the possession to the satisfaction of the jury, said: "It does no more than to make possession of

the prohibited article prima facie evidence of guilt."

In Thompson v. The People, 4 Neb. 524, this court said: "The better rule however seems to be, that if the possession of the stolen article be recent after the theft, such evidence is sufficient to make out a prima facie case, proper to be left to the jury, who are the sole judges of the effect that should be given to it." See, also, McLain v. State, 18 Neb. 154, 24 N. W. 720; Grentzinger v. State, 31 Neb. 460, 48 N. W. 148; Robb v. State, 35 Neb. 285, 53 N. W. 134; Palmer v. State, 70 Neb. 136, 97 N. W. 235; Kurpgeweit v. State, 97 Neb. 713, 151 N. W. 172; Barr v. State, 114 Neb. 853, 211 N. W. 188.

In Greenough v. State, 136 Neb. 20, 284 N. W. 740, it was said: "Under the doctrine announced in this state no presumption of guilt arises from the mere possession of stolen property. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury when weighed in connection with all other evidence adduced at the trial."

In these cases no procedural statute such as the one being considered here was involved but the pronouncements serve to show that from earliest times this court has recognized a rational connection between unexplained possession of stolen property and presumed guilt of the possessor.

While the opinion in Greenough v. State, *supra*, declares that under the doctrine of this state no presumption of guilt arises from the mere possession of stolen property it neither directly nor by reasonable inference denies the power of the Legislature to declare a statutory presumption upon proof of facts if the proved facts bear a rational relationship to the ultimately presumed fact.

In another class of cases this court has definitely declared that the power exists to constitutionally enact such legislation. In Parsons v. State, 61 Neb. 244, 85 N. W. 65, a case involving a statute declaring possession of intoxicating liquor presumptive evidence of the keeping

of intoxicating liquor for the purpose of sale without a license, this court declared that it was competent for the Legislature to provide that certain facts, when established, should be presumptive evidence of the material and ultimate fact to be proved. See, also, Durfee v. State, 53 Neb. 214, 73 N. W. 676.

We conclude that the rule to be applied is that an act of the Legislature declaring a prima facia case or a statutory presumption of guilt of a defined criminal offense upon proof of certain facts is valid and not subject to attack on constitutional grounds if in the light of the common circumstances and experiences of life there is a rational connection between the facts thus to be proved and the ultimate fact to be presumed.

We conclude further that the statute is immune from the attack made upon it since under the rule clearly there is a rational connection between the facts necessary to be adduced in proof of the defined criminal act and the ultimate fact to be presumed or held to be prima facie proof of the defined act.

The judgment of the district court is affirmed.

AFFIRMED.

PAINE, J., not participating.

MICHAEL B. BEECHAM, APPELLEE, v. FALSTAFF BREWING CORPORATION ET AL., APPELLANTS.

36 N. W. 2d 233

Filed February 25, 1949. No. 32565.

Master and Servant: Appeal and Error. In a hearing in the district court on appeal from a determination of an appeal tribunal set up under the provision of the Placement and Unemployment Insurance Law of the State of Nebraska the trial is required to be de novo, or in other words anew.

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

Fraser, Connolly, Crofoot & Wenstrand, Robert G. Fraser, and *John E. Sidner,* for appellants.

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

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

YEAGER, J.

This is an action by Michael B. Beecham, plaintiff, appellee here, against Falstaff Brewing Corporation and Donald P. Miller, Commissioner of Labor, defendants, appellants here, to recover unemployment benefits under the provisions of the Placement and Unemployment Insurance Law of the State of Nebraska, this law being sections 48-601 to 48-668, R. S. 1943, as amended.

Prior to the events under consideration here appellee had for 25 or 30 years been a truck farmer. There is no evidence that he had any special training in any vocation except that of a farmer or that he at any time adapted himself to any other class of work involving any class or degree of skills. On February 13, 1945, he became employed by the Falstaff Brewing Corporation as a watchman. The duties of the employment were those generally and usually attached to such positions. No particular skills appear to have been involved. He continued in this employment until December 1, 1947. On November 15, 1947, he was notified that his employment would cease on December 1. A day or two before he left his employment as watchman he was informed that he could have a job as attendant in the men's dressing room. The duties of the offered job were janitorial in character. The occupant of the job was required to keep the room and toilets located therein clean and to remove therefrom as occasion required empty beer cases which would accumulate. The actual work was not heavy and actual working hours few. The hours of the job offered were not longer than those of watchman and the pay was higher.

Appellee did not accept the new job but on December 2, 1947, he registered for work with the Nebraska State Employment Service at Omaha, an agency having recognition under the Placement and Unemployment Insurance Law, and filed claim for unemployment benefits. Later at the request of the Falstaff Brewing Corporation he was sent back by the Nebraska State Employment Service to the brewery where he again declined to accept the job as janitor.

It is undisputed under the facts as disclosed by the record that if appellee is entitled to unemployment benefits at all he is entitled to them at the rate of $18 a week for the legal maximum of 18 weeks.

The claim was, agreeable to law, presented to and determined by a claims deputy. The deputy allowed benefits on the ground that the appellee was refused suitable work.

Appeal, also in due form of law, was taken by the Falstaff Brewing Corporation to the appeal tribunal set up under the law where the decision was reversed on the ground that appellee failed without good cause to accept suitable work when offered.

Appeal, likewise in due form of law, was then taken to the district court and the decision of the appeal tribunal was reversed and the claim sustained on the ground that the work offered was not suitable work considering the age and condition of health of appellee, having regard to his prior employment.

The appeal here is from this determination made by the district court. The only question for determination here is that of whether or not the district court erred in its determination that the work offered was not under the law and the facts as disclosed suitable work.

Paragraph (c) of section 48-628, R. S. Supp., 1947, provides in part as follows: "(1) In determining whether or not any work is suitable for an individual, the commissioner shall consider the degree of risk involved to his health, safety and morals, his physical

fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence; (2) notwithstanding any other provisions of sections 48-601 to 48-668, no work shall be deemed suitable and benefits shall not be denied under said sections to any otherwise eligible individual for refusing to accept new work under any of the following conditions: * * * (ii) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; * * *." There are other named conditions under which new work may not be considered suitable but they have no bearing on the matter under inquiry here.

While from this language it would appear that the determination in these respects is to be made by the Commissioner of Labor, section 48-630, R. S. 1943, points out that the decision within these limits is to be made by a deputy designated by the commissioner.

Without question the deputy is an agent within the department who in the first instance in cases such as this is required to make the determination upon which the law is to be administered. § 48-630, R. S. 1943. Likewise the appeal tribunal is an agency set up within the department for the purpose of reviewing the action of the deputy and making its determination on the law and facts which determination supersedes the one made by the deputy if it is in conflict therewith. § 48-633, R. S. Supp., 1947. §§ 48-634, 48-635, 48-636, and 48-637, R. S. 1943.

Thus up to this point the determination, decision, interpretation, and application of the law to the facts in each particular case must be made by officers or agencies charged with the duty of construing, administering, and applying the law. § 48-628, R. S. Supp., 1947.

The law makes provision for appeal to the district court from the appeal tribunal and from the district

court to the Supreme Court. § 48-638, R. S. Supp., 1947. §§ 48-639, 48-640, R. S. 1943.

It becomes necessary then to determine what force and effect if any should be accorded to the decision of the appeal tribunal by the district court on appeal.

Section 48-639, R. S. 1943, contains the following: "In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo upon the record." This court, in considering similar language in section 48-706, C. S. Supp., 1939, which was a part of the then Nebraska unemployment compensation law, said in the opinion in Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. 2d 332: "The district courts of this state are courts of general jurisdiction, and in the absence of specific statutory restriction a provision of statute providing for an appeal to and a trial de novo in the district court contemplates a trial in the commonly accepted sense of that term in a court of general jurisdiction, including the right to produce evidence in the same manner as if the action had originated in the district court."

It follows then that when this matter came before the district court it became the duty of that court to consider and determine the case de novo or in other words to try the case anew. Thies v. Thies, 103 Neb. 499, 172 N. W. 364, 175 N. W. 646.

There is evidence that appellee objected to accepting the work because it involved the cleaning of toilets. On the record this objection was clearly aesthetic since there is no suggestion that this character of work would be anything more than an offense to sensibilities.

In an opinion in Collins Radio Company v. Iowa Employment Security Commission, a case in the district court for Linn County, Iowa, which opinion is cited in Unemployment Compensation Interpretation Service, Benefit Series, Vol. 6, No. 10, p. 125, in dealing with a matter very much like the one presented here, it was said: "The position of janitor is honorable and decent

and one which no self-respecting American citizen needing employment should hesitate to accept, if it is within his physical capabilities. It is true that, as claimant urged in his testimony, if he did not wish to accept it he was entirely within his legal rights in refusing to do so. But that does not mean that he could refuse and still collect unemployment compensation. The record seems to show that the claimant did not want to act as a janitor, that he felt it was somewhat beneath him. In this it is impossible to agree. Pride is a standard American virtue, and in its place is an excellent thing; but pride which leads one in need of employment to refuse honorable work which he is able to perform, and to elect to collect compensation because of unemployment, is not a virtue."

While this observation would seem to have no application by reason of the Nebraska statute in those cases where the applicant's former employment depended upon particular training or skills and the offered employment involved a definite departure therefrom, yet in a situation such as this where no such elements existed we think it should have controlling force and effect.

Another theory on which appellee has sought to sustain his contention is that the work was unsuitable because it involved risk to his health and physical fitness.

In this connection he said that on July 27, 1947, there was spraying at the brewery for the purpose of killing cockroaches and he inhaled sufficient of the spray so that on account thereof he went to the hospital for two days and remained away from work for a week. He also said that the doctor who attended him said not to take the job and that on account of the condition his lungs were in he was better off outside. Also he said that he had a hernia which he protected by wearing a truss.

The doctor did not appear as a witness but a statement prepared by him is in evidence without objection relating to appellee and this subject matter wherein on January 27, 1948, it was stated that appellee had asthmatic bronchitis and a left inguinal hernia which would permit him

to do light work as a watchman. There is nothing in it to throw any light on the question of whether or not his health would be adversely affected by the performance of the duties of this offered position.

The record discloses that the offer was of an 8-hour-day position but which position involved only about three hours of work each day; that the work involved scrubbing two floors and aisles between lockers, keeping three or four toilets clean, and removing empty beer cases which weighed eight to ten pounds each; and that no other lifting was involved. The description of the floor area is not accurate or adequate but it is sufficient from which to infer that it was not large.

There is nothing in the evidence to indicate a lack of physical ability to do this work. In fact there is evidence indicating a desire on the part of appellee to be assigned to work at the brewery which involved handling full beer cases weighing about 50 pounds each.

From the evidence it may be said that appellee came to the conclusion that the employees of the brewery smoked in these rooms and in consequence thereof it would have been detrimental to his health to accept employment therein.

The conclusion that this condition would be detrimental to his health finds no support in evidence having probative value. It did not depend either upon trial and experience by appellee at that place or elsewhere or upon expert or nonexpert testimony of other witnesses that the condition obtaining in this offered employment would adversely affect his health taking into consideration his condition if he engaged in the performance of the work of the position. The only evidence tending to support the conclusion is the testimony of appellee that the doctor hereinbefore referred to, without any indication that he knew or was apprised of the work or the conditions under which it was to be performed except that it was inside work, advised him not to accept the work because in his condition he would be better off outside. This was

insufficient upon which to base a finding and determination that the work of the offered position would detrimentally affect appellee's health or physicial fitness.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROBERT J. SIMON, APPELLEE, V. STANDARD OIL COMPANY, APPELLANT.

36 N. W. 2d 102

Filed February 25, 1949. No. 32517.

1. **Workmen's Compensation.** A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
2. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
3. ———. An employee to be entitled to disability benefits because of the Workmen's Compensation Act must have received an injury which had its origin in or have been incidental to the employment, or it must have resulted from a risk which by reason of the employment exposed the employee to a greater hazard than if he had not been so employed.
4. ———. The fact that the employee was at the place of the injury because of his employment is not sufficient if the injury resulted from a cause having no relation to the nature of the employment.
5. ———. If an employee chooses to go to a dangerous place where his employment does not require him to be, and he thereby incurs a hazard of his own choosing foreign to any reasonable requirement of his position, the risk arising from such action is not incident to and does not arise out of or in the course of his employment.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and dismissed.*

Fitzgerald & Smith and *Robert L. Smith,* for appellant.

Kennedy, Holland, DeLacy & Svoboda, Edwin Cassem, and *Harry R. Henatsch,* for appellee.

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

BOSLAUGH, J.

This is an action by Robert J. Simon, appellee, against Standard Oil Company, appellant, for disability benefits under the provisions of the Workmen's Compensation Act of Nebraska.

Appellee alleged that by an accident on the 8th day of August, 1947, he suffered personal injuries arising out of and in the course of employment consisting of fractures and lacerations of the thumb and the first finger, and a severed tendon of his right hand, by coming in contact with an electric fan while being operated in the repair shop of the appellant in Council Bluffs, Iowa. The appellant denied that the alleged injuries arose out of and in the course of the employment of the appellee by the appellant, and alleged that any injuries inflicted upon the appellee were the direct and proximate result of his willful negligence in that he deliberately walked more than 30 feet from the place where his duties required him to be and placed his hand in such close proximity to the fan as to be injured; that the fan was in a well-lighted room and was readily discernible for a distance of more than 30 feet; and that it was no part of the duties of appellee to operate, maintain, or care for the fan or to be in close proximity thereto.

The issues are whether appellee was the subject of an accident arising out of and in the course of his employment, or whether the accident was caused by his willful negligence.

The case was by stipulation of the parties, heard before a member of the compensation court in Douglas County, Nebraska, and an award was made for the appellee. A rehearing was had by that court on request of the appellant and the original award was affirmed. Appellant appealed to the district court of Douglas County where the findings and award of the compensa-

tion court were sustained. This appeal is from that judgment.

The evidence contains no dispute as to any material fact. Appellee, a young man of 24 years, was employed and worked for appellant. Commencing in June, 1947, he was assigned to the Omaha shop and worked as one of the shop personnel until it was moved to Council Bluffs, Iowa, about the first of August, 1947. Appellee was employed as a tank calibrator, but was instructed, as all the shop personnel were, to sweep and clean up the shop and leave it clean at night. The sweeping and cleaning was generally done by Mr. Bailey, assisted by appellee. His duties as a calibrator were to check and measure the capacity of storage tanks mounted on trucks. This was done by filling state-inspected measuring buckets with water and pouring the water therefrom into the tank, marking each time the actual amount of liquid in the tank with a measuring stick until the full capacity was reached and then setting the gauge. Cleaning the repair shop consisted of sweeping and then washing the floor with a water hose.

Appellee took a tank truck from Omaha to Council Bluffs about noon on the 8th day of August, 1947, and engaged in the work of calibrating it that afternoon in the wash room of the repair shop until about 3:30 p. m., when he found that he could not finish it because of an error made in calibrating and the lack of some required material.

The repair shop of appellant at Council Bluffs consisted of two rooms—a wash room for washing trucks and equipment, and a paint room. The front of the building was to the west. There was a solid wall between the two rooms and a doorway on the west between the rooms fitted with a door. The wash room was on the south, and the paint room on the north. The paint room was 33 feet east and west and 27 feet north and south, and it was 30 feet from the door or entrance to the paint room in a straight line to the location of the

fan at the northeast corner of the room. A new 24-inch exhaust fan was installed in the east wall near the northeast corner of the paint room of the repair shop a day or two before the accident by the Flynn Electric Company of Council Bluffs.

When the appellee discontinued his work on the truck about 3:30 p. m. the day of the accident, he assisted for about five minutes in sweeping or cleaning the floors of the shop, but does not remember definitely where he worked, but it did seem to him that he was sweeping last in the area to the right or south of the wash rack in the wash room and that he helped "squirt the hose around all over the shop." Appellee got off the truck and helped Mr. Bailey who was sweeping the floor and was "in the process of running a hose over it." Mr. Bailey "was running the hose over it" and appellee "helped him sweep down some of the dirt into the drain." The drain was in the wash room. The fan was not operating or running while the work of cleaning was being done. Mr. Bailey turned on the fan after the work was finished. Appellee had no duty or obligation in reference to the operation, care, or maintenance of the fan. When the cleaning was finished and after Mr. Bailey had put the fan in operation, appellee went to the fan, put up his hand to it, and got it too close. "Q- What did you do that for? A- I did it just to see how much air it was pulling through it. I thought I could feel it without getting my hand in it. I didn't put my hand in it. I just wanted to see how much air it was pulling and as I got my hand up there my hand was flipped and it happened before I knew it. * * * Q- The fan was a new thing? A- Yes."

Appellee knew the action of the fan pulled air into it and created a suction or force toward the fan. He had been working in the area of the truck, had finished his work and went to the fan in the adjacent room "just to see how much air it was pulling through it."

An important inquiry is whether the accident causing

injury to appellee arose out of his employment. An injury to be the basis of a cause of action within the provisions of the Workmen's Compensation Act must be one caused by an accident arising out of and in the course of the employment. In many instances an injury which occurs in the course of the employment is also one which arises out of it. This is not always true. The compensation law does not make the employer an insurer against all injuries suffered by his employees in the course of their employment, but it does limit recovery of disability benefits to injuries received both in the course of and out of the employment. The phrases "in the course of" and "arising out of" are not synonymous, and where they are used conjunctively, as they are in the compensation law of this state, a double condition is imposed and both must exist to bring a case within the act. § 48-109, R. S. 1943; Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788; Gale v. Krug Park Amusement Co., 114 Neb. 432, 208 N. W. 739, 46 A. L. R. 1213; 58 Am. Jur., Workmen's Compensation, § 210, p. 717. The right of recovery is statutory, and unless the case has been brought within the conditions imposed by the statute, it must fail. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Hopper v. Koenigstein, 135 Neb. 837, 284 N. W. 346; Conzuello v. Teague, 123 Neb. 574, 243 N. W. 779; 58 Am. Jur., *supra*.

An injury to entitle an employee to disability benefits because of the Workmen's Compensation Act must have had its origin in or have been incidental to the employment, or it must have resulted from a risk, which by reason of the employment exposed the employee to a greater hazard than if he had not been so employed. The fact that the employee was at the place of the injury because of his employment is not sufficient to sustain a recovery, if the injury resulted from a cause having

no relation to the nature of the employment. In Hopper v. Koenigstein, *supra,* the rule is stated in this language: "The term 'arising out of the employment' in the workmen's compensation law covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.

"In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard." See, also, Bergantzel v. Union Transfer Co., 124 Neb. 200, 245 N. W. 593; and Henry v. Village of Coleridge, 147 Neb. 686, 24 N. W. 2d 922.

Appellee had no duty or obligation concerning the operation, inspection, care, or maintenance of the fan. It was not operating until after the duties of the day of the accident were completed. The fan was a fixture and was not a machine for the conduct of the business of the appellant. It was properly installed and presented no dangers not incident to any such device. Appellee under the evidence in this case had no more occasion to go to the fan and test its operation than he would have had to go to the place of a circular saw or any dangerous machine that might be properly installed for the conduct of the business, for the purpose of testing whether the saw or machine was in motion. He had completed all his work of that day before the fan was put in motion. He was to the right and south of the wash room when he finished his duties for that day.

That place was much more than 30 feet from and in a different room than the one in which the fan was located. Contrary to being engaged in the pursuit of any duty of his employment or anything even remotely incident thereto, the appellee, not passively, but voluntarily and intentionally, went to and attempted to test a fixture with which he had no concern, duty, or responsibility. He placed his hand in close proximity to the fan for the sole purpose of satisfying his curiosity as to the suction power of the fan—"to see how much air it was pulling through it." It is certain that the accident had no connection with his employment or any matter reasonably necessary or incident to the work of his employment.

It is suggested that the appellee had a right to go into and be in the paint room where the fan was installed and in which a part of his work was on occasions performed. This can have no probative force in this case as he did not go into and was not in this room at the time of the accident for any purpose connected with or incident to his work. The performance of no work or any incident of employment led him to the fan. He was impelled by his personal curiosity. There is no legal principle within which it can be said that the accident arose out of the employment. Where an employee chooses to go to a dangerous place where his employment does not necessarily carry him and incurs danger of his own choosing altogether outside any reasonable requirement of his position, the risk arising from such action is not an incident to and does not arise out of the employment. Bergantzel v. Union Transfer Co., *supra;* Feda v. Cudahy Packing Co., 102 Neb. 110, 166 N. W. 190; Sheets v. Glenwood Telephone Co., 135 Neb. 56, 280 N. W. 238; White Star Coach Lines v. Industrial Commission, 336 Ill. 117, 168 N. E. 113; Saucier's Case, 122 Me. 325, 119 A. 860; Willette's Case, 135 Me. 254, 194 A. 540; Maronofsky's Case, 234 Mass. 343, 125 N. E. 565.

An injury received by an employee, proximately resulting from acts done by him for the purpose of gratifying his curiosity, and having no connection with the duties of his employment is not compensable as arising out of and in the course of his employment. 58 Am. Jur., Workmen's Compensation, § 238, p. 743; Maronofsky's Case, *supra;* Saucier's Case, *supra.*

An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act, when it takes place within the period of the employment, at a place where the employee has a right to be, and while he is engaged in performing the duties of the employment or something reasonably incidental thereto. An employee is not in the course of his employment, even though he may be in the general sphere of it, if he is not engaged in performing some duty for which he was employed or something reasonably incidental thereto. The fact that the injured employee was at the place of the injury because of his employment is not sufficient to sustain a recovery if the injury sustained resulted from a cause having no relation to the nature of the employment. An injury is not compensable where an employee on his own initiative leaves the line of duty under his employment for a purpose of his own and pursues it to his injury. The liability under the Workmen's Compensation Act is based not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because of and in the course of which he is injured, and the clause "personal injuries arising out of and in the course of employment" is declared by the Legislature "not to cover workmen who, on their own initiative, leave their line of duty * * * for purposes of their own." § 48-109, R. S. 1943; § 48-151 (6), R. S. Supp., 1947; Burlage v. Lefebure Corp., 137 Neb. 671, 291 N. W. 100; Bergantzel v. Union Transfer Co., *supra;* Henry v. Village of Coleridge, *supra;* 58 Am. Jur., Workmen's Compensation, § 212, p. 720.

The work of the day of the accident had been com-

pleted. Appellee was in a place of safety a considerable distance from the fan. He, on his own initiative, went to the fan for a purpose of his own "to see how much air it was pulling through" and he pursued this purpose to his injury. If the appellee had stayed in or departed the premises from the wash room, where he was at the time the work was completed, or if he had not yielded to his curiosity as to the operation of the fan, he would have received no injury. The accident resulting in injury to the appellee was not in the course of his employment.

A liberal construction of the Workmen's Compensation Act is urged in support of the claim of appellee. A liberal construction of this statute is a tradition in this jurisdiction, but it cannot be liberalized by judicial interpretation to allow noncompensable claims. Its provisions cannot be legally extended to make the employer an insurer of his employee against all misfortunes however received if they happen on the premises of the employer. This is neither the language nor the intent of the statute.

The evidence does not establish the defense of willful negligence. Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15. A careful review of this case compels the conclusion that the judgment should be reversed and the action dismissed.

REVERSED AND DISMISSED.

CARTER, J., dissenting.

I am not in accord with the majority opinion. The difference in views goes to the scope of the Workmen's Compensation Act and not to the facts as recited by the writer of that opinion.

The claimant was injured on the premises of the employer during his assigned working hours. He violated no instructions of the employer in entering the room where the exhaust fan was located; in fact, the evidence is that he, on occasion, had duties to perform in this room. The majority opinion states that the accident was not the result of willful negligence on the part of the claimant and with this I agree. The differ-

ence in views rests on the meaning to be given the words "arising out of and in the course of the employment" contained in the act. It can be generally stated that the words "out of" point to the origin of the cause of the accident, and the words "in the course of" point to the time, place, and circumstances under which the accident occurred. Under the Nebraska act a compensable accident must arise out of and in the course of the employment.

The application of the act is comparatively simple when the accident occurs on the premises of the employer while he is engaged in the performance of his assigned work during the hours of his employment. It is only when, as in the instant case, there has been some deviation from the ordinary that interpretation of the act is required.

We have consistently held that the liberality of construction required by the act does not apply to the proof of claim. An award of compensation must be supported by competent evidence which preponderates in favor of the claimant. But in determining the scope of the act it was clearly the intention of the Legislature that liberality of construction was to be employed in its administration. The purpose of the Workmen's Compensation Act was not to limit and reduce the amounts to be paid employees for already existing liabilities; its purpose was to increase the scope of liability to include accidents connected with the employment for which no liability had previously existed. It was intended that industry should bear the burden of the loss of earning capacity suffered by employees resulting from the ordinary and usual hazards of the industry. It need not arise out of the nature of the employment alone. An injury arises out of the employment if it arises out of the nature, conditions, obligations, or incidents of the employment. This court has recognized this in many cases where the deviation was harmless or the result of the usual and ordinary conduct of employees which an employer ought to anticipate. Accidents which are said to be incidental to the employment

have repeatedly been held compensable, and properly so. In defining the scope of acts requiring that the accident "arise out of and in the course of" the employment, courts generally have held that acts of personal ministration are incidents of the employment. So, too, resting, getting fresh air, smoking, eating, quenching thirst, using the telephone or a toilet, or using an elevator or stairway, are incidental to the employment and injuries sustained are compensable when incurred in the doing of such acts. The rule of liberal construction has been employed in holding that injuries caused by overheating, freezing, snowblindness, assaults, bites by dogs and insects, lightning, objects falling from adjacent premises, larking and horseplay by other employees, are compensable. The foregoing evidences, I think, what the Legislature had in mind in requiring that a liberal construction be given the act.

The claimant in the present case placed his hand in front of an exhaust fan "to see how much air it was pulling through." He certainly did not do it with any intention of injuring his hand. He did it to satisfy his curiosity as to its effectiveness as a suction fan. It was done as any employee might have done under similar circumstances. The actions of employees in touching radiators to see if they are hot or cold, or to hold a hand in front of an air vent to determine if it emits cold or hot air, and similar incidents, including the one before us, are common habits of employees and are risks contemplated within the coverage of the compensation law. In Hopper v. Koenigstein, 135 Neb. 837, 284 N. W. 346, we said: "The term 'arising out of the employment' in the workmen's compensation law covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions

of his work, are regarded as being within the scope or sphere of the employment. * * * The test to be applied in such a situation to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incidental thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard." Can one say that this claimant in walking into the adjoining paint room and testing the exhaust fan, as anyone might do, severed the employment relationship? He was doing one of the things that men ordinarily do and incurred a wholly unexpected result.

In Moise v. Fruit Dispatch Co., 135 Neb. 684, 283 N. W. 495, the court held that claimant's husband suffered a compensable accident when he struck a match to light his pipe in a gas-filled room and was killed by the explosion. The deceased was an expert in the use of the gas and was fully aware of the danger. Even though he had been warned not to light a match, he thoughtlessly did so. The opinion states: "At the time of the accident Moise as resident manager was in his employer's trade territory, where his duties at the time called him. He was at the identical place where service was required. He had not completed the work in hand and was on his way to the office of defendant's customer to perform further duties for his employer. By lighting a pipe for his own pleasure or comfort he did not necessarily abandon for the moment his relation to his employer."

In the case before us, the claimant did not embark on a mission of his own. The relation of employer and employee still existed. The act of placing his hand before the fan, ordinarily a harmless test, was incidental to his employment. It was an act which the employer might well anticipate in which employees might engage. It falls within that class of cases which hold that accidents resulting from acts incidental to the employment are compensable.

The opinion of the majority tends, in my judgment, to

restrict unduly the purposes of the compensation act. The deviation was not of such a character as to terminate the relation of employer and employee. What the claimant did was incidental to his employment. In my opinion, the compensation court and the district court were correct in allowing compensation benefits. The award ought to be affirmed here.

MARY F. BROWN, APPELLEE, v. THE SECURITY MUTUAL LIFE INSURANCE COMPANY OF LINCOLN, NEBRASKA, A CORPORATION, APPELLANT.

36 N. W. 2d 251

Filed March 3, 1949. No. 32496.

1. **Estoppel.** Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, mend his hold, and put his conduct upon another and a different consideration.
2. **Insurance.** A provision in a life insurance policy containing a total disability provision, that written notice of claim must be given to the company during the lifetime of the insured and during the period of disability and failure to give such notice shall invalidate any claim unless it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible, is construed to mean that failure to give such notice shall invalidate any claim unless it shall be shown not to have been reasonably possible to give such notice during the lifetime of the insured and during the period of disability, and that notice was given as soon as was reasonably possible thereafter.
3. ———. Where notice of a disability is received by an insurance company and the company acts upon such notice, it is immaterial what relationship existed between the sender of the notice and the beneficiary.
4. **Principal and Agent.** The acts of a self-constituted agent may be ratified by the one for whom such agent has assumed to act, as of the date when the acts were performed.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Kuns & Van Steenberg and *John H. Comstock*, for appellant.

Torgeson & Halcomb and *Bernard F. O'Brien*, for appellee.

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

SIMMONS, C. J.

This is an action to recover on a life insurance contract containing a total-and-permanent-disability, waiver-of-premium provision. Upon issues made trial was had to a jury, resulting in a verdict for the plaintiff. Defendant appeals. We affirm the judgment of the trial court.

Under date of November 28, 1944, the defendant issued a $5,000 life insurance policy, with an annual premium provision, upon the life of Maurice D. Brown. The policy contained a provision for a grace period of one month for the payment of renewal premiums. At the same time, for an additional premium, it attached to the policy a waiver-of-premium contract as follows:

"TOTAL AND PERMANENT DISABILITY PROVISION

"(Waiver of Premium)

"INSURING CLAUSE—The Security Mutual Life Insurance Company, (hereinafter called Company) hereby insures, (subject to all the provisions and conditions hereinafter contained)----------MAURICE D. BROWN --------(hereinafter called Insured), against total and permanent disability beginning while this endorsement is in full force and before the Insured shall have attained the age of Sixty (60) years, and resulting from bodily injuries sustained or disease contracted while this endorsement is in full force and it is understood and agreed that this endorsement is made in conjunction with Life Insurance Policy No. 77353 issued by this Company upon the Life of the Insured.

"DISABILITY BENEFITS

"Upon receipt of due proof of such total and permanent

disability of the Insured (provided that such disability shall already have continued uninterruptedly for a period of at least Six Months), the Company during the continuance of such disability, will

"WAIVER OF PREMUIMS—Waive the payment of each premium falling due after the commencement of such disability, provided the first premium to be waived shall not be a premium which fell due more than six months prior to notice of claim.

"STANDARD PROVISIONS

"1. Total disability is defined to be total incapacity (resulting from bodily injury or disease) to engage in any occupation for remuneration or profit.

"2. Total disability which has been continuous for not less than Six Months shall be presumed permanent but only for the purpose of permitting commencement of liability hereunder.

"3. In case any premium on said policy or this Endorsement is in default before receipt at the Home Office of the Company of written notice of claim hereunder, waiver of premium hereunder shall be made only if such notice is so received within six months after the due date of the first premium in default, and either

"(a) the permanent and total disability for which claim is made commenced prior to the date of such first premium in default, or

"(b) the permanent and total disability for which claim is made commenced subsequent to the date of such first premium in default but within the grace period allowed by said policy for payment of such premium, in which case, however, the Insured shall be liable to the Company for such premium in default with interest at five per cent per annum.

"4. Written notice of Claim must be given to the Company during the lifetime of the Insured and during the period of disability. Failure to give such notice shall invalidate any claim unless it shall be shown not to have

been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

The first annual premiums were paid.

The beneficiary named in the policy at the time of issuance was the wife of the insured, if living, otherwise his children. By change of beneficiary consented to by defendant on November 12, 1945, the insured's mother was made beneficiary, if living, otherwise the children. The mother is plaintiff in this action. At or about that time the insured left the policy, together with policies concerning his children, with the agent of the defendant.

The second annual premiums were not paid.

The defendant died April 29, 1946. On May 15, 1946, Mr. Halcomb, an attorney of Kimball, Nebraska, secured the policy from the agent, and on May 20, 1946, wrote the defendant as follows:

"RE: Policy #77353 Maurice D. Brown

"Will you kindly forward the necessary forms for making proof of loss in connection with the death of the insured under the above numbered policy?

"The insured passed away on or about April 30, 1946 following a long illness. Mr. Brown was in fact totally and permanently disabled from June, 1945 to the date of his death but we have not been advised if he made claim direct to your company by virtue of his disability.

"It may be that the information already filed with your company with particular reference to the insurance policies issued on the lives of his two children Barbara Phyllis Brown and Marshall Dale Brown will suffice except for special data as to the disability.

"Kindly acknowledge receipt of this communication and advise as to what additional data you require."

On May 24, 1946, the defendant wrote Mr. Halcomb as follows:

"Replying to your letter of May 20th:

"I refer you to Paragraph 4 under the Standard Provisions of the Total and Permanent Disability Provision

incorporated in Policy No. 77353 owned by Maurice D. Brown.

" 'Written notice of Claim must be given to the Company during the lifetime of the Insured and during the period of disability. Failure to give such notice shall invalidate any claim unless it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.'

"The Company never received said written notice from the insured, which is a condition precedent in the policy."

On May 17, 1947, plaintiff brought action to recover on the policy.

By amended petition plaintiff alleged the corporate capacity of the defendant, the issuance of the policy, the payment of the premium, the change of beneficiary, and the waiver-of-premium provision down to but not including the Standard Provisions clause. The plaintiff further alleged that insured became permanently and totally disabled due to disease while the policy was in full force; that insured so continued until his death on April 29, 1946; that the defendant was notified thereof within six months of the date on which the second premium fell due; that notice of death was given on May 20, 1946; that notice of claim for benefits was furnished the defendant; and that defendant disclaimed any liability in connection with or upon said policy.

By amended answer the defendant admitted its corporate capacity, the issuance of this policy, the payment of premium, and the change of beneficiary. It denied generally otherwise, and alleged that insured was not suffering from any total or permanent disability at any time during the period the policy was in effect; that the insured did not during his lifetime give any written notice to the defendant of any claim that he was suffering from a total and permanent disability; that the insured did not submit due proof of any alleged total and permanent disability; and that the defendant's liabil-

ity terminated at the end of the grace period on December 28, 1945.

By reply plaintiff alleged that defendant was notified at or about the time the annual premium was due in November 1945 that the insured was permanently and totally disabled and not required to make the payment; that before six months elapsed from November 28, 1945, the insured was unable by virtue of physical and mental illness and the effect of drugs to give written notice of his disability; that it was not reasonably possible to give written notice or proof of claim prior to insured's death; that notice was given as soon as was reasonably possible; and that payment of the second premium was not required because of the permanent and total disability.

By its letter of May 24, 1946, the defendant declined to act and in effect refused to pay because it never received written notice from the insured as provided in the policy provision that "Written notice of Claim must be given to the Company during the lifetime of the Insured and during the period of disability. Failure to give such notice shall invalidate any claim unless it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

It long has been the rule in this state that " 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold.' " McDowell v. Metropolitan Life Ins. Co., 129 Neb. 764, 263 N. W. 145. Other defenses are not to be considered. See, also, Ross v. First American Ins. Co., 125 Neb. 329, 250 N. W. 75; Serven v. Metropolitan Life Ins. Co., 132 Neb. 637, 272 N. W. 922; From v. General American Life Ins. Co., 132 Neb. 731, 273 N. W. 36; Miceli v. Equitable Life Assurance Society, 138 Neb. 367, 293 N. W. 112, on rehearing, 138 Neb. 374, 294 N. W. 659; Farmers Union Fidelity Ins. Co.

v. Farmers Union Co-Op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122.

Accordingly defendant limited itself to the defense that it had not received the notice of claim during the lifetime of the insured and during the period of disability, subject to its further construction of the provision in the letter and in its answer that the notice had to be given by the insured. Plaintiff by her reply raised the issue based upon the second sentence of the last quoted provision.

The provision relied upon calls for written notice during the lifetime of the insured and during the period of disability and failure to give such notice shall invalidate any claim. However, the provision does not end there and accordingly we are not confronted with questions of construction and enforceability that would arise if such were the entire provision. There is an exception to the above provision. The claim is not invalidated by failure to give the notice if it be shown "not to have been reasonably possible to give such notice"—in the construction of which must be included from the previous sentence, "during the lifetime of the Insured and during the period of disability," in which event notice must be given as soon as was reasonably possible thereafter. Such we think is a fair and reasonable construction of the language, strengthened by the fact that defendant wrote the language used. Obviously the insured could not give the notice after his death.

Defendant assigns as error that the court erred in admitting in evidence the letter of May 20, 1946. Defendant objected to the letter as immaterial on the ground that there was no evidence to show that it was given on behalf of plaintiff or by her authority. The exhibit was offered at the same time as the letter of May 24, 1946, which was admitted without objection, and it was admitted that the letter of May 20th was received by the defendant. We do not deem it necessary to recite the evidence as to the authority of the writer of the letter.

Defendant having received the notice and acted upon it by denying liability, it is immaterial as to what relationship existed between the sender of the notice and the beneficiary. Continental Casualty Co. v. Buchtel, 74 Neb. 823, 105 N. W. 707. Assuming that the writer of the letter acted without specific authority it is patent that the plaintiff ratified the writing of the letter. The ratification operates as of the date of the writing of the letter. Schneider v. Modern Woodmen of America, 96 Neb. 545, 148 N. W. 334.

Defendant complains of a part of instruction No. 3, which told the jury that as a condition to a verdict for plaintiff it must find that written notice on behalf of the plaintiff was given to the defendant as soon as it was reasonably possible to do so, under all the circumstances shown in the evidence, subsequent to the death of the insured, and in any event on or before May 28, 1946. The complaint is that the instruction disregards the policy provision relative to the time and manner of giving the notice. Under the construction heretofore made of the policy provision involved, the error assigned is not sustained.

Defendant next assigns as error certain parts of instruction No. 4. The court instructed the jury that "You are not concerned with the question of whether or not the insured was permanently disabled for a period of as much as six months, for the reason that the insured died within six months after the due date of the first premium in default." The contention is that the instruction violates that part of the contract that "such disability shall already have continued uninterruptedly for a period of at least Six Months." Under what has been said about the issues that were before the court for determination by the jury, this instruction was not error.

The trial court also instructed the jury that "Provisions No. 3 and No. 4 under the 'Standard Provisions' above quoted are to be construed by you as giving the insured six months after the due date of the first premium in

default, within which to give written notice of his disability. Aside from during a few days of the last two or three weeks of his life, the insured was amply able both physically and mentally to have given written notice of his disability. However, six months after the due date of the first premium in default had not elapsed at the time of his death, and the plaintiff or someone acting in her behalf was required to give such written notice as soon as was reasonably possible after such death. The letter shown by Exhibit 20 was sufficient written notice, if the writer thereof was acting on behalf of the plaintiff. If the writer thereof, was not acting on behalf of the plaintiff, then no written notice was given the defendant, and in such case your verdict will be for the defendant." Objection is made to the first and third sentences in the quoted part of the instruction, on the ground that the court failed to notice the qualifying provision that notice be given during the lifetime of the insured and during the period of disability. In the light of the construction which we have given to that paragraph of the contract, the claimed error is not sustained.

Objection also is made to that part of the next sentence, "The letter shown by Exhibit 20 (May 20, 1946) was sufficient written notice." The instruction obviously refers to written notice of the claim as provided for in paragraph 4 of the "Standard Provisions" of the policy.

Defendant by stopping its quote at the point noted in the paragraph next above argues that it refers to proof of permanent and total disability for the period prescribed in the policy. It is patent from the instruction that the trial court was there referring to notice of the claim and not proof of death. Defendant concedes that it has waived any requirement of giving notice and making proof of death. The proof-of-death requirement and the proof-of-total-and-permanent-disability requirement are separate but on a parity. By the act in which it waived proof of death, defendant also waived proof of permanent and total disability within the terms of the contract.

Defendant then argues that the letter was not a notice of claim but merely a request for blanks upon which to make proof of loss. Defendant construed it otherwise when the letter was received. The letter of May 20, 1946, advised defendant that the insured was "in fact totally and permanently disabled" from June 1945 to the date of his death in April 1946. The defendant did not question that statement nor ask for additional data or showing. It placed its refusal to pay under the contract on other grounds and, as has been pointed out, cannot now raise the question here presented. The instruction put a burden on the plaintiff of proving that the letter was written by one acting in her behalf. As has been pointed out in discussing the admissibility of the letter, that proof was not required. In that respect the instruction was more favorable to the defendant than the issue required. The assigned error is not sustained.

Defendant assigns as error the court's failure to instruct the jury that if the insured was mentally able to give notice of disability, such notice was required prior to the death of the insured. We see no error in that regard.

Defendant challenges the sufficiency of the evidence to sustain the verdict. The insured was a farm laborer with no other particular skill. The evidence shows without dispute that the insured became ill in June 1945. Thereafter in July he was hospitalized with a diagnosis of pneumonia. It developed into a lung abscess. He worked the last time on October 10, 1945. Thereafter he had recurring and more severe periods of illness requiring repeated hospitalization. He was under a doctor's care for the period from June 1945 to his death. He was totally unfit to work during that period. He was last hospitalized on April 4, 1946, and during the last two weeks he was physically and mentally unable to discuss business, and during the last three days of his life was in a comatose or unconscious condition. It further appears without dispute that neither insured nor his former wife,

from whom he was divorced in 1945, nor the plaintiff, nor his friends were advised of the gravity of his illness and the imminence of death. At the time of death the policy was in the possession of the agent of defendant at Kimball, Nebraska. The attorney secured possession of it on May 15, 1946, and the letter of May 20, 1946, followed. Without discussing the evidence further we find no basis for holding it insufficient.

Defendant moved for a directed verdict at the close of the plaintiff's case-in-chief and again at the close of all the evidence. The court overruled the motions. Defendant assigns as error the overruling of the motions. The matters raised by these motions have hereinbefore been determined adversely to defendant and need not be further discussed.

The judgment of the trial court is affirmed.

AFFIRMED.

FRANK E. EDGERTON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THOMAS H. SMITH, DECEASED, APPELLANT, v. HAMILTON COUNTY, NEBRASKA ET AL., APPELLEES.

36 N. W. 2d 258

Filed March 3, 1949. No. 32537.

1. **Homesteads.** The words "separate property" in sections 40-102, R. S. 1943, and 40-117, R. S. Supp., 1947, are used in the sense of an ownership of the homestead property in either the husband or the wife and not in the sense of the character of the title by which the ownership was acquired.
2. **Appeal and Error.** In appellate proceedings the examination of this court, whether on appeal or writ of error, will be confined to questions determined by the trial court.

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

Edgerton & Powell, for appellant.

E. D. Warnsholz, Charles F. Adams, James H. Ander-

son, Attorney General, and *Homer L. Kyle,* for appellees.

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

SIMMONS, C. J.

This action is brought by the executor of the estate of Thomas H. Smith for a declaratory judgment to determine the question of an exemption of an asserted homestead from claims of creditors under the provisions of section 40-117, R. S. Supp., 1947. The declaratory judgment rendered by the district court was contrary to plaintiff's contentions. He appeals. We affirm the judgment of the district court.

The issues were made in the trial court and here on appearances by the county, its treasurer, and its director of assistance office.

The facts were stipulated. The stipulation recites that Thomas H. Smith and Kate G. Smith were the "joint owners" of two lots in the city of Aurora, having received title to one lot in 1907 and to the other in 1908. The character of the joint ownership is recited in the stipulation, but since it is not material to the question presented, the recital is not set out here. After purchase the Smiths erected a two-story building on the lots and from about 1908 until their deaths resided therein as their homestead.

Kate G. Smith died on February 7, 1946, and Thomas H. Smith died on March 27, 1947. Plaintiff was appointed and qualified as executor of his will. Thomas H. Smith had neither widow nor dependents at the time of his death.

Hamilton County, pursuant to section 68-215, R. S. 1943, authorizing reimbursement for old age assistance from recipient's estate, filed a claim for $3,063.84 against the estate. The claim was allowed on October 27, 1947, as a claim of the fourth class. Likewise a claim was allowed, in part as a claim of the second class and in part as a claim of the fourth class, to one Lela Hamilton. Lela Hamilton was named as a party defendant in the

caption of plaintiff's petition. The record does not show that she was served with summons and she does not appear in this action.

While not expressly stated in the stipulation or the pleadings, it appears from recitals in the proceedings that the property has been sold under a provision in the will and the proceeds held by the executor.

Plaintiff contends that $2,000 of the value of the premises was exempt as a homestead and passed to the heirs of Thomas H. Smith free from the claims, and that section 40-117, R. S. Supp., 1947, does not change the exemption "where said homestead was selected from the property of joint tenants." Defendants contend that the entire proceeds of the sale are applicable to the payment of claims allowed against the estate. Each party sought a declaration that his construction was correct or as stated in the stipulation, each sought a determination of the meaning of the above section "with regard to the right of the devisees of Thomas H. Smith to claim a homestead right in the real estate owned by Thomas H. Smith."

Section 40-117, R. S. 1943, provided: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of sections 40-101 to 40-117; * * *." By amendment effective August 10, 1945, the statute provided: "If the homestead was selected from the separate property of either husband or wife, the homestead right shall terminate upon the death of the person from whose property it was selected where the

decedent does not leave surviving either a wife or husband, or a minor child, or an adult dependent blood relative who is mentally incompetent or physically incapacitated from earning a livelihood, and in such event the real estate that constituted the homestead shall be subject to the debts of the deceased and shall descend and vest upon death in the same manner as other real property of the deceased. In all other cases, the homestead vests on the death of the person from whose property it was selected, in the survivor for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as above provided in this section and except such as exists or has been created under the provisions of sections 40-101 to 40-117; * * *." § 40-117, R. S. Supp., 1947.

The trial court held that the entire proceeds of the sale of the property were available to satisfy the claims of creditors as against the claims of the heirs and devisees of Thomas H. Smith. Plaintiff appeals from that determination.

It is plaintiff's contention that the 1945 amendment making the real estate that constituted the homestead exemption subject to the debts of the deceased applied only to that estate where the homestead was selected from the "separate property" of the husband or wife, and that it does not reach the property here involved because it was originally selected from jointly owned real estate.

The language, "If the homestead was selected from the separate property of either the husband or wife," has been in the statutes, unchanged, since 1879. Laws 1879, § 17, p. 61. Section 40-102, R. S. 1943, provides: "If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent

of the wife from her separate property." That language also has been in the Homestead Act since 1879. Laws 1879, § 2, p. 58.

Obviously, if plaintiff's construction of the language in section 40-117, R. S. Supp., 1947, is correct, then a question would arise as to whether or not a homestead right could attach to jointly owned property, and it could be argued with considerable force that the Legislature intended that the homestead right attached only to property in entire ownership of one person when selected. That conclusion would be opposed to the obvious public purpose of the Homestead Act.

We have held under this act that a homestead may be claimed in land held in joint tenancy, specifically stating that the act did not specify or define the character of the ownership or interest in lands which is necessary to support the homestead right, and that any estate or interest was sufficient which gave a right of occupancy or possession accompanied by requisite occupancy. Giles v. Miller, 36 Neb. 346, 54 N. W. 551, 38 Am. S. R. 730. This decision has been repeatedly followed.

In Hoy v. Anderson, 39 Neb. 386, 58 N. W. 125, 42 Am. S. R. 591, after specifically referring to the language in question, we approved the Giles v. Miller holding. See First Nat. Bank of Tekamah v. McClanahan, 83 Neb. 706, 120 N. W. 185. In Doman v. Fenton, 96 Neb. 94, 147 N. W. 209, following the Giles v. Miller holding, we held that a homestead may be claimed in lands held in joint tenancy or tenancy in common. See, also, Connor v. McDonald, 120 Neb. 503, 233 N. W. 894; Fisher v. Kellogg, 128 Neb. 248, 258 N. W. 404; J. H. Melville Lumber Co. v. Maroney, 145 Neb. 374, 16 N. W. 2d 527.

It appears, therefore, that over a long period of years we have construed the language of section 40-102, R. S. 1943, as to the property from which a homestead may be selected, as having a meaning contrary to that contended for by the plaintiff when applied to the same language in section 40-117, R. S. Supp., 1947. The

Legislature has not indicated that we are in error in that construction. Plaintiff concedes that this construction has been given to the language of section 40-102, R. S. 1943, but argues that the language should be given a liberal construction in order to promote the purposes of the Homestead Act; whereas, in section 40-117, R. S. Supp., 1947, that language should be given a strict construction because it is one restricting the homestead right. In short, plaintiff would have us construe the words "separate property" when used in the same act as meaning two different things. Obviously in the light of the close connection of the use that should not be done. It does not appear, however, that the construction here advanced has been urged in the prior cases.

In 1866, provision was made for the selection of a homestead "by the owner" of the land. R. S. 1866, Code of Civil Procedure, § 525, p. 484.

In 1871, the Legislature provided that a married woman had "separate property" rights in real and personal property. Laws 1870-1871, p. 68. As amended, this act is now section 42-201, R. S. 1943, and following sections. By act of the Legislature approved February 25, 1875, the Legislature repealed section 525 of the Code of Civil Procedure and enacted a new act whereby the words "to be selected by the owner thereof" were omitted, and providing that on application "of the debtor, or his wife," the homestead should be set off to the debtor. Laws 1875, § 2, p. 46.

In 1877, the Legislature passed an act to exempt homesteads from judicial sale. This act provided that the homestead "whether owned by the husband or wife" was exempt, and that the "owner, or the husband or wife" could select it. Laws 1877, §§ 1, 10, pp. 34, 35. It contained additional references to the "husband or wife."

By the act of 1879, the acts of 1875 and 1877 were repealed. Laws 1879, § 18, p. 57.

It seems clear from a review of these previous acts that

by the use of the language here involved the Legislature intended to make certain that the homestead could be selected, as it said, from the separate property of the husband or, with her consent, from the separate property of the wife in the sense of ownership in either the one or the other and not in the sense of the character of the title by which the ownership was acquired. Clearly the same meaning attaches to the words "separate property" when used in section 40-117, R. S. Supp., 1947, as in section 40-102, R. S. 1943. It follows that the contention of the plaintiff is not sustained.

Plaintiff further contends and asks for a declaration that all of the judgment for money paid to Thomas H. Smith before the 1945 amendment shall not be a "lien on this homestead." The stipulation recites that "a claim" for $3,063.84 was allowed in favor of Hamilton County. It further recites that $2,371.99 was paid up to and including August 1945, and thereafter $691.85 was paid. This question appears nowhere in the pleadings filed in the district court nor in the decree. It is raised for the first time here. It goes not to the question of the termination of the homestead exemption determined in the trial court and here, but to the amount of the claim to be paid from the $2,000 involved in the homestead exemption. Without determining whether or not this was an issue that could properly have been determined in a declaratory action in the district court, we here follow the rule that "It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to the questions determined by the trial court." Lickert v. City of Omaha, 144 Neb. 75, 12 N. W. 2d 644.

The judgment of the trial court is affirmed.

AFFIRMED.

JOSEPH JENNINGS, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.
36 N. W. 2d 268

Filed March 3, 1949. No. 32451.

1. **Witnesses.** The maxim, "he who speaks falsely on one point will speak falsely upon all," deals with the weight of evidence and the credibility of witnesses.
2. **Trial: Witnesses.** It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, "he who speaks falsely on one point will speak falsely upon all."
3. ———: ———. An instruction on the credibility of the witnesses, containing the following language, "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true," constitutes error. When applied to the testimony of the state's witnesses, the rule imposes a burden upon the defendant which he is not required to assume.

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

Eugene D. O'Sullivan, Arthur J. Whalen, Ernest S. Priesman, Eugene D. O'Sullivan, Jr., and *Warren C. Schrempp,* for plaintiff in error.

James H. Anderson, Attorney General and *Walter E. Nolte,* for defendant in error.

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

MESSMORE, J.

Joseph Jennings was informed against and charged with the crime of murder in the second degree. He was convicted of the crime of manslaughter and sentenced to the penitentiary. He brings the case to this court by writ of error for review.

For convenience the plaintiff in error will hereafter be referred to as the defendant.

We set forth the evidence necessary to a determination of this proceeding in error.

The defendant, on February 12, and the early morning hours of February 13, 1947, was employed in tending bar in the Workmen's Club in Omaha, a club operated for the benefit of members only. On the dates mentioned, the members were holding open house to provide entertainment for the older people of the community.

The club is entered from the west into a small entryway. To the south is a door leading into a large barroom. About 14 feet 4 inches from the west wall is the front of the bar. There is a narrow back bar against the north wall, and a space of 4 feet 6 inches between it and the bar which is 26 feet in length east and west, 21 inches in width, and about 4 feet high. The room is furnished with tables and chairs, a juke box, and other club equipment. About 12 feet from the east end of the bar is a space flanked by two rails for service to the tables and to an annex to the south which is equipped with wire tables and chairs and has a dance floor. The entrance to the annex is opposite about the center of the bar. The only exit from the bar is a gate at the east end.

At approximately 10:45 p. m., one James Monday and some acquaintances entered the club and proceeded to the annex where they occupied two tables placed together and ordered some drinks. The defendant served them with beer and pop, and when more people joined the group the order was repeated and they were again served by the defendant. Shortly thereafter a disturbance occurred in the annex resulting in a fight among the members of the group which included Monday. The evidence is in conflict as to whether or not Monday participated in the fight. The defendant was assisted in tending bar by one Riley, both of whom went into the annex when the disturbance occurred. There is a conflict as to which arrived first. However, each had a gun. The defendant requested the group

to break up the fight and to get out and stay out. The defendant claimed the group had been using loud, profane, and indecent language, and that Monday, a large man 6 feet 6½ inches tall and weighing 270 pounds, threw a chair in his direction. He warned Monday if he came on, he would shoot. Riley testified when he went into the annex the fight had subsided and the people were standing up. Others in the room had scattered in different directions. The defendant testified that Monday stated he would return later. Riley heard a similar remark but did not know who made it. The group left the club in a few minutes.

About 12:45 a. m., Monday returned to the club and walked over to a table where his brother-in-law, Albert Rose, and a fellow by the name of Stewart were sitting. After some conversation Monday and Rose went to the bar and stood in the service space.

There is conflict in the evidence as to whether Monday stood to Rose's right or left. Monday ordered two bottles of beer and the defendant served them. Defendant was standing opposite Rose, behind the bar. Monday mentioned something about the defendant drawing a gun on him and his acquaintances earlier. Rose was about to question the defendant about the matter when the defendant said: "Yes, I drew a pistol on you: what are you going to do about it?" Rose testified that the defendant reached in his right rear pants pocket for a gun and fired one shot which hit Monday.

Stewart corroborated the conversation and the shooting, as heretofore related, except he did not know where the defendant procured the gun.

One Harrison Brown, Jr., who was standing with his back to the bar at the east end thereof listening to the juke box against the south wall of the barroom, did not hear the conversation between Monday, Rose, and the defendant, but heard the shot, turned around and saw the defendant with a gun in his right hand at a

45 degree angle. The defendant was backing away from the bar toward the east exit. Monday stumbled back from the bar, placed his hands to his chest and went out the door into the entryway.

According to Riley and the defendant, the guns, one an automatic and the other a 41 Colt which the defendant used, were kept in a pull-out drawer in the back bar. The drawer was pulled open and the defendant said that is where he got the gun at the time of the shooting.

Riley was sitting at the east end of the bar reading a newspaper and listening to the juke box. He did not hear the conversation between Monday, Rose, and the defendant. He heard the shot and went to the rear of the club to get the manager, where she had rooms.

The defendant testified that when Monday came into the barroom several of the people left. When he arrived at the bar, Monday ordered some beer and said in a harsh way that he did not want a glass. The defendant further testified that when he returned with the beer Monday said: " 'these guys made a gun play here this evening, put us out of here with a gun.' He said 'I told him I was going to make him back it up.' Mr. Rose said 'You watch that fellow setting down there'—Mr. Riley. * * * I said 'I thought that was over with; you are not supposed to come in here any more.' He said 'I told you I was coming back: what are you going to do about it?' " The defendant further testified that Monday "started for his coat pocket with his right hand. It was then I reached for the gun. I said 'Mr. Monday, don't do that. Now, I told you fellows to stay out of here', but he continued to go to his pocket. I came up with the gun and it went off." The defendant did not know that he had shot Monday, but told him: "Now, you get out of here and stay out of here."

The defendant further testified that Monday had seen him earlier with the weapon and told him he was

coming back, and he figured that he would. He tried to treat Monday nice, but the better he treated him the more he tried to start an argument. He was afraid of Monday and feared Monday would injure him or take his life. Remarks were made which he heard, that Monday would return and clean the place up. The defendant admitted he fired the shot, and surrendered the gun to the police officers.

The bullet penetrated Monday's heart and caused his death in a few minutes. There is no evidence that Monday was armed either the first time he was in the club or when he returned to the club the second time.

The defendant requested an instruction on the doctrine of falsus in uno, falsus in omnibus.

In the case of Knihal v. State, *ante* p. 771, 36 N. W. 2d 109, this court held: "The maxim 'he who speaks falsely on one point will speak falsely upon all,' deals with the weight of evidence and the credibility of witnesses. It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, 'he who speaks falsely on one point will speak falsely upon all.' "

In view of the foregoing authority, the defendant's contention is without merit.

Instruction No. 14, given by the trial court on its own motion, relating to the credibility of witnesses included the statement: "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true." A similar statement was recently held to be prejudicially erroneous in Wilson v. State, *ante* p. 436, 34 N. W. 2d 880, wherein it was held: "In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of

their judgment. An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgment of a substantial right of the defendant."

While the circumstances in the instant case relating to the purported application of the instruction are not identical with those in the foregoing case, the basic rules promulgated in the cited case are applicable in the instant case, and the quoted qualification being prejudicially erroneous, should not have been included in the instruction, because, when applied to the state's witnesses, the rule imposed a burden upon the defendant which he was not required to assume. See, Frank v. State, *ante* p. 745, 35 N. W. 2d 816; Swanson v. State, *ante* p. 761, 35 N. W. 2d 826; Knihal v. State, *supra.*

The giving of this instruction, among others, was assigned as error in the motion for a new trial and in the petition in error. It is not particularly assigned as error by the defendant in his brief here. We consider the instruction to be a plain error which may be noted under Rule 8 a 2 (4) of this court. See Knihal v. State, *supra.*

The defendant's assignment of error that the trial court failed to instruct the jury properly and fully upon the defendant's theory of the case of shooting in self-defense, and accidental shooting, is based upon the present record and the details of the testimony. A reversal granting a new trial being required, which will involve a new record, we do not deem it necessary to determine this assignment of error.

For the reasons given herein, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ELSIE I. RUEGER, APPELLEE, v. W. A. HAWKS, FIRST AND REAL NAME UNKNOWN, APPELLANT, IMPLEADED WITH HARRY N. SPENCER, APPELLEE.

36 N. W. 2d 236

Filed March 3, 1949. No. 32488.

1. **Appearances.** A party may raise the question of jurisdiction over his person for the first time in his answer. If instead of answering he files a motion attacking the petition, he thereby waives the question of jurisdiction over his person.
2. ———. Where a party files a motion attacking the petition instead of answering and obtains some relief thereby, and subsequently answers the petition not raising the question of the jurisdiction of the court over his person, he cannot afterwards make such defense in an amended answer.
3. **Witnesses.** In the absence of a statute rendering children under a specified age incompetent, or presumably so, a witness is not disqualified because of his youth.
4. ———. There is no precise age which determines the question of his competency, it depending upon his capacity and intelligence and his appreciation of the difference between truth and falsehood.
5. ———. The question of the competency of such a witness rests largely in the sound discretion of the trial court, whose decisions will not be disturbed in the absence of clear abuse.
6. ———. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case.
7. **Trial: Appeal and Error.** Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong.
8. ———: ———. Where the trial court admits evidence over objection, on the promise of counsel that he will make it competent by the introduction of connecting evidence, or where he conditionally sustains or overrules an objection to the introduction of evidence because he is unable to decide the question of its competency at the time, and no further ruling is requested or made, the question of the competency of the evidence cannot be raised on appeal.
9. ———: ———. A verdict of a jury may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in

the record, or it is clear that the jury disregarded the evidence or rules of law.

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

Votava, McGroarty & Sklenicka and *Fred Komarek,* for appellant.

Gross & Welch and *Harold W. Kauffman,* for appellee Rueger.

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

MESSMORE, J.

This is an action at law to recover damages for personal injuries sustained by the plaintiff as the result of an automobile collision. The pleadings are of importance in determining this appeal and a summary thereof is deemed necessary.

Plaintiff's petition filed January 2, 1947, alleged that she is a resident of Kansas; that the defendant W. A. Hawks is a resident of Bruning, Thayer County, Nebraska, and that the defendant Harry N. Spencer is a resident of Douglas County, Nebraska. The petition further alleged that on November 17, 1946, the plaintiff was riding as a passenger in the front seat of an automobile owned and operated by her husband, proceeding generally southward on U. S. Highway No. 6; that the truck of the defendant W. A. Hawks traveling northward on the highway struck the car of the defendant Spencer, also traveling northward, and threw the Spencer car into the path of the car in which the plaintiff was riding, injuring the plaintiff. The petition charges negligence and concurrent negligence of the defendants as follows: That the defendant Spencer passed the defendant Hawks immediately prior to the collision and in so doing failed to keep a proper lookout for traffic coming in the opposite direction, and particularly for the car in which the plaintiff was riding; in failing to have his car under

proper control; in driving at a high and excessive rate of speed, at a speed that was greater than was reasonable and proper under conditions of traffic on the highway; in failing to give a warning or signal of intention to change his course and to pass the truck; that the defendant Hawks was operating his truck at the time of the collision at a high, careless, and negligent rate of speed, at a speed that was greater than was reasonable and proper under the conditions of traffic on the highway; in failing to have his truck under proper control; in failing to keep a proper lookout for the car in which the plaintiff was riding and the Spencer car; and in failing to apply his brakes and to avoid driving into and against the Spencer car and knocking it across the highway.

On February 21, 1947, the defendant Hawks filed a motion to make the plaintiff's petition more definite and certain. On the 5th of March 1947, the court sustained the motion in part and overruled it in part; on application of the plaintiff, granted leave to the plaintiff to amend the petition instanter by interlineation, and granted the defendant Hawks ten days in which to answer.

On March 14, 1947, the defendant Hawks filed his answer which admitted that there was a collision; denied generally the allegations of the plaintiff's petition; alleged that he was driving his truck in a careful manner and was not guilty of any negligence whatsoever; that the collision and any damage sustained by the plaintiff was caused wholly by the joint and concurring negligence of the plaintiff and her husband, and the defendant Spencer; that the plaintiff's negligence was, as a matter of law, more than slight; and prayed for a dismissal of the plaintiff's petition.

On March 25, 1947, the defendant Harry N. Spencer filed an answer which admitted certain allegations of the plaintiff's petition and that a collision occurred; denied generally other allegations of the plaintiff's petition not admitted; alleged that he was driving his car in a careful

and prudent manner and at a moderate rate of speed; that he was not guilty of any negligence whatsoever which caused or contributed to the collision; that the collision and any damage sustained by the plaintiff were wholly and exclusively by joint and concurring negligence on the part of the plaintiff and her husband, and the defendant W. A. Hawks; that the negligence of each of said parties was, as a matter of law, more than slight; and prayed that the action be dismissed as to him.

Thereafter the defendant Hawks took the depositions of the plaintiff and her husband, and on April 24, 1947, 26 days after taking said depositions and more than six months before trial, filed an amended answer by leave of court, repeating the substance of the original answer and in addition thereto alleged that the court had no jurisdiction of this answering defendant; that this defendant was a resident of, and was served with summons in this action in, Thayer County, Nebraska; that the collision pleaded in plaintiff's petition occurred in Sarpy County, Nebraska; that the defendant Spencer was a resident of Douglas County, Nebraska; and that there was no joint liability of this defendant and the defendant Spencer.

At the close of all of the evidence the defendant Spencer moved for a directed verdict on the ground that the evidence was insufficient to establish any of the allegations of negligence in the plaintiff's petition as against him. The defendant Hawks moved for a directed verdict on the ground that the plaintiff failed to adduce sufficient competent evidence to establish a cause of action against him, and for the further reason that the plaintiff had failed to produce evidence to show any joint liability of the defendants Hawks and Spencer. The case was submitted to a jury resulting in a dismissal as to the defendant Spencer and a verdict in favor of the plaintiff as against the defendant Hawks. Separate motions for new trial and for judgment notwithstanding the verdict were filed by the defendant Hawks, both of

which motions were overruled. The defendant Hawks perfected his appeal to this court.

For convenience the appellant will be referred to as originally designated in the trial court as defendant, and the appellee as originally designated therein as plaintiff. The defendant Spencer, having been dismissed of any liability by the jury, will be hereafter referred to as Spencer, and his car either the Spencer car or the Ford.

The defendant contends that the trial court erred in failing to sustain the aforesaid motions made in his behalf to dismiss the action as to him, for the reason that the plaintiff's petition alleged joint and concurring negligence on the part of the defendant Spencer and the defendant, however, when plaintiff's deposition was taken it became apparent that the defendant Spencer was merely aiding the plaintiff, and the action was against this defendant only. Error in this respect is urged for the further reason that the plaintiff failed to offer or prove evidence on the allegations of her petition heretofore set out wherein the defendant Spencer was charged with negligence in passing this defendant's truck immediately prior to the collision, and gave her driver no warning or signal of his intention to change his course; that by such allegations of the petition there was no point in the defendant questioning the jurisdiction if he agreed to the facts as pleaded by the plaintiff, and the same constituted his version as to how the collision occurred; and that the situation in the instant case is one where lack of jurisdiction does not appear on the face of the record. Defendant relies on Peters v. Pothast, 120 Neb. 208, 231 N. W. 805, and cases cited therein as controlling.

In the cited case this court held: "Where a joint liability is alleged in the petition against a resident defendant and a defendant in a county other than where the action is commenced, and the jurisdictional defect does not appear on the face of the record, the nonresident defendant may challenge the jurisdiction of the court

over his person, together with such other defenses as he may have, in the answer, without raising the jurisdictional question by special appearance or other preliminary pleading."

No issue can be taken with the defendant's proposition that it is proper to raise the question of jurisdiction and venue in the answer and without filing a special appearance where those questions cannot be determined on the face of the record. It is apparent that defendant contends that he objected to jurisdiction over his person as soon as required.

This court, in the case of Williamson v. Williamson, 120 Neb. 40, 231 N. W. 506, said: "A party may raise the question of jurisdiction over his person for the first time in his answer. If instead of answering he files a motion attacking the petition, he thereby waives the question of jurisdiction over his person." This opinion also contains the following pertinent language governing such a situation: "It is a well-established rule in Nebraska that by filing such motion the defendants submitted themselves to the jurisdiction of the court and waived any irregularity or defect in obtaining jurisdiction over them. Bankers Life Ins. Co. v. Robbins, 59 Neb. 170, and Lillie v. Modern Woodmen of America, 89 Neb. 1. This rule is in conformity with good judgment, for naturally it would be useless for the court in Lancaster county to spend its time examining the petition persuant to defendants' motion if the court did not have jurisdiction over the persons of the defendants." See, also, Richards v. Estate of Gilmore, 140 Neb. 165, 299 N. W. 365; Richards v. Goldstein, 124 Neb. 438, 246 N. W. 925; Crowell and Crowell v. Galloway, 3 Neb. 215.

In Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. S. R. 484, this court said: "* * * where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have. * * * But while the

defense set up in the amended answer was one that might properly be raised by answer in conjunction with other defenses, and while no preliminary objections were necessary to enable it to be so raised, we think it is the duty of a defendant in such cases to plead the want of jurisdiction as soon as called upon to answer. If he answers without so doing, we think he can not afterwards make the defense in an amended answer."

The plaintiff's petition adequately discloses that the plaintiff was seeking to hold both defendants jointly and severally, but regardless, under the afore-cited authorities, the defendant entered a general appearance and invoked the jurisdiction of the court to determine the issues involved in the pleadings. The defendant's contention is without merit.

The record establishes the following facts. The plaintiff and her husband left Omaha enroute to their home in Marysville, Kansas, about 4 p. m. November 17, 1946. The husband was operating a 1937 Chevrolet coach. The plaintiff was sitting to his right in the front seat. They proceeded southward on their proper side of the road which was U. S. Highway No. 6, a concrete highway 20 feet in width between Omaha and Lincoln. The day was clear and the pavement dry. The defendant Harry N. Spencer, Sr., with his two minor children Harry N., Jr., and Frankie Ann both aged about six years, had been outing at Trussell lake near Gretna, Nebraska. This defendant proceeded from such point driving a 1931 Model A Ford equipped with what is known as "bumperettes" consisting of two light bumpers which curve around the back or rear part of the car. He was proceeding in a northward direction toward Omaha on his right side of the highway. Harry N. Spencer, Jr., was in the back seat, and Frankie Ann Spencer was seated to the right of her father in the front seat. The defendant Hawks was driving a 1946 ton-and-one-half, straight body type Dodge truck equipped with dual

wheels in the rear and single wheels in the front which, at the time, was loaded with 11 head of cattle making the total weight of the truck and its contents a trifle in excess of 16,000 pounds. The cattle were owned by one Ernest Schulte who was accompanying Hawks taking them to market. The cab of the truck was painted red, the hood red, and the fenders and the bumpers black. The truck and its occupants were proceeding northward toward Omaha on their own right side of the highway.

About 5:30 or 5:45 p. m., at dusk with the visibility good, the plaintiff's husband had the headlights of the Chevrolet turned on; Spencer had the lights of the Ford car turned on; and the defendant Hawks had the clearance lights of his Dodge truck turned on.

At a point north of Gretna the Burlington railroad tracks ran underneath the highway slightly to the southwest from the northeast. The highway, as it passes over the Burlington tracks, runs straight north and south for a distance of about 100 feet. The contour of the road in this vicinity is a gradual curve which approaches the railroad tracks toward the southwest. There is one turn to this single curve. The pavement slopes toward the northeast and constitutes a gradual down slope. The accident occurred approximately 600 feet east toward Omaha from the Burlington overpass north of Gretna.

Facts in controversy are in substance as follows: The plaintiff's husband, just prior to the time of the accident, was in the process of negotiating the curve, driving at a rate of speed of 35 to 40 miles per hour. There were no cars in front of him proceeding in the same direction. About 300 feet in front of him he observed a car and a truck approaching. The truck was behind the car and they were proceeding northward, each on its own side of the highway, which was the opposite side of the highway from him. He noticed the clearance lights of the truck even though there was sufficient light so that he could see the truck in any event. He continued to observe the car

which later developed to be the Spencer car and the truck which later developed to be the Hawks truck, and did not see the Spencer car pass or attempt to pass the Hawks truck nor the Hawks truck pass or attempt to pass the Spencer car. He observed that the Hawks truck was getting closer to the rear of the Spencer car and was about 50 feet behind it. He estimated the speed of the Spencer car prior to the accident at 35 miles per hour and the speed of the Hawks truck as the same, but testified that the Hawks truck kept gaining on the Spencer car. Suddenly the Spencer car came across the highway at an increased speed and struck the Chevrolet coach head-on, stopping it immediately. The driver of the Chevrolet coach was dazed by the impact. When he got out of his car it was headed toward Lincoln on its right side of the highway in the same position as at the time of the impact. The defendant Spencer was lying on the pavement beside the Chevrolet in an unconscious condition. The Spencer car was four feet to the rear of the Chevrolet on its top with all four wheels in the air, and was across the center line of the highway, facing toward the west.

The plaintiff testified that she first observed the Spencer car about 300 feet distant from the car in which she was riding, coming from the opposite direction at a speed of approximately 35 miles per hour. The Hawks truck was behind the Spencer car. She noticed the clearance lights on the truck; that the Spencer car continued at the same rate of speed up to the time of the accident; and that the truck kept getting closer to the Spencer car at all times. She did not base an opinion as to the speed of the truck. The last time she noticed the Spencer car and the Hawks truck, the truck was within 50 feet of the Spencer car and trailing at all times she observed it. When the Chevrolet in which she was riding got even with the Spencer car, the Hawks truck was still behind it. She observed no movement of the truck or the Spencer car that would indicate either was going to cross the highway to the opposite side. Then

the Spencer car seemed to get out of control and came across the center line of the highway at a rapid rate of speed striking the Chevrolet.

Harry N. Spencer, Jr., testified that he remembered riding in the back seat of his father's car and looking out the back window. He testified that the Hawks truck which he was watching struck his father's car and threw it across the highway where it struck a car approaching from the opposite direction. The three occupants of the car in which he was riding were thrown out of the car. He further testified that his father did not pass any truck before the accident nor at the time thereof. He testified to the position of the Chevrolet and the Spencer car after the accident.

Frankie Ann Spencer testified she was riding with her father in the front seat of the Ford; that he did not pass a truck at the time of the accident nor did she see any truck in front of or beside their car before the accident; and that all at once her father's car went across the highway onto the other side and smashed into the car approaching from the opposite direction in which the plaintiff was riding.

The defendant Harry N. Spencer, Sr., testified that at the time of the accident he was driving at a speed of between 25 to 30 miles per hour, did not pass a truck up to the time of the accident, and had no recollection of the accident. He further testified that his car was in a defective mechanical condition which lessened its power.

A state patrolman arrived at the scene of the accident at 6:06 p. m. He observed the Hawks truck partly on the right shoulder of the highway headed toward Omaha. He corroborated the testimony of other witnesses with reference to the position of the Chevrolet and the Ford after the accident.

The defendant Hawks testified that he was operating the truck on its proper side of the highway at a speed of from 30 to 35 miles per hour. When he first saw the Spencer car it was alongside the door of the truck

and was proceeding faster than the truck. He estimated the speed of the Ford at from 45 to 50 miles per hour. The highway curved at this point and he endeavored to pull over a little to the right side thereof, and did. He first observed the Chevrolet coming from the opposite direction at a distance of better than 100 yards, just as the Ford passed and went around his truck. The right rear bumper of the Ford hooked the left side of the front bumper of the truck. Immediately thereafter the Ford proceeded ahead a short distance and then went diagonally across the highway to the left. After the Ford hooked the bumper of the truck Hawks slammed his brakes on and turned his wheels to the right traveling a distance of about 20 feet endeavoring to go to the right off the pavement. The right side of the truck was off the pavement on the shoulder and the left side thereof was on the ridge when he brought the truck to a stop about 60 feet distant from the other two cars. On cross-examination he testified that the Ford proceeded across the highway to the other side, demolished the Chevrolet, came back across the highway high in the air landing on top of the truck, and then proceeded across the highway again to the west side thereof and lay on its side. He estimated that the hood of the truck stood about 4 or 5 feet in height from the pavement.

The witness Schulte was sitting to the right of Hawks in the cab of the truck and was not able to see the left part of the front bumper of the truck. He testified that he saw the Ford when it was even with the truck and then at the time it went around it. It looked to him as if the driver of the Ford was having difficulty, as it was curving in. The back part of the Ford struck the front bumper of the truck, and the Ford proceeded across the highway to the west and thereafter bounced back on top of the truck.

From the evidence it appears that the right front part of the Spencer car at the time of the impact came

into contact with the left front part of the Chevrolet, demolishing the whole front end and one side of the body thereof. The car could not be repaired and had to be junked. The front end of the Spencer car was mashed, the top was mashed in, the rear fender was bent, and there was testimony to the effect that there was red paint on the bumper and taillight which looked like a fresh mark. The left door, left cowl panels, cowl and cab alignment, the door glass and parking-light units of the truck were damaged. The sealed headlight units, the hood, and left front fender required repair. There was no damage to the grille. The truck was equipped with a braced steel bumper which was pulled toward the front and the "U" irons, a part of the bumper, were broken from the back leaving the front part thereof intact. The fender was pulled away from the cab, and there was a small crease on the top thereof toward the headlight. Most of the damage was to the rear part of the fender where it buckled away from the body. The hood was twisted out of line and the left door was mashed.

A witness engaged in the livestock commission business, together with his son, stopped at the scene of the accident and assisted the patrolman in flagging traffic. This witness and his son observed the truck and identified the bumper as a heavy steel one which was pulled straight ahead toward the front left side of the truck.

The defendant contends the trial court erred in permitting the minors, Harry N. Spencer, Jr., and Frankie Ann Spencer, to testify, for the reason that no sufficient and proper foundation was laid for the admissibility of this testimony, and proper objection was made as to the competency thereof, which was overruled.

In this state no age is fixed by statute below which a child is presumed to be incompetent to testify. See Evers v. State, 84 Neb. 708, 121 N. W. 1005.

There is no precise age which determines the question

of a child's competency, it depending upon his capacity and intelligence and his appreciation of the difference between truth and falsehood. A child may be a competent witness although he is very young, where he has sufficient intelligence to receive just impressions as to the facts of which he is to testify and to relate them correctly. The question of the competency of such a witness rests largely in the sound discretion of the trial court, whose decision will not be disturbed in the absence of clear abuse. See, 70 C. J., Witnesses, § 122, p. 92; 58 Am. Jur., Witnesses, § 129, p. 97.

In Abbott v. State, 113 Neb. 517, 204 N. W. 74, it was held: "Where a preliminary examination by the trial court shows that a female child is a competent witness, she should not be prevented from testifying merely because she is only six years of age."

In Davis v. State, 31 Neb. 247, 47 N. W. 854, this court held: "A child possessing sufficient capacity to understand the nature and obligations of an oath is a competent witness."

In the instant case, at the time of the accident the two minor children in question were nearly six years of age, and at the time of trial were nearly seven years of age. From an examination of the record we hold that the trial court did not abuse its discretion in permitting these minor children to testify, and defendant's predication of error in such respect is not well taken.

The defendant contends the trial court erred in overruling his motion for a directed verdict or a dismissal of the action as against him for the reason that the plaintiff, though testifying to all facts and details of the collision, by her own testimony failed to establish a right of recovery against this defendant. In this connection, without repeating the entire evidence of the plaintiff a major part of which appears heretofore, it apparently is the defendant's contention that the plaintiff abandoned all effort to make a case against the defendant

Spencer for the reason that the plaintiff's testimony shows that this defendant's truck was following the Spencer car and at all times was a distance of 50 feet behind it, and there was not a time when the gap between the Spencer car and the defendant's truck was closed. In addition thereto, the defendant argues that the plaintiff's husband, although watching the truck and the Spencer car coming toward him at all times, did not see the defendant's truck strike the Spencer car; and that the only evidence which purported to prove the truck struck the Spencer car was the evidence of the witness Harry N. Spencer, Jr.

As to the right of a party to the benefit of other evidence than his own, in contradiction of his own self-injuring statements, (if the testimony of the plaintiff in the instant case can be so considered) there is great confusion and conflict among the jurisdictions and as to particular types of testimony. Under the older practice and prevailing rule, a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory. See annotation in 169 A. L. R., p. 809. See, also, Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A. L. R. 619; Cox v. Jones, 138 Or. 327, 5 P. 2d 102; McFaden v. Nordblom, 307 Mass. 574, 30 N. E. 2d 852.

In the instant case the plaintiff's testimony is not inconsistent with the evidence as a whole. She testified as to what she actually observed, and the fact that she did not see the Hawks truck strike the Spencer car or just what did occur at the time of the collision does not preclude her from recovery when there is other competent evi-

dence as to what did occur at such time. She testified she observed the Spencer car coming at a high rate of speed across the highway and striking the car in which she was riding. The witness Harry N. Spencer, Jr., testified to his observation as to how the accident occurred, which is not inconsistent with the plaintiff's testimony but in fact corroborates and ties in with it. We believe the evidence as a whole constitutes a question for the jury as to how the accident happened and which party's negligence caused the accident and the damages resulting therefrom. Therefore, the foregoing contention of the defendant cannot prevail.

The defendant contends the trial court erred in not directing a verdict and dismissing the action as to him for the reason that the undisputed physical facts demonstrate that the collision out of which the plaintiff sustained injuries was not caused by negligence of this defendant, citing Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514, and other cases to like effect.

This assignment of error is based on the testimony of witnesses who observed that the left part of the front bumper of defendant's truck was pulled straight forward. In furtherance of such testimony defendant argued that considering the weight of the bumper, its position and the manner in which it was fastened by "U" irons which were broken, and the grille not being damaged, the only way in which the accident could happen would be that when the Spencer car passed defendant's truck it locked the left part of the front bumper thereby pulling it directly forward; that the bumper was black in color and the hood of the truck was red, so if there were any red paint marks on the Spencer car they came from the hood of the truck; and that the foregoing facts corroborate defendant's and the witness Schulte's testimony as to how the accident occurred, which could not be denied by the physical facts. The evidence is in controversy as to how the accident happened, and is in controversy with

reference to the physical facts as to the manner in which the accident happened.

It is the rule in this jurisdiction that physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. See, Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766; Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

The following authority is pertinent to the instant case: "Where, however, there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong." Moore v. Krejci, 139 Neb. 562, 297 N. W. 913. See, also, Pruitt v. Lincoln City Lines, *supra.*

We conclude the defendant's contention in such respect cannot be sustained.

The defendant contends the trial court erred in permitting the plaintiff's physician to testify as to what certain X-ray pictures taken of the plaintiff would show with reference to injuries she received at the time of the accident, when the same were not offered or received in evidence.

It appears that the X-ray pictures were available to appellant's counsel who saw them, but contended they were not available for exhibits for the purpose of the record. Objection was made to this line of testimony for the reason that no proper foundation was laid, and such testimony constituted a conclusion of the witness. Motion to strike such testimony for the same reason was also made. The defendant introduced certain X-ray pictures in evidence from which his medical expert testi-

fied, and it is clear that both the plaintiff's physician and defendant's expert are in agreement that the plaintiff suffered a fracture of the second cervical vertebra. Their disagreement is as to the extent of the fracture, whether or not it is entirely healed, whether or not plaintiff has any permanent injury, and the treatment, as to the necessity of wearing the neck brace.

The record discloses the court did not definitely rule on the defendant's objections and motion to strike, but reserved his ruling and agreed to rule later in the course of the trial, which the court did not do. The court's attention was not called to the objections and motion to strike so made by the defendant, nor was the court requested to make a ruling thereon, nor was the court's attention directed to the fact that he had reserved his ruling. Under such circumstances, the rule is well established that where the trial court admits evidence over objection, on the promise of counsel that he will make it competent by the introduction of connecting evidence, or where he conditionally sustains or overrules an objection to the introduction of evidence because he is unable to decide the question of its competency at the time, and no further ruling is requested or made, the question as to the competency of the evidence cannot be raised on appeal. In other words, the general rule is that when a ruling on objection to evidence has been reserved, the objecting party must obtain a direct decision or ruling in order to preserve the objection for review. See annotation in 48 A. L. R., pages 487, 488, and 494. See, also, 4 C. J. S., Appeal and Error, § 322, p. 657; Federal Schools v. Barry, 195 Iowa 703, 192 N. W. 816; McManus v. Chicago G. W. Ry. Co., 156 Iowa 359, 136 N. W. 769; Naas v. Welter, 92 Minn. 404, 100 N. W. 211; Thornton v. Davis, 113 Neb. 529, 204 N. W. 69; Chicago, St. P. M. & O. R. R. Co. v. Lundstrom, 16 Neb. 254, 20 N. W. 198; 49 Am. R. 718; Plath v. Brunken, 102 Neb. 467, 167 N. W. 567.

We conclude the trial court did not commit prejudicial error as contended for by the defendant.

The defendant contends the verdict in the amount of $5,250 is so excessive as to indicate passion and prejudice on the part of the jury.

The record shows that in addition to a fracture of the second cervical vertebra the plaintiff suffered a cut in her forehead, and immediately following the accident had pains in the back of her neck and through her shoulders, and severe headaches. She suffered a severe blow to her head which produced a concussion of the brain. When she was removed to her home a few days after the accident she was in bed for a week, and was unable to do her housework for a period of time, and, under her physicians instructions, was required to wear a neck brace day and night for a period of three months and in the daytime for one month thereafter. This brace interfered with her rest and her sleep, and prevented her from attending to washing her neck, combing her hair, or doing her housework without suffering pain. Housework tired her up to the time of the trial. She suffered nervous shock due to the accident, was on a tension, and also afraid to ride in automobiles. Eight years previous to this accident she was in an automobile accident which resulted in minor injuries to her nose. Prior to the accident in this case her health was good. She was 32 years of age. At the time of the trial she was apparently doing her own housework. Her arms, shoulders, and down the back of her neck still bothered her when she was required to do extra work. A change in the weather was when it bothered her most.

Defendant's medical expert testified that the statement of the plaintiff that the weather caused her discomfiture is a fair statement to make with reference to any fracture for a period of possibly a year, or even two years.

The plaintiff's attending physician testified to seeing and administering to her on five occasions. He gave as his opinion that the plaintiff would have pain in her

neck, with a slight limitation of motion; that the laceration on her forehead was 2½ or 3 inches in length and would leave a permanent scar. Defendant's medical expert testified that the fracture of the second cervical vertebra had healed completely and that there was no evidence of permanent disability.

In an action sounding in damages merely where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere. See Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396.

This court is committed to the rule: "A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." Horky v. Schroll, *supra.*

In Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387, it was said: "No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lesser amount would constitute adequate compensation for the injuries sustained."

For the reasons heretofore stated, the judgment of the trial court is affirmed.

AFFIRMED.

PAINE, J., not participating.

RALPH MCQUEEN, APPELLANT, V. JAMES M. JONES, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.
36 N. W. 2d 271

Filed March 3, 1949. No. 32584.

Appeal and Error. In the absence of a bill of exceptions and a motion for a new trial a judgment will be affirmed where the pleadings state a cause of action or defense and support the judgment rendered.

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

Ralph McQueen, pro se, for appellant.

James H. Anderson, Attorney General and *Walter E. Nolte,* for appellee.

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

MESSMORE, J.

The petitioner appeals from the judgment of the district court for Lancaster County denying his release from the Nebraska State Penitentiary on a writ of habeas corpus. James M. Jones, warden of the penitentiary, is the respondent and appellee.

For convenience the appellant will be referred to as the petitioner and the appellee as the respondent.

The petitioner alleged in his application, in substance, that he had been confined in the Nebraska State Penitentiary since March 1947; that on March 10, 1947, he appeared before the district court for Keith County, Nebraska, to answer to an information containing six counts of unlawfully making, issuing, uttering, and delivering no-fund checks with the intent to defraud. Count No. 6 carried the additional charge that the petitioner was an habitual criminal. He was represented by counsel appointed by the trial court.

It appears from the journal entry in the case, which is a part of the record, that upon motion of the county

attorney the first five counts were dismissed; that the court informed the petitioner of his right to counsel and appointed counsel for him; that the petitioner expressed a willingness to plead guilty to count No. 6 of the information; and that the court made inquiry of the petitioner as to his previous convictions of felonies as charged in such count and upon the petitioner's entrance of a plea of guilty to count No. 6 of the information, sentenced him to ten years in the state penitentiary at Lincoln, Nebraska.

The petitioner alleges that the proceedings had in the district court for Keith County denied him his rights and privileges guaranteed to him under the federal Constitution for the reason that he was denied and deprived of the fundamental right to the assistance of counsel for his defense, and did not knowingly and intelligently understand the nature of the accusation of which he was charged and to which he was to answer; and that the trial court was without jurisdiction to impose sentence on the petitioner.

The return to the writ discloses the petitioner was charged as heretofore mentioned, and in count No. 6 was charged with having been previously convicted of felonies on three separate occasions and confined in penal institutions wherein, in each instance, the sentence was not less than one year; further, that the petitioner was charged under the statute pertinent to the Habitual Criminal Act and entered his plea of guilty to such count, and on March 11, 1947, was sentenced to ten years imprisonment in the Nebraska State Penitentiary, is there now confined, and has not been paroled or discharged by the Board of Pardons.

A trial was had to the district court for Lancaster County upon the application of the petitioner for a writ of habeas corpus and the return made thereof. Evidence was taken, whereupon a judgment was rendered denying the release of the applicant from the peniten-

tiary. No motion for new trial was filed. An appeal was taken from the judgment, but the evidence was not preserved and presented to this court with the appeal. Therefore, there is no question of fact which was determined by the district court before this court for review.

The law is well established in this state: "In the absence of a bill of exceptions and a motion for a new trial a judgment will be affirmed where the pleadings state a cause of action or defense and support the judgment rendered." Mantell v. Jones, No. 32507, *ante* p. 785, 36 N. W. 2d 115.

In the case of In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85, it was said: "When it is sought to review the judgment of a district court, no motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had." See, also, Tait v. Reid, 91 Neb. 235, 136 N. W. 39.

Under the rule as announced in the above-cited cases, the judgment of the district court in the instant case must be affirmed if the return to the writ filed by the respondent supports the judgment of the district court for Lancaster County, Nebraska, which it does. Therefore, judgment of the trial court is affirmed.

AFFIRMED.

ROSE KUENZLI ET AL., APPELLANTS, v. FRED KUENZLI ET AL., APPELLEES.

36 N. W. 2d 247

Filed March 3, 1949. No. 32520.

1. **Equity: Appeal and Error.** While this court is obliged in an

equity action to try the issues of fact de novo upon the evidence and reach an independent conclusion with reference to the findings of the district court, yet when the testimony of witnesses upon the material issues involved is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.

2. **Lost Instruments.** A party seeking to recover upon a lost or stolen written instrument has the burden of proving the former existence, execution, delivery, loss, and contents of the instrument by clear, satisfactory, and convincing evidence.
3. **Specific Performance: Lost Instruments.** To obtain specific performance thereof, such party must not only so establish that he has a valid legally enforceable contract, but also must establish by a preponderance of the evidence that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants imposed upon him.

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

Fraser, Connolly, Crofoot & Wenstrand and *J. V. Benesch,* for appellants.

Campbell & Nyberg and *Mills, Mills & Mills,* for appellees.

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

CHAPPELL, J.

Plaintiffs and the principal defendants, Fred Kuenzli and Frank Kuenzli, are elderly sisters and brothers. The other defendants are wives of the brothers. This action was brought to establish and specifically enforce an alleged lost written instrument executed by plaintiffs and their brothers in February or March, 1922, whereby said defendants agreed that upon payment of two certain real estate mortgages for $9,000 each, executed by de-

fendants to a loan company on two described farms separately deeded to the brothers by their father during his lifetime, they would respectively execute two new real estate mortgages thereon for a total of $12,000, and pay the proceeds to plaintiffs as compensation for services rendered by plaintiffs in caring for their father and mother during their lifetime.

Defendants answered, denying generally that such an agreement ever existed. They also claimed substantially that in, arising out of, and resulting from an action brought by the brothers against the father on January 21, 1922, to specifically enforce a prior oral agreement made by the father, whereby they were to have the farms after the death of both the father and the mother, an agreement and settlement was made by the parties finally and completely settling defendants' rights in the land, and the father's estate, and fixing not only their obligations to the father and his estate, but also to plaintiffs. They claimed also that by stipulation between the parties, a final judgment was entered in such action, adjudicating all the rights and liabilities of the brothers and quieting their title to the farms in conformity with such agreement and stipulation.

Plaintiffs' reply denied generally, but admitted the pendency and disposition of such former action by stipulation and judgment thereon.

After hearing upon the merits, the trial court entered its judgment, finding generally in favor of defendants and against plaintiffs. Their motion for new trial was overruled, and plaintiffs appealed, assigning as error substantially that the judgment was contrary to law and not sustained by the evidence. We conclude that plaintiffs' assignments should not be sustained.

In Miller v. Knight, 146 Neb. 207, 19 N. W. 2d 153, it was held: "While this court is obliged, in an equity action, to try the issues of fact de novo upon the evidence and reach an independent conclusion without reference to the findings of the district court, yet when the testi-

mony of witnesses upon the material issues involved is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other." See, also, Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

It is generally the rule that a party seeking to recover upon a lost or stolen written instrument has the burden of proving the former existence, execution, delivery, loss, and contents of the instrument relied upon by clear, satisfactory, and convincing evidence. Nitz v. Widman, 106 Neb. 736, 184 N. W. 172; Cohen v. Swanson Petroleum Co., 133 Neb. 581, 276 N. W. 190; 54 C. J. S., Lost Instruments, § 27, pp. 831-834; 38 C. J., Lost Instruments, § 24, p. 259, §§ 25, 26, and 27, p. 260; 34 Am. Jur., Lost Papers and Records, § 62, p. 627.

It is also the rule that a party seeking to secure specific performance must not only so establish that he has a valid legally enforceable contract, but also must establish by a preponderance of the evidence that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part or show a valid excuse for nonperformance of the covenants imposed upon him. O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

In the light of the foregoing rules, we have examined the record and conclude that plaintiffs failed to assume the burden imposed upon them. Without dispute, plaintiffs lived with, rendered services to, and cared for the father and mother during their lifetime. Concededly, liability therefor, if existent, was primarily that of the father or his estate. However, plaintiffs' evidence with reference to the contract relied upon to establish the liability of defendants therefor was not only vague,

unsatisfactory, and not convincing upon every other element which they were required to establish, but was also categorically denied by defendants, whose evidence was supported by undisputed circumstances, transactions, and proceedings hereinafter set forth.

In that connection, the following is without dispute: In 1879 the farms involved were purchased by the father. Until 1897 the family, composed of the father and mother, plaintiffs, two other daughters, and Fred Kuenzli and Frank Kuenzli, hereinafter generally designated as the defendants or the sons, lived on the farms. At that time, the father retired, bought a home in, and moved to Columbus, where the father, mother, and both plaintiffs eventually lived. The defendants, however, continued to live on the farms, paying taxes thereon and an annual cash rental to the father, while plaintiffs generally lived with and cared for the father and mother until their deaths. The mother died in 1917 and the father in 1927.

On February 26, 1903, the father made a will, contended by defendants to have been executed in performance of and in conformity with a prior existing oral agreement with them. Therein, among other provisions, after giving his wife, the mother of plaintiffs and the defendants, the use and benefit of all his property during her lifetime, and disposing of certain personal property, the will devised Lot 1, Block 127, in Columbus, and one described farm involved herein to defendant Fred Kuenzli, and devised the other described farm involved herein to defendant Frank Kuenzli, provided that after and upon final administration of the father's estate, they should each pay $1,200 to plaintiff Rose Kuenzli, $1,625 to plaintiff Emma Kuenzli, also $1;000 to Sophia Kuenzli, and $900 to Louisa Hagel, the two other daughters, which sums were respectively so bequeathed in the will. Plaintiff Rose Kuenzli was also devised the east half of Lot 2, Block 127 in Columbus.

Having knowledge of such will, the defendants continued to live on the farms, paid the taxes on the property

so devised to them, made very substantial improvements thereon, and paid an annual cash rental to the father.

Dissension arose, and the father canceled and revoked the foregoing will by one executed on June 19, 1920, in the presence of the four daughters but without defendants' presence or knowledge thereof. The specific provisions of the latter will do not appear in the record, but there is evidence indicating that it divided the father's estate equally between all the children. Thereafter, under date of August 26, 1920, the father caused to be prepared and served upon the defendants respectively notices to quit and vacate the farms on or before March 1, 1921, unless they would each agree on or before September 1, 1920, to pay a certain substantially enhanced annual rental therefor.

On September 3, 1920, the sons filed an action against the father for specific performance of their alleged oral agreement with him, evidenced generally by the father's 1903 will heretofore set forth, which agreement they had allegedly performed since its inception. On December 6, 1920, however, that action was voluntarily dismissed without prejudice.

A settlement was not perfected, and thereafter on January 21, 1922, a new action of similar import and purpose as the former, and to quiet the title to the farms respectively in them, was filed by the defendants, as plaintiffs, against the father as defendant.

On February 21, 1922, the sons entered into a written and acknowledged agreement with their father to satisfactorily adjust the issues raised in that action and to make a complete settlement of every controversy existing between them with respect to the farms. The agreement provided substantially that on or about March 1, 1922, in any event within 30 days from February 21, 1922, the sons would pay the father $18,000, and each, beginning March 1, 1922, would pay him $200 annually during his lifetime. Also, upon the father's death, each son was required to pay $250 as funeral expenses, and to erect a

monument. In consideration thereof, the father agreed to separately convey the farms involved herein by warranty deed to the sons respectively, upon which event the sons each agreed to fully release the father and his estate from all further claims by them. The warranty deeds were to be executed and deposited in escrow, to be delivered to the sons upon payment of $18,000 by them, and the action then pending was to be disposed of in such manner as was thereafter mutually agreed upon by the parties.

The parties were respectively represented by counsel, who, on February 21, 1922, entered into, signed, and filed in the action a stipulation which not only conformed with and included the terms of the foregoing agreement between the father and sons, but also specifically agreed that subject to the other conditions therein, upon payment of $18,000, the sons should be relieved from payment of any other sum or sums to the father and to any and all other children who might be heirs at law of the father, particularly Louisa Hagel, Sophia Kuenzli Shadd, Emma Kuenzli, and Rose Kuenzli, the last two being plaintiffs herein. It was further stipulated that the other payments to be subsequently made by the sons should in no wise be liens upon the farms, but personal obligations only.

Also, on February 21, 1922, the father as a widower, bearing relationship of father to the grantees, executed and acknowledged two warranty deeds to the separately described farms, wherein defendant Frank Kuenzli was grantee in one and defendant Fred Kuenzli was grantee in the other, the consideration in each being the past performance by the grantee of the grantor's oral agreement for the respective deed or conveyance, and the sum of $10,000 in hand paid.

Further, on February 21, 1922, the father likewise executed and acknowledged a warranty deed to Lot 1 and the east half of Lot 2, Block 127, in Columbus, wherein plaintiffs Rose Kuenzli and Emma Kuenzli in equal

shares were the grantees, the consideration therefor being $3,000 in hand paid, and love and affection.

Thereafter, on March 7, 1922, plaintiffs Rose Kuenzli, single, and Emma Kuenzli, single, jointly and severally executed and acknowledged two warranty deeds to the separately described farms involved herein, in which deeds defendant Frank Kuenzli was grantee in one and defendant Fred Kuenzli was grantee in the other, the consideration in each being $4,000 and other consideration, in hand paid. Each such warranty deed also specifically provided: "And the said Rose Kuenzli and Emma Kuenzli hereby relinquishes all their interest, rights, claims, and demands in and to the above described premises."

On March 8, 1922, evidence was adduced in the action then pending between the father and the sons, and the district court entered a judgment, filed March 15, 1922, fixing all the rights and liabilities of the parties, in strict conformity with the agreement and stipulation heretofore set forth, and quieting title to the farms absolutely in the sons. That judgment was never modified in any manner, and no appeal was taken therefrom. True, plaintiffs were not named as parties in that action, but it will be noted that contractually and for a valuable consideration they were parties to the settlement which finally disposed of the father's estate, out of which plaintiffs contended that they were to be compensated, and fixed the rights and liabilities of all the parties interested therein.

In that connection, on March 23, 1922, mortgage loans of $9,000 upon each farm were separately obtained and completed by defendants to make up the total of $18,000 cash to be paid by the sons. On that date, the father's account with the loan company was credited with $18,000 cash paid by the sons, and the father signed, executed, and delivered a receipt therefor to them. Out of that sum Sophia Kuenzli Shadd was paid $4,000 on March 24, 1922, Louisa Hagel was credited in her loan company

account with $2,000 on April 29, 1922, she having theretofore been advanced $2,000 by the father, and also on the same day plaintiffs Rose Kuenzli and Emma Kuenzli each received $4,000, being credited in their loan company account with a total of $8,000. They invested that amount with the loan company in mortgages on May 1, 1922, and received the interest thereon as paid, thereafter withdrawing $6,000 of the principal sum on May 1, 1927, and the remaining $2,000 on June 1, 1929.

In the regular course of events, the warranty deeds heretofore described were delivered to the respective grantees therein, and defendants have performed all of the conditions agreed by them to be performed. In addition, defendant Fred Kuenzli, at the time of the trial of the case at bar, had previously paid all the mortgage indebtedness on his farm, and defendant Frank Kuenzli had paid all of the mortgage indebtedness on his farm except $1,400 and a year's interest thereon.

It will be observed that plaintiffs have already received $8,000 cash, plus the Columbus properties, and that all of the daughters, including plaintiffs, have received a total of $14,000 in cash. Plaintiffs' contentions that at or about the time the foregoing transactions took place defendants orally agreed to pay $14,000 more to plaintiffs, which a few days later was reduced in a separate written but lost agreement with defendants to $12,000 for wages due them from their father or his estate, are not sustained by the evidence. We are convinced that the instruments and proceedings heretofore described constituted the entire transaction, and conclude that plaintiffs, being bound thereby, should not recover in this action.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

PAINE, J., not participating.

BERTHA STOKES LITTLE ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

36 N. W. 2d 261

Filed March 3, 1949. No. 32557.

1. **Eminent Domain.** An unaccepted proposal in an application for condemnation of an easement right-of-way that condemner obligates itself to pay future crop damages caused by the maintenance, repair, or rebuilding of the improvement on the easement is not an agreement and is not binding on the condemnee.
2. ———. The condemner in the absence of an agreement between the parties must take the rights he appropriates unconditionally and must make full compensation to the condemnee for what he takes.
3. ———. Proprietary rights reserved to the landowner must be distinguished from unaccepted promises of the condemner to do something in the future for the benefit of the owner of the land affected by the condemnation.
4. ———. A landowner is assured by the Constitution of the state recovery in one action of the whole damage sustained by him because of the taking of his property by the power of eminent domain.
5. ———. When property is taken by the power of eminent domain the compensation of the owner is determined on the basis of the actual legal rights acquired by the condemner and not by the use he may make of them.
6. **Pleading.** A litigant may not enlarge his rights or gain advantage by alleging unnecessary, immaterial, or improper matters in a pleading.
7. **Eminent Domain: Appeal and Error.** Damages sustained by a landowner for right-of-way condemned is a question to be determined by a jury, and this court will not ordinarily disturb the verdict if it is based upon the evidence in the case.
8. **Juries: Trial.** It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed.
9. **Appeal and Error.** Errors assigned but not discussed will not be considered by this court.

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

Walter & Flory, Gerald E. Collins, and *Joseph E. Strawn,* for appellant.

Abel V. Shotwell and *William R. Patrick,* for appellees.

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

BOSLAUGH, J.

Loup River Public Power District, appellant, commenced proceedings against Bertha Stokes Little and John T. Little, appellees, to acquire by condemnation an easement for right-of-way purposes through land owned by them.

Appellant is a public corporation engaged in the generation and distribution of electric energy in this state, and owns and operates works of public improvement appropriate for its operations. The easement acquired by the proceedings in this case is perpetual, 100 feet wide across the north part of the southwest quarter of Section 23, Township 14 North, Range 12 East, of the 6th P. M., in Sarpy County, Nebraska, and is a right-of-way for the construction, maintenance, and operation of a wood pole "H" structure "X" braced 115,000 volt transmission line with minimum clearance of 26 feet as specified in the National Electric Safety Code.

The commissioners made an award in the sum of $800. An appeal was taken by appellees to the district court and the trial there resulted in a verdict of $2,000. Judgment was entered for appellees for $2,000, the amount of the verdict, and for $341.33, interest thereon from October 5, 1945, the date of the award of the commissioners, to the 9th day of August, 1948. The appeal is from that judgment.

The appellant in paragraph VII of its application for condemnation states, "This applicant does not desire the fee title, but a 100-foot easement, and * * * obligates itself to pay all future crop damages incident to the maintenance and reconstruction of said line when and as such damages occur." Error is claimed because the offer in evidence of the quoted statement was refused and

that the exclusion of this from the jury, and the failure of the court to include this proposal in his instructions prevented the defendant from having a fair trial. Appellant asserts it had a right in this way to eliminate from consideration in this case the evidence of crop damage which will probably result from the maintenance, repair, and rebuilding of the transmission line or a part of it during the future years, and thus mitigate the damages recoverable herein. There is no evidence or claim that the proposal had been approved or accepted by appellees or that they had done anything to prejudice their right to the immediate recovery of full compensation resulting from a consideration of all legal elements, including the matter of probable future crop damage in the use of the easement. This was clearly an unaccepted promissory stipulation. A proposal made as a part of an application in a condemnation case in substantially the language used in this case was determined by this court not to constitute an agreement. Pierce v. Platte Valley Public Power and Irrigation District, 143 Neb. 898, 11 N. W. 2d 813. In the absence of an agreement between the parties the condemner must take the rights he seeks to appropriate unconditionally and he must make full compensation for what he takes. An unaccepted promise to do something in the future cannot affect the character or the extent of the rights acquired or the amount of the damages to be recovered as just compensation. When property is taken by the power of eminent domain, the compensation of the owner is to be determined by the actual legal rights acquired by the condemner and not by the use he may make of the rights. Pierce v. Platte Valley Public Power and Irrigation District, *supra*. See, also, Louisville and Nashville R. R. Co. v. Western Union Tel. Co., 184 Ind. 531, 111 N. E. 802, Ann. Cas. 1917C 628; State ex rel. Polson Logging Co. v. Superior Court,

11 Wash. 2d 545, 119 P. 2d 694; 18 Am. Jur., Eminent Domain, § 114, p. 741.

Proprietary rights reserved to the owner of the fee are to be distinguished from unaccepted promises of the condemner to do something in the future for the benefit of the owner. An application for appropriation of land might be so drawn as to limit the rights to be acquired thereunder and leave in the owner easements and rights not taken by the condemnation, if such reservation of rights in the owner is not incompatible with the use for which the land is condemned and does not impair the ability of the condemner to render the public service for which the taking is had. The appellant has limited its rights acquired to some extent by reserving the proprietary right to the owners of the land in question here to say where upon the land, not included in the area of the easement, and how the right of ingress and egress shall be exercised by the appellant.

There is a distinction between an appropriation subject to rights of the landowner excepted therefrom and left unaffected thereby in him, and an attempt to impose unaccepted promissory stipulations and proposed agreements by the condemning party in respect to undertakings to be performed subsequent to the time of the appropriation. The unaccepted promise or proposal to do something in the future upon the happening of some contingency does not affect the character or extent of the rights acquired or the amount required to be paid as just compensation.

The proposal in the application of appellant herein quoted is promissory in its terms and relates only to acts to be performed upon contingencies to arise after the appropriation has been completed. If this proposal were operative, any action because of a failure to perform its terms would be one for damages on an unliquidated claim. This would be a source of frequent if not fruitful litigation. The proposal of appellant would

deny appellees their right to recover in one action the damages which the Constitution guarantees them in consequence of a taking of a part of their land and the making of a construction thereon, and would limit them to another action or actions for damages in the event appellant and appellees could not agree on the future damages to be paid by appellant under the terms of this proposal. Fortunately this is not the law. Appellees were assured by the Constitution of the state recovery in one action of the whole amount of the damages they sustained because of the taking without the delay or expense of future lawsuits. Art. I, § 21, Constitution of Nebraska; Pierce v. Platte Valley Public Power and Irrigation District, *supra*; Robinson v. Central Nebraska Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509; Snyder v. Platte Valley Public Power & Irrigation District, 140 Neb. 897, 2 N. W. 2d 327. See, also, DePenning v. Iowa Power & Light Co., — Iowa —, 33 N. W. 2d 503; Milwaukee E. Ry. & L. Co. v. Becker, 182 Wis. 182, 196 N. W. 575.

Appellant attempts to further support this alleged error by representing it has no intention to go upon the easement in the near future to repair, maintain, or rebuild the construction made thereon or any part of it, and that it may be 25 years or more before the appellant will have occasion or the necessity to do so. This is not important because the fact that the condemner has no present intention of exercising all the rights acquired or the probability that its use may be a limited one are not proper matters for consideration in fixing compensation since damages are required to be paid for the right appropriated, even though full use may not be immediately contemplated or never had. The presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent. 29 C. J. S., Eminent Domain, § 155, pp. 1015, 1016; 18 Am. Jur., Eminent Domain, § 249, p. 887; Penn

Builders, Inc. v. Blair County, 302 Pa. 300, 153 A. 433, 75 A. L. R. 850; DePenning v. Iowa Power & Light Co., *supra;* Shell Pipe Line Corporation v. Woolfolk, 331 Mo. 410, 53 S. W. 2d 917; Coos Bay Logging Co. v. Barclay, 159 Or. 272, 79 P. 2d 672; Klopp v. Chicago, M. & St. P. Ry. Co., 142 Iowa 474, 119 N. W. 373.

Appellant also contends that "statements and allegations in pleadings are a part of the proceedings for all purposes of the trial" and "this paragraph (VII) being a part of the application, and never having been stricken, it is within the issues." It relies upon statements in Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173 as its authority for this position, but it disregards the very important qualifying phrases contained therein, such as " 'The pleadings in a cause * * * are not a means of evidence, but a waiver of all controversy (*so far as the opponent may desire to take advantage of them*) * * *' " and " 'Statements, admissions and allegations in pleadings (upon which the case is tried) * * * are before the court and jury, and *may be used for any legitimate purpose.*' " (Emphasis supplied.)

Condemnation is a special statutory proceeding. The right to authorize the exercise of the power and the mode of the exercise thereof is legislative. Missouri Valley Pipe Line Co. v. Neely, 124 Neb. 293, 246 N. W. 483; Goergen v. Department of Public Works, 123 Neb. 648, 243 N. W. 886; 18 Am. Jur., Eminent Domain, § 9, p. 637, § 308, p. 954; Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A. L. R. 1194. The applicable statute provides that the condemner may present a petition describing the land, the size of the works, the quantity of land required to be taken, the names of the parties interested in the land, and a prayer for the appointment of appraisers. § 46-247, R. S. 1943. There is no requirement or permission for an application in a case of this character to contain any other matter, neither is there any obligation on the condemnee to make any pleading in

a condemnation case if the only question is the amount of the compensation to be exacted because of the taking. A litigant may not enlarge his rights or gain any advantage by alleging unnecessary, immaterial, or improper matters in a pleading. Pierce v. Platte Valley Public Power and Irrigation District, *supra;* United States Nat. Bank of Omaha v. Loup River Public Power District, 139 Neb. 645, 298 N. W. 529.

The record shows the right-of-way easement condemned is 100 feet in width across the north part of land of appellees, slightly diagonal in direction from the west to the east, and leaves a small triangular part of the land between the north boundary of the area of the easement and the north line of the farm. The area affected by the easement is about six acres. The farm is a level 160 acres, all tillable, very productive, exceptionally desirable and valuable, advantageously located, and adjoins the town of Papillion on the north, with buildings near the southwest corner consisting of a large garage, a large hay barn, machine shed, double corncrib, hog house, tank house, and large modern house, and bounded by graveled highways on the north and south and a paved highway on the west—one of the main highways into Omaha. The house is rented for residential purposes for a rental of $75 per month and is not used as a part of the farm operations. The loss and inconvenience because of the construction of the right-of-way on this land is detailed at unusual length. An acreage adjoining Papillion on the south has been platted and is being developed as a subdivision for residential purposes, and an area one mile and a half north of Papillion—just north of the county line—has been platted for residential purposes, and many houses have been built there. This land was suitable and desirable for use for suburban homes. There had been recently an enormous development in the north part of Papillion. The construction made on the right-of-way

by appellant was a wood pole "H" structure "X" braced 115,000 volt transmission line which has a minimum clearance of 26 feet. There are four two-pole structures on the land of appellees with a space of about 14 feet between the poles of each structure. The jury on the request of appellant viewed the premises and the construction thereon.

The witnesses of appellees testified that the reasonable market value of the land before the condemnation of the easement across it was $250 per acre, and two testified that after the condemnation the reasonable market value of the land was $225 per acre, and one testified to a value of $220 to $225 per acre, and one testified to a value of $212.50. The witnesses for the appellant fixed the reasonable market value of the land before the condemnation of the easement from $160 per acre to $250 per acre, and the decrease in the reasonable market value of the land because of the condemnation at $500, $400, $200, and $157.50 respectively, and one witness stated that the reasonable market value of the land was $200 per acre, and this was not changed or affected in any amount because of the condemnation of the easement and the construction of the transmission line.

Appellant claims that the verdict is excessive. The rule is that the amount of damages sustained by a landowner for right-of-way condemned across his land is a question of a local nature proper to be determined by a jury of the county, and this court ordinarily will not interfere with the verdict if it is based on the evidence in the case. Kennedy v. Department of Roads and Irrigation, *ante* p. 727, 35 N. W. 2d 781. There was material disagreement of the witnesses as to the market value of the land, both before and after the appropriation of the right-of-way. The qualification of each witness to testify was established. Wahlgren v. Loup River Public Power District, 139 Neb. 489, 297 N. W. 833. There was

no evidence produced to discredit any witness. The testimony was conflicting. It was pertinent to the issue and it was for the jury to say what conclusion should be drawn therefrom. It would be arbitrary and without justification for this court to substitute its judgment for that of the jury. When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong. Kennedy v. Department of Roads and Irrigation, *supra*. The jury are the judges of the credibility of witnesses and the weight of their testimony. Newman v. Department of Public Works, 124 Neb. 684, 248 N. W. 94. In Remmenga v. Selk, *ante* p. 401, 34 N. W. 2d 757, it is said: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." It cannot be said that the verdict in this case is excessive.

It is said by appellant that the verdict was the result of passion and prejudice, but it fails to indicate anything in the record of the case tending to support this charge. It will not be presumed that passion and prejudice influenced the minds of the jurors. It must be made to appear from the record before the verdict will be disturbed by this court. Hickey v. Omaha & C. B. St. Ry. Co., 140 Neb. 665, 1 N. W. 2d 304.

There are several assignments of error in general terms, but none of these are otherwise considered in the brief of appellant. This court will not pass on alleged errors assigned but not discussed. It may, at its option, consider a plain error observed by the court but not assigned. Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403. A review of the record has failed to disclose any plain error.

AFFIRMED.

LESTER J. LUTZ ET AL., APPELLEES, v. LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.
36 N. W. 2d 267

Filed March 3, 1949. No. 32558.

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

Walter & Flory, Gerald E. Collins, Joseph E. Strawn, for appellant.

William R. Patrick, for appellees.

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

BOSLAUGH, J.

Loup River Public Power District, appellant, commenced proceedings against Lester J. Lutz and Minnie C. Lutz, appellees, to acquire by condemnation an easement for right-of-way purposes through land owned by them.

Appellant is a public corporation engaged in the generation and distribution of electric energy in this state, and owns and operates works of public improvement appropriate for its operations. The easement acquired by the proceedings in this case is perpetual, 100 feet wide across the north part of the southeast quarter of Section 23, Township 14 North, Range 12 East, of the 6th P. M., in Sarpy County, Nebraska, and is a right-of-way for the construction, maintenance, and operation of a wood pole "H" structure "X" braced transmission line.

The commissioners made an award in the sum of $800. An appeal was taken by appellees to the district court, and the trial there resulted in a verdict of $1,550. Judgment was entered for appellees for $1,550, the amount of the verdict, and for $264.53 interest from October 5, 1945, the date of the award of the commissioners, to

the 9th day of August, 1948. The appeal is from that judgment.

The record shows the right-of-way easement condemned is 100 feet in width along the north part of the land of appellees, slightly diagonal in direction from the northwest towards the southeast, and leaves a small triangular tract of land five feet wide at the west end, and 110 feet wide at the east, of about three or four acres between the north boundary of the area of the easement and the north line of the farm. The area affected by the easement is about seven acres. The farm is a quarter section of typical Sarpy County rolling land. The farm is well improved, and the buildings are on the south part of the farm. The loss or inconvenience because of the construction on the right-of-way is detailed and repeated at unusual length. The transmission line consists of four "H" type structures consisting of two wood poles, each set of poles are about 14 feet apart with an "X" brace on each structure. The jury, on request of appellant, viewed the premises and the construction thereon.

The witnesses of the appellees in reference to the value of the land before and after the condemnation were two who testified to $170 per acre before and $150 per acre after; two who testified to $175 per acre before and $160 per acre after; one who testified to $167.50 before and $157.50 after; and one who testified to $160 before and $148.50 after. The witnesses for the appellant each testified to a diminution in value of the farm, because of the condemnation and construction of the transmission line, of $5 per acre.

The assignments of error, the contentions, and the discussion of appellant in this case are identical with those made by it in the case of Little v. Loup River Public Power District, *ante* p. 864, 36 N. W. 2d 261, and what was said therein applies to and controls the disposition of this case.

AFFIRMED.

ANDREW S. BATTERMAN, APPELLANT, V. ALTON BRONDERSLEV ET AL., APPELLEES.

36 N. W. 2d 284

Filed March 11, 1949. No. 32573.

1. **Schools and School Districts.** Section 79-1907, R. S. 1943, and section 79-221, R. S. 1943, each deal with separate and distinct subjects, and section 79-1907 is not supplementary to section 79-221.
2. ———. Plaintiff's petition examined and held to state a cause of action under section 79-221, R. S. 1943.

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

Paul Rhodes, for appellant.

Morrow, Lovell & Bulger, for appellees.

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

MESSMORE, J.

This is an appeal from the district court for Morrill County, from an order sustaining the defendants' demurrer to the plaintiff's petition and dismissing said petition. The plaintiff elected to stand on his demurrer.

We set forth, in substance, the pertinent allegations of the petition deemed necessary for a determination of this appeal.

The petition alleged that School District No. 150 is a duly organized and existing school district in Morrill County, Nebraska; that during the regular school term of 1947 and 1948, there were less than five children seven years of age and less than sixteen years of age residing in the said school district who would be required to attend school during such school term; that pursuant to law, the school board of the district closed the school; and that as a result thereof it became necessary for the school board to furnish transportation and other expenses of such children while attending school in another district. The petition further alleged that the plaintiff

was the parent of three children entitled to the benefit of school privileges during the 1947 and 1948 school term; that said children were forced to attend school in another district, namely district No. 28, which is more than two miles from the place where the plaintiff and his children reside; and that prior to the beginning of the school term the plaintiff and the members of the school board of district No. 150 attempted to agree upon the amount to be paid for transportation and other expenses with reference to the plaintiff's children attending school in another district, and were unable to reach an agreement. As a consequence of the failure to reach an agreement, the plaintiff was forced to provide transportation for his children to another school district, which he did; that prior to bringing this suit the plaintiff made a demand on the school board of district No. 150 for the payment of such transportation and expenses, which demand was refused. Two exhibits are attached to the petition setting forth the items constituting the plaintiff's claim against the school district which include the mileage traveled, the rate of pay therefor, and other expenses. The plaintiff prayed judgment in the amount of $1,093.60, and costs.

The appellant contends the trial court erred in sustaining the demurrer of the appellees to his petition and dismissing it.

The general demurrer admits all allegations of fact in the pleading to which it is addressed, if the allegations are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions, except as supported by, and necessarily resulting from, the facts pleaded. See Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593.

In support of this contention the appellant sets forth section 79-221, R. S. 1943, as follows: "In any district where there are less than five children who are seven years of age and less than sixteen years of age who will attend school during the term, and residing in the district,

the school board may close such school and may use the school funds of such district received from any source to provide for the board and transportation and other expenses of such children while attending school in another district * * *. If such board, transportation and expenses do not exceed the cost of maintaining school in the district of their residence, such children with the consent of the school board of the district of their residence may attend school in such school districts as shall be most convenient for them with the consent of the school board of the district in which they reside; * * *."

Appellant asserts that he has pleaded every requirement of the foregoing section of the statutes to state a cause of action against the appellees.

The appellees contend that section 79-1907, R. S. 1943, is supplementary to section 79-221.

Section 79-1907, R. S. 1943, provides: "When no other means of free transportation is provided and the child lives more than three miles from the public schoolhouse which he is authorized to attend by the nearest practicable traveled road, five cents per family for each day of actual attendance, by means of the nearest practicable traveled road actually traveled, for each one half of a mile or fraction thereof by which the distance of the residence from the schoolhouse exceeds three miles shall be paid such family monthly by such district on the basis of the record of attendance of such child, which shall be reported monthly by the teacher to the school board of such public school district; and no pupil shall be exempt from school attendance on account of distance from the public schoolhouse."

Appellees' contention is that when sections 79-221, R. S. 1943 and 79-1907, R. S. 1943, are read together, it must be accepted that section 79-1907 governs the rate of pay to be paid to the parents for transportation of their children from one school district to another school district, and that the afore-cited sections of the statutes are intended to supplement each other, for the reason

that section 79-1907 provides for reimbursement to the parents, and defines the method of computation of the amount due, therefore a school district cannot be subject to a suit for the amount due, except for refusal to pay pursuant to section 79-1907; that plaintiff, in order to state a cause of action under section 79-1907, must allege the distance from the home of the child to the schoolhouse, attendance, and number of days of actual attendance as reported by the school teacher; that plaintiff's petition lacks such allegations; that the plaintiff's suit is based on quantum meruit for claimed mileage expense and for the time and effort of himself and wife in providing transportation for their children; and that there is no statutory authority for such an action.

We are not in accord with the appellees' contention as heretofore stated.

In reviewing the sections of the statute pertinent to this appeal, section 79-1907, R. S. 1943, was formerly a part of section 79-1902, C. S. Supp., 1941, before the 1943 Statute Commission revised and edited the statutes which are now Revised Statutes of Nebraska, 1943, and was originally enacted by the Legislature prior to section 79-221, R. S. 1943.

From an analysis of section 79-221, R. S. 1943, this section makes the obligation of the school board mandatory where children reside more than two miles from the schoolhouse in the district where they actually attend school. This section provides that the funds of the school district, received from any source, may be used by said district for transportation, board, and other expenses of such children as are covered thereby while attending school in another district, and for correspondence courses where children are physically incapacitated for traveling to or attending other schools. This section also sets forth the conditions and circumstances whereby a school may be closed by the school board of a district, and provides for the obtaining of the consent of said school board for transportation of children covered by it to

attend school in a district other than that of their residence. Further, it provides the extent of the liability of such a school district, when a school is closed pursuant to law, for transportation, lodging, and other expenses of such children residing with their parents or guardians in such school district. This expense must not exceed the cost of maintaining school in the district of such children's residence.

We believe it is obvious that section 79-1907, R. S. 1943, and section 79-221, R. S. 1943, from what has been previously pointed out, each deal with entirely separate and distinct subjects, and therefore section 79-1907 is not supplementary to section 79-221.

The cases of Peterson v. School District No. 68, 124 Neb. 352, 246 N. W. 723, and Morfeld v. Huddin, 131 Neb. 180, 267 N. W. 350, cited and relied upon by the appellees, are not in point with the issue raised on this appeal.

We conclude the appellant's petition states a cause of action under section 79-221, R. S. 1943, and the trial court was in error in sustaining the appellees' demurrer to the appellant's petition. We reverse and remand the cause for further proceedings.

REVERSED AND REMANDED.

ANNA M. ANDERSON ET AL., APPELLEES, v. ARNOLD J. ANDERSON ET AL., APPELLANTS.

36 N. W. 2d 287

Filed March 11, 1949. No. 32472.

1. **Evidence.** An instrument otherwise admissible which comes from proper custody and appears valid on its face and which is more than thirty years old, the authenticity of which has not been brought into question, may be received in evidence without further identification under the "ancient document" rule.
2. ———. The "ancient document" rule is not applicable to inauthentic copies of original instruments.
3. **Frauds, Statute of.** Where an attempt is made to enforce an oral promise the purpose of which is to establish an interest

in land the attempt is to establish an oral trust in real estate and it must fail, since such a promise is void under the statute of frauds.

4. **Specific Performance: Frauds, Statute of.** Courts of equity are empowered to compel specific performance of oral contracts for conveyances of real estate declared void by the statute of frauds in cases where there has been part performance.

5. ———: ———. Before a court of equity may decree specific performance, on the basis of performance, of an oral contract for the conveyance of real estate declared void by the statute of frauds the party seeking specific performance must prove an oral contract the terms of which are clear, satisfactory, and unequivocal, and also part performance, and that the acts done in performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.

APPEAL from the district court for Burt County: HENRY J. BEAL, JUDGE. *Reversed and dismissed.*

J. R. Swenson, for appellants.

Fred S. Jack and *John A. McKenzie,* for appellees.

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

YEAGER, J.

This is an action by plaintiffs who are widow and children of one Elmer S. Anderson, deceased, against the defendants all of whom are children of Charles P. Anderson, deceased, except Josie Anderson who is the wife of Clarence A. Anderson, the purpose of which is to have quieted in plaintiffs title to the northwest quarter and the north half of the southwest quarter of Section 19, Township 22 North, Range 10 East, in Burt County, Nebraska, record title to an undivided one-half of which, up to July 1, 1938, the date of the death of Charles P. Anderson, resided in him and title to the other one-half in Elmer S. Anderson.

Trial was had to the court and a decree was entered

granting the relief prayed by plaintiffs. A motion for new trial was filed and overruled. From the decree and the order overruling the motion for new trial the defendants have appealed.

There are numerous errors assigned as grounds for reversal. In order that they or such of them as are pertinent to a determination of this appeal may be properly considered it appears necessary to describe in some detail the issues as presented by the pleadings and the manner in which they were set out and also the family background in its changing aspects over a period of about 30 years before the commencement of this action which last date was June 20, 1947.

As to the family background, Charles P. Anderson was the father of Elmer S. Anderson, deceased, and of all the defendants herein except Josie Anderson. At the time of his death he was a resident of Burt County, Nebraska. He died intestate July 1, 1938, and his estate was probated in Burt County. Elmer S. Anderson was a resident of Burt County. He died intestate March 22, 1940, and his estate was probated also in Burt County. The plaintiffs are his heirs at law.

By warranty deed dated February 23, 1920, one Alfred Olson and Signe Olson, his wife, conveyed the land which has been described to the said Elmer S. Anderson and the said Charles P. Anderson for a stated consideration of $67,900, which deed was recorded on March 8, 1920. The record title remained thus except as it was affected by the two probate proceedings mentioned, the probate of the will of Caroline Anderson, widow of Charles P. Anderson, who died in 1946, and a deed from Clarence A. Anderson to Caroline Anderson, until the entry of decree in this case in the district court.

Plaintiffs as heirs of Elmer S. Anderson, deceased, filed the petition herein on June 20, 1947. The declared cause of action was based on a claim that they were entitled to have title quieted in them as heirs. They

alleged that Elmer S. Anderson purchased the land by written contract dated May 23, 1919, pursuant to which by the warranty deed hereinbefore referred to the land was conveyed to Elmer S. Anderson and Charles P. Anderson. They alleged that Charles P. Anderson invested no money or property in the land and contributed nothing in payment or upkeep of the same; that he was never in possession; that he never claimed to be an owner; and that he had no interest therein save and except that he assisted in the purchase by loaning to Elmer S. Anderson certain funds which had long since been repaid.

On June 26, 1947, plaintiffs filed an amended petition which was in substance the same as the earlier one except that in this one was set out the contract of May 23, 1919, by which plaintiffs alleged that Elmer S. Anderson purchased the land.

On December 5, 1947, plaintiffs filed another amended petition and it was on this one that the cause was tried. In this petition the declarations as to the manner of acquisition and the place of repose of title were the same as those of the other two petitions, however the alleged basis upon which they claimed the right to have title quieted in them materially departed from the allegations of the other petitions.

In this last petition plaintiffs alleged that the name of Charles P. Anderson was placed in the deed from Alfred Olson and Signe Olson pursuant to an oral agreement between Charles P. Anderson and Elmer S. Anderson, which agreement provided that Charles P. Anderson was to loan to Elmer S. Anderson such sums of money as Elmer S. Anderson might desire to use in his business; that the deed was to be taken in the name of Charles P. Anderson as one of the grantees to secure the repayment of such sums; that Charles P. Anderson was to execute a deed to Elmer S. Anderson which should release of record the apparent interest of Charles P. Anderson; that such deed should be placed in escrow

so that when Elmer S. Anderson had repaid all sums so advanced under the agreement the escrow holder would deliver said deed to Elmer S. Anderson thereby releasing of record all apparent interest of Charles P. Anderson; and that as a part of the agreement and pursuant thereto Charles P. Anderson did execute the deed which was to be placed in escrow.

They alleged that the oral agreement was made at the home of Elmer S. Anderson; that the date of the deed to be placed in escrow and the name of the escrow agent are unknown; and that the whereabouts of the deed is unknown and cannot be ascertained.

They further alleged that the exact amount of money advanced pursuant to the agreement is unknown but that it approximated $5,000, all of which had been repaid and that therefore and because thereof the defendants had no right, title, or interest in the land in question.

They further alleged that any right that the defendants had in the land has been barred by the statute of limitations.

While the foregoing is a summary of the pleaded cause of action on which plaintiffs went to trial the record discloses that in an important respect by their evidence they submitted it on a different theory. Instead of submitting it on the theory that Charles P. Anderson became a named grantee in the deed to secure the repayment of loans made by him to Elmer S. Anderson of money to use in his business they submitted it on the theory of security for repayment of the advancement of a part of the purchase price of the land. There is no competent evidence whatever tending to support a contention that the alleged oral contract had any relation whatever to anything except an advancement of a part of this purchase price.

The answer on which the case was submitted after generally denying the allegations of the petition set forth in effect, among other things not necessary to be repeated or summarized here, that Charles P. Ander-

son acquired an undivided one-half interest in this land by purchase thereof by reason of the fact that he furnished one-half of the consideration for the purchase and that he was the owner of such interest at the time of his death and further that Elmer S. Anderson and these defendants, except Josie Anderson, as heirs, together with certain devisees of Caroline Anderson, succeeded to the interest and all of the rights which he had at the time of his death.

The plaintiffs as a step in their effort to sustain their contentions sought to prove that in the first instance and on May 23, 1919, Elmer S. Anderson purchased this land by written contract from Alfred Olson. The only evidence offered in proof of this is what on its face purports to be a copy of a written contract, identified as exhibit No. 1, between Alfred Olson and Elmer S. Anderson. The exhibit is in nowise authenticated by any witness except that plaintiff Anna M. Anderson testified that it was a document kept among the papers of Elmer S. Anderson. She testified that the names of the purported contracting parties appended thereto were not their signatures. The exhibit was received in evidence over appropriate objection of the defendants. The ruling in this respect is presented here by assignment of error.

The district court admitted the exhibit not on the basis of proof of authenticity and upon identification by someone having knowledge of its execution but under the "ancient document" rule, a rule which permits of the admission in evidence, without direct proof of their execution, of instruments which have been in existence for more than 30 years and appear to be valid on their face and which come from proper custody. 20 Am. Jur., Evidence, § 935, p. 786.

The rule appears to have recognition in this state. It was considered and discussed in Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764.

As pointed out in Peterson v. Bauer, *supra,* and else-

where and by that which inheres in the rule itself, the rule can have no application to the instrument under consideration here.

In the first place, as shown by the evidence, neither this instrument nor the original instrument, if there was an original, of which it purports to be a copy, was more than 30 years old.

In the second place the reasoning of Peterson v. Bauer, *supra,* makes it clear that where the authenticity of an ancient document is brought into question it ought not to be admitted without some proof of execution by the maker or makers. Anna M. Anderson brings authenticity into question, in truth she shows that it is not an instrument having binding force and effect, by her testimony that the purported signatures appended are not the signatures of the named contracting parties. See, Applegate v. Lexington & Carter County Mining Co., 117 U. S. 255, 6 S. Ct. 742, 29 L. Ed. 892; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553.

In the third place the rule applies only to original instruments and not to mere copies. 20 Am. Jur., Evidence, § 935, p. 786; McCleery v. Lewis, 104 Me. 33, 70 A. 540, 19 L. R. A. N. S. 438.

We therefore conclude that the exhibit was erroneously admitted in evidence and that in consequence thereof and of the fact that there was no other evidence of purchase of the land ahead of the deed of conveyance to Elmer S. Anderson and Charles P. Anderson our consideration of the issues must start at that point.

Starting at that point the record discloses that a warranty deed already referred to herein was executed wherein Elmer S. Anderson and Charles P. Anderson were named as grantees. The consideration was $67,900. By the terms of the deed the grantees took the land subject to two mortgages, one for $16,000 and the other for $3,500.

The record reasonably discloses that the consideration was paid as follows: The two mortgages mentioned

were assumed, the grantor took back a mortgage for $13,000, and the balance which was in the amount of $35,400 was paid in cash.

Of the cash balance $31,590 came as the proceeds of the sale of a farm referred to as the Manley farm, title to which stood at the time of sale and for a considerable period of time prior thereto in the names of Elmer S. Anderson and Charles P. Anderson. Of the remaining amount $1,941.67 was paid by check of Charles P. Anderson payable to Elmer S. Anderson and endorsed by him. Presumably the remaining amount was paid by Elmer S. Anderson. Plaintiffs claim this to be true and defendants do not contend otherwise. It therefore appears on the face of the record without explanation that each of these two obligated himself and contributed within a few dollars equally to the payment of the consideration for the purchase of this land.

Plaintiffs contend and attempted to prove that though Charles P. Anderson held title with Elmer S. Anderson to the Manley farm the sale price of which went into the purchase of the land in question he had no interest therein and that the proceeds of that sale were entirely the property of Elmer S. Anderson and that payment of that amount was by him and that the only amount paid by Charles P. Anderson was $1,941.67. It is to this amount that their evidence to support the oral agreement, its obligation, and its satisfaction applies.

It becomes apparent from all of this that the first question for consideration is that of whether or not the plaintiffs have sustained their burden of proving the oral agreement which is the basis for their claimed right to relief in this action.

The only evidence adduced to sustain the allegation that there was an oral contract and the terms thereof is found in the testimony of the plaintiff, Anna M. Anderson, and in documents identified or referred to by her. The same is true as to the matter of performance pursuant to its terms.

The record of the direct testimony of this witness, with omissions of objections and rulings thereon, conversational interchanges, and questions and answers containing nothing informative, beginning with question No. 203 and ending with question No. 234, is as follows: "Q- Mrs. Anderson, between the time that this contract was signed, Exhibit 1, which has not been offered in evidence, on May 23, 1919, and the time that the deed was signed and the money was paid over, did you hear any conversation between your husband and Charles P. Anderson with reference to loaning money or anything of that kind? * * * Q- Did you hear the conversation? * * * A- I heard the conversations. Q- You have got the question in mind? * * * A- Yes; I heard the conversation, but I didn't take part in it. Q- Where did this conversation take place? A- Well, it was at home there. I just heard them talking over it and I listened, but I didn't take part in it at any time. * * * Q- I wish you would tell us what you heard and said with reference to Charlie loaning money to Elmer? * * * A- Well, when they bought the farm he wanted his dad to advance money, and when he paid off his father - he said he wanted his father to be on the deed, and when it was paid off his father was to give us the deed to the property. * * * Q- Was there anything said in that conversation that you heard there with reference to any other transaction had between the parties? * * * A- Yes; Grandpa - C. P. Anderson — Q- I want you to tell as near as you can what you heard them say and what was said? A- I can't tell you exactly. I was busy there and I just couldn't only hear just parts of their conversation. I had that cranky baby, and he is sitting over there * * *. Q- Tell us as near as you can what was said? A- Grandpa said he would put his name on the deed and he would keep it there until Elmer had got this paid off, and then he would turn it over to Elmer. Q- What I am asking about now particularly is when they were talking about that and you heard that. Was

there anything said in that conversation with reference to any other deal they had with reference to a similar nature or character? What I am referring to or getting your attention to is about the Manley Place. A- Oh, yes, that was when we first started out. Of course, he advanced that money — * * * Q- I want you to tell what you heard them say at that time with reference to the Manley deal, if there was anything said about it? A- He would be on that deed and he said he would stay on this deed with Elmer then until he paid it off. I just didn't talk with them or ask them anything about it. * * * Q- You bought the Manley Farm; your husband had the Manley Farm and bought it and you lived on it for ten years? A- Yes. Q- You knew how he paid for that farm? A- Yes. * * * Q- Just answer my question. Now, you had talked that over with your husband on a number of occasions? A- Yes. Q- Got information about that? A- Yes. Q- Now, in this conversation you overheard at the home where you and your husband and his father were, was there anything said with reference to the money he had advanced on the Manley Place or anything of that kind? * * * Q- Have you got the thing in mind? A- Well, all I can say is that grandpa wanted that money that he had advanced to Elmer to be — he would put that on the deed and then Elmer was to pay him back. Q- That's what you heard in this conversation? A- Yes; that was to be paid back. When Elmer had gotten this all paid back then the deed was to have gone over to Elmer. * * * Q- You are referring now to the Manley Place; is that what was said with reference to the Manley Place? A- Yes; and it was the same on the other place. When Elmer wanted some advancement on the other place Grandpa said he would put that on the deed, and it would be the same on this place as it was on the Manley Place? Q- Do you know whether or not your father-in-law had advanced money on the Manley place? A- Yes he did. Q- And how much did he advance? * * * Q- How do you know the amount

he had advanced? Had you heard talk with reference to that? A- Well, I had heard Grandpa was going to advance $2000.00 and he had put a mortgage on part of his farm to get it. Q- He had put a mortgage on his farm to get that $2000? A- Yes. Q- And you know about that, don't you? A- Yes. Q- Was that mortgage put on at the time this $2000.00 was advanced? A- Yes. * * *" At this point one of the attorneys for the defendants was permitted to interrogate the witness pursuant to which the following appears: "Q- * * * Who told you that, Mrs. Anderson, that Mr. C. P. Anderson was going to advance $2000? A- Why, I knew it. Q- * * * Who told you? A- My husband told me that, that Grandpa was advancing it, and he was helping us, and we were starting out and he was helping us. Q- * * * And that's how you knew he was to advance $2000? A- Yes, it was. Q- * * * And that's the only reason you know, isn't it? A- And then the mortgages that Grandpa gave on it. Q- * * * Did you learn about that $2000 advance by what you say now to be made by Charles P. Anderson, in any other way except what your husband told you about it? A- Yes, we had looked it up. My attorneys helping out and looked it up, so that I know it. Q- * * * You know about it now because your attorneys have helped you look it up? A- Yes. Q- * * * Except what your husband told you and what your attorneys told you, you don't know anything about it, do you? Go ahead. * * * A- Well, I knew this was definitely advanced because I heard them say Grandpa was going to help us, and I knew that this money was advanced to Elmer. Q- * * * And you heard Elmer say so, didn't you? A- Yes, he told me. Q- * * * And that's how you knew it? A- Sure. How should I know it otherwise?" On cross-examination with regard to the arrangement for the purchase of the Manley farm the following appears: "Q- But it was on the basis of what Elmer Anderson told you that you testified on direct examination as to the arrangement

made between Elmer and his father to buy the land, isn't that true? A- Yes."

As to the allegation that as a part of the oral agreement pleaded there was or was to be executed a deed to be put in escrow there is no testimony of Anna M. Anderson that it was referred to in the conversation between Elmer S. Anderson and Charles P. Anderson before or at the time the farm was purchased. She testified that she first heard of it in 1933 as follows: "Q- When did you first learn about an escrow, Mrs. Anderson? A- It was when I heard Elmer talking with his father about this $14,000 mortgage. Q- That was in 1933? A- Yes." There is nothing more in the record with regard to the existence of the escrow deed except as to a search made therefore by the witness. It may be said therefore with confidence that there is a complete lack of competent proof of this portion of the alleged oral agreement.

We think it should be interpolated here, for facility in the discussion, that appropriate exception was taken to evidence either by objection at the time of offer or by timely motion to strike what shall be referred to and considered hereinafter as incompetent, or improper evidence, or evidence lacking probative value, as soon as incompetency or impropriety or the lack of probative value was made to appear.

In order to determine whether or not plaintiffs have adduced evidence sufficient to sustain the alleged oral contract and a right to recover it becomes necessary to ascertain at this point the character of proof required. This depends upon the character of relief they seek.

The matter of the escrow deed having been eliminated as it was by a failure of evidence in that regard, what plaintiffs attempted to do as to the other phases of the alleged contract was to establish an oral trust in real estate. See Cameron v. Nelson, 57 Neb. 381, 77 N. W. 771.

The opinion in Cameron v. Nelson, *supra,* points out

that such an agreement is violative of the statute of frauds. It is there said: "As an induction from all the cases it may be said that where it is practicable to enforce the oral promise without establishing any interest in the land itself, the statute does not apply; but where the right to recover depends upon the establishment of an interest in the land, the attempt is to raise an oral trust and must fail." See, also, Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679; Norton v. Brink, on rehearing, 75 Neb. 575, 110 N. W. 669, 121 Am. S. R. 822.

The sections of our present statute of frauds to which this has reference are the following:

"No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." § 36-103, R. S. 1943.

"Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." § 36-105, R. S. 1943.

Section 36-106, R. S. 1943, is the following: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

This is an action to establish an oral contract declared void by the statute of frauds. Such a contract is unenforceable unless the evidence is sufficient to satisfy the requirements of section 36-106, R. S. 1943.

In order to satisfy the requirements of this section the burden was upon plaintiffs to prove an oral contract the terms of which were clear, satisfactory, and unequivocal, and also part performance, and that the acts done in

performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that Elmer S. Anderson would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to a fraud upon him. Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Taylor v. Clark, on rehearing, 143 Neb. 563, 13 N. W. 2d 621; Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184; Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731; Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409; Baker v. Heavrin, 148 Neb. 766, 29 N. W. 2d 375; Smith v. Kinsey, 148 Neb. 786, 28 N. W. 2d 588; Riley v. Riley, *ante* p. 176, 33 N. W. 2d 525.

We are of the opinion that the evidence of plaintiffs is deficient in these respects. In the evidence which has been quoted which is substantially all of the affirmative evidence relating to this subject, even if all of it were considered as having probative value and as being admissible as it may not since that portion which depends upon information furnished by Elmer S. Anderson to the witness must be rejected as hearsay, we fail to find clear, satisfactory, and convincing evidence either of the contract pleaded, or that contract with the element of an escrow deed eliminated, or any other contract.

The total effect of this evidence is that this witness overheard a conversation in which Elmer S. Anderson and Charles P. Anderson agreed that the land in question would be purchased with title taken and held in the two of them the same as the Manley farm was purchased and held until sold; that the purchase money received from the Manley farm would be used in the purchase of this land; and that when Charles P. Anderson had been paid back the money he had put into the transaction he would take his name off the deed.

As to uncertainties there is no competent evidence as

to the amount of the purchase price contributed by Charles P. Anderson. The witness assumed to testify that the amount was only $1,941.67 but the evidence was clearly incompetent. Again it appears evident that any agreement would have embodied something with relation to mortgages assumed and placed on the land as a part of the purchase price on which Charles P. Anderson obligated himself jointly with Elmer S. Anderson. Incidentally at the time of the trial of this case there was a balance of about $12,000 still unpaid on a mortgage given in renewal of a purchase money mortgage which was given by Elmer S. Anderson and Charles P. Anderson.

Contributing to the uncertainty of the proof offered by the witness is a recital appearing in the petition for the settlement of the estate of her husband, Elmer S. Anderson, which petition bears her signature and was sworn to by her on July 24, 1943, in which recital it is stated that at his death Elmer S. Anderson had an undivided one-half interest in this land. The instrument was introduced on her identification as a part of cross-examination.

Contributing further to the uncertainties of plaintiffs' proof are negative inferences to be drawn from the absence of any evidence that Elmer S. Anderson during the life of his father or in his own lifetime laid claim to or made any effort to acquire the apparent interest of the father in this land although the effort made by plaintiffs herein was to prove that such interest as the father had became extinguished in 1937.

As to the element of performance nothing need be said except that certainty of the oral contract itself not appearing there is nothing to which to attach proof of performance.

We hold therefore that the evidence of plaintiffs was insufficient to sustain this cause of action and that, as contended by defendants in their first assignment of error, the district court erred in holding generally in favor of plaintiffs and against defendants and in decreeing accordingly. This conclusion renders unnecessary

consideration of the remaining asignments of error.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA EX REL. MRS. MAUD HUBBARD, APPELLANT, V. VIRGIL NORTHWALL ET AL., APPELLEES.

36 N. W. 2d 282

Filed March 11, 1949. No. 32542.

1. **Statutes.** The general rule in construing a statute is that the subject of the enactment should be taken into account with nothing avoided if that is possible and with the language employed considered in its plain, ordinary, and popular sense.
2. ———. The word "may" in public statutes should be construed as "must" whenever it becomes necessary in order to carry out the intent of the Legislature, but in all other cases the word must have its ordinary meaning.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Ralph R. Bremers, for appellant.

James J. Fitzgerald and *Joseph P. Inserra,* for appellees.

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

YEAGER, J.

This is an action in mandamus by the State on relation of Maud Hubbard, relator, who is appellant here, against Virgil Northwall, Dr. George A. Young, and Robert Smith as commissioners of the county board of mental health of Douglas County, Nebraska, who are appellees here.

The appellant filed a petition wherein it was alleged that one George Hubbard on July 10, 1945, was found by the appellees to be mentally ill and on warrant for

removal issued by the said appellees he was taken on August 31, 1945, to the State Hospital for the Mentally Ill where ever since he has been incarcerated. It was not alleged that there was anything illegal or improper in the commitment or in the incarceration up to October 10, 1947. Maud Hubbard is the wife of George Hubbard.

It was alleged that on October 10, 1947, the relator made written demand upon the appellees for removal of the said George Hubbard from the State Hospital for the Mentally Ill to a hospital in Omaha, Nebraska, equipped to handle and care for this type of patients. It was alleged that the St. Joseph Hospital of Omaha, Nebraska, has a duly approved psychiatric ward and that Dr. Frank Barta of that city had agreed to care for the said George Hubbard.

It was further alleged that the demand was refused and that appellees' refusal is violative of section 83-341, R. S. 1943, as amended.

The prayer of the petition was for an alternative writ of mandamus requiring appellees to execute and deliver an order of release of the custody of George Hubbard from the State Hospital for the Mentally Ill and for transfer of his custody to the psychiatric ward at St. Joseph Hospital and Dr. Frank Barta and that on hearing the writ be made absolute.

The district court issued an alternative writ of mandamus and an order to the appellees to comply with the writ or show cause for a failure so to do.

To the petition the appellees filed a demurrer the grounds of which are as follows:

"1. That the petition filed by the relator does not constitute a cause of action against these named respondents.

"2. That the court has no jurisdiction over the person or the subject matter of the action at this time."

No further pleadings were filed in the action. The matter came on for hearing before the court and evidence was taken which was preserved and brought here by

bill of exceptions. We think that the evidence requires no consideration since it is made clear by an entry denominated memorandum opinion and order of dismissal that the judgment which was unfavorable to the relator was rendered on the substantial ground that the petition failed to state a cause of action.

Whether or not the district court decided correctly in this respect depends upon the proper interpretation of section 83-341, R. S. 1943, as amended by section 83-341, R. S. Supp., 1947, which is the following:

"Whenever the relatives or immediate friends of any patient in a state hospital for the mentally ill who is not cured, and who cannot be safely allowed to go at liberty, apply for the transfer of that patient to the county for care outside of the hospital, the county board of mental health of the county may make provision for the care of that patient within the county as provided in this act, and shall order the patient to be discharged from the hospital. No patient who is under charge or conviction of homicide shall be discharged under this section without the order of the Board of Control."

The theory of appellant's petition is that on application pursuant to this statute for the transfer of a patient from a state hospital for the mentally ill to a county for care therein the county board of mental health is required to comply therewith and to provide for the care of such patient in the county, and that for failure so to do action in mandamus will lie to compel performance.

The theory of the demurrer is that the statute is not mandatory but on the contrary is permissive only, thus leaving the county board of mental health free to exercise its discretion in any such case. The district court sustained the contention of appellees.

The word "may" is used in the statute. The word on its face denotes a discretionary power in the board. The general rule is that in construing a statute the subject of the enactment should be taken into account with nothing avoided if that is possible and with the language em-

ployed considered in its plain, ordinary, and popular sense. Hagenbuck v. Reed, 3 Neb. 17; Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813; Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217; In re Guardianship of Kraft, *ante* p. 171, 33 N. W. 2d 534.

This general rule is applicable unless it is made to appear from the relation of the word to other words and to the entire context of the provision and the purpose to be accomplished by the statute that the Legislature intended it to have a mandatory application, or in other words mean "shall."

In the opinion in Kelly v. Morse, 3 Neb. 224, it is said: "Without doubt the word 'may' in public statutes should be construed as 'must' whenever it becomes necessary, in order to carry out the intent of the legislature, but in all other cases this word, like any other, must have its ordinary meaning." There has been no departure from this pronouncement in the later decisions of this court. The reasoning is sound and should continue to control.

There is nothing in this section or the entire act of which it is a part which could give rise to any conclusion that the Legislature intended other than to lodge in the county boards of mental health a discretion to allow or disallow an application made pursuant to statute for care and treatment in the home county of inmates of state hospitals for the mentally ill who are not yet cured.

The demurrer was properly sustained and the action properly dismissed.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF SOLON L. WILEY, DECEASED. WILLIAM L. SHEARER ET AL., APPELLANTS, V. EMMET S. BRUMBAUGH, ADMINISTRATOR WITH WILL ANNEXED, OF THE ESTATE OF SOLON L. WILEY, DECEASED ET AL., APPELLEES.

36 N. W. 2d 483

Filed March 11, 1949. No. 32483.

1. **Equity.** Whether interests in land are equitably converted into personal property by dealings with the land depends upon the law of the state where the land is.
2. **Conflict of Laws.** In the absence of pleading and proof to the contrary Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law.
3. **Vendor and Purchaser.** An executory contract for the sale and purchase of land, enforceable for and against vendor and vendee, is a present equitable conversion of land into personalty and of personalty into land.
4. ———. Where an owner of realty entered into a binding contract for the sale thereof prior to his death equity will treat the realty as personalty in distributing his estate.
5. **Executors and Administrators.** County courts have the power to require executors and administrators to exhibit and settle their accounts and to account for all assets of the estate that have come into their possession and to hold them liable for the actual value of any property which they have unlawfully appropriated to their own use.
6. ———. County courts, in carrying out their exclusive original jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates.
7. ———. County courts should compel the representatives of estates to charge themselves with interest in their account when, by doing some unauthorized act they have abused their trust or have been guilty of some fault or wrong in its performance and are surcharged because thereof. Interest should be upon the amount so surcharged at the legal rate from the date of such unauthorized act.
8. **Trusts.** A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property.

9. **Attorney and Client.** It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case to accept the retainer as lawyer in that case. And where, after retainer, it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether or not he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation.

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

Munger & Rhodes, for appellants.

Gray & Brumbaugh, Will H. Thompson, Lee & Bremers, and *Richard W. Lee,* for appellees.

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

WENKE, J.

This action arises in connection with the administration of the assets of the estate of Solon L. Wiley who died testate on July 5, 1926, a resident of Douglas County. The will of the deceased was allowed and admitted to probate by the county court of Douglas County on September 3, 1926. William L. Shearer and Walter S. Wiley were nominated in said will to be the executors of the estate and pursuant thereto the county court, on the same day the will was allowed and admitted to probate, appointed them to act as such. They qualified on September 14, 1926, and continued to act in that capacity until they resigned. They resigned on July 16, 1942. However, prior to resigning they made a final report and accounting as executors dated May 20, 1942. Objections were filed thereto, a hearing was had thereon, and the county court entered judgment against the executors.

On appeal from the county court a trial was had in the district court for Douglas County. The district court found that the executors had failed to account for cer-

tain assets of the estate which assets William L. Shearer, one of the executors, had, on November 21, 1931, converted to his own use. The court then charged the executors, William L. Shearer and Walter S. Wiley, and each of them, with the reasonable market value of the assets so converted in the sum of $28,000 with interest thereon at four percent from that date.

The court further found that the waivers, assignments, and conveyances executed by Helen S. Saxe and Marion A. Chapman, devisees and legatees under the will of Solon L. Wiley, to William L. Shearer were procured by him through misrepresentation and without consideration and because thereof caused them to be vacated, canceled, and set aside.

From this judgment William L. Shearer and Walter S. Wiley appeal and Emmet S. Brumbaugh, administrator with the will annexed of the estate of Solon L. Wiley, deceased, Will H. Thompson, intervener, and Helen S. Saxe and Marion A. Chapman, heirs and beneficiaries of the will of Solon L. Wiley, deceased, cross-appeal.

Emmet S. Brumbaugh was appointed and qualified as administrator with the will annexed of the estate after the resignation of William L. Shearer and Walter S. Wiley, the executors.

Solon L. Wiley at the time of his death was 85 years of age. He left surviving him as heirs at law three children and two grandchildren, all of whom are beneficiaries under the provisions of his will. The three children are Walter S. Wiley, a son, Ruth Harrison, a daughter, and Anna Katherine Shearer, a daughter. The two grandchildren are Helen S. Saxe, a granddaughter, and Marion A. Chapman, a granddaughter.

Solon L. Wiley was married twice, his wives being sisters. The first wife was Anna C. to whom was born a son, Walter S. Wiley, one of the executors herein, and a daughter, Edith Anna Wiley, who through marriage became Edith Anna Sherwin. To this marriage two

children were born, namely, Helen S. Sherwin and Marion A. Sherwin. Edith Anna died before her father and at the time of his death both grandchildren had married and were then and are now Helen S. Saxe and Marion A. Chapman. The second wife was Kate M. to whom was born two daughters, namely, Ruth and Anna Katherine. Anna Katherine married William L. Shearer, one of the executors of the estate, and Ruth married Thomas S. Harrison.

For the purpose of convenience we shall refer to Solon L. Wiley, the person whose estate is herein involved, as Solon L. Wiley in all matters discussed before his death and as deceased in all matters discussed after his death; to appellant William L. Shearer as Shearer; to appellee Emmet S. Brumbaugh, administrator with the will annexed, as the administrator; to appellee Will H. Thompson, attorney for the executors during most of the period herein involved, as Thompson; and to appellees Helen S. Saxe and Marion A. Chapman, who are heirs of the deceased and beneficiaries under his will, as heirs.

In its inception the relationship of the parties was such that the principle is applicable that no one should attempt to serve another when he claims personal interests that conflict therewith. The evidence shows that the personal interests of both executor Shearer and his counsel, Thompson, conflicted with that of the estate. Out of that situation, when choice was made by the executor between his claimed personal interest and his duty to the estate, the trouble herein involved began.

This proceeding is to require an accounting by the executors and to force them to bring the assets of the estate into court to be turned over to the administrator for the purpose of distribution. We will therefore only determine the issues necessarily involved therein. When such an accounting has been made and the assets of the estate fully accounted for the question of claims, whether properly allowed, waived, outlawed, or filed

out of time, can be determined. Also at that time the expenses of administration, including the allowance of attorney's fees and other expenses relating to the administration of the estate but not executors' fees, which are herein denied, can also be determined and the assets applied and distributed to those entitled thereto in the manner required by law. We do not herein determine any of the rights of Thompson for services rendered, expenses had, or costs advanced for the deceased in his lifetime as they relate to the assets of the estate, including any claim to or lien on the proceeds of the contract of sale of the Wyoming ranch. However, as to the moneys Thompson handled and distributed for the executors while acting as their counsel there must be an accounting. We will consider that issue in connection with our disposition of the final accounting by the executors.

The record establishes that Solon L. Wiley, on December 24, 1919, entered into a contract with Robert S. Trumbull for the sale of the Wiley ranch located in Park County, Wyoming. The ranch was referred to in the contract as about 2,400 acres and was sold for a consideration of $50,000. However, subsequently, but during the lifetime of Solon L. Wiley, the agreed acreage of the ranch was reduced to approximately 2,000 acres and the consideration to $48,000. This was done pursuant to the provisions of a supplement attached to the contract.

The evidence further establishes that, in April 1923, Solon L. Wiley assigned his interest in this contract, together with his interest in a contract for the sale of some Sarpy County, Nebraska, lands, to Shearer as security for an advance of $1,800.

In this connection it should be said that the evidence is clear and conclusive that the assignment of Solon L. Wiley's interest in the contract for the sale of the Wiley ranch in Wyoming, insofar as Shearer is concerned, was solely to secure the $1,800 which Shearer

advanced at that time. It was not given to secure any other moneys that Shearer claims he advanced to Wiley. But even if it had been given for the latter purpose the evidence offered by Shearer to establish such advances was insufficient and entirely inadequate. It completely fails to establish any advances for which it could be held if any agreement for that purpose had been entered into.

After Shearer had secured the interest of Solon L. Wiley in the contract for the purpose of securing his advance of $1,800 a modification of the contract was entered into on May 5, 1925. This modification related to the removal of four houses from the ranch to some lots in Cody, Wyoming, and the addition of those lots in Cody, to which the houses had been moved, as security for the purchase price. While the contract with Trumbull, in which these changes were made, was in the name of Shearer the evidence is clear and conclusive that Shearer's only interest therein was that he held it as security for his advance of $1,800 and that Solon L. Wiley was the actual owner of the contract and remained the owner thereof, subject to that assignment, at the time of his death on July 5, 1926. The evidence further establishes that it was so considered and treated by the executors at all times until Shearer claimed to be the owner thereof. This will be more fully discussed hereinafter.

Appellant's principal contention is that the county court of Douglas County was without jurisdiction to determine the questions herein involved.

Ordinarily the nature of a contract for the sale of land is determined by the law of the jurisdiction wherein the land is situated. As stated in Restatement, Conflict of Laws, § 209, p. 298: "Whether interests in land are equitably converted into personal property by dealings with the land depends upon the law of the state where the land is." See, also, 2 Beale, Conflict of Laws, § 209.1, p. 935; 18 C. J. S., Conversion, § 4, p. 47; 11 Am. Jur.,

Conflict of Laws, § 64, p. 351; Morris v. Linton, 74 Neb. 411, 104 N. W. 927.

However, appellants neither plead nor proved the law of Wyoming where the ranch was located and, in the absence thereof, we have said: "The rule is that, in the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law." Forshay v. Johnston, 144 Neb. 525, 13 N. W. 2d 873. See, also, Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N. W. 2d 185, and In re Application of Blackwell, Blackwell v. Pszanowski, 145 Neb. 256, 16 N. W. 2d 158.

In this jurisdiction we have held: "An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price." Jewett v. Black, 60 Neb. 173, 82 N. W. 375. "In an executory contract for the sale of real estate equity treats the vendor as the trustee of the purchaser and the purchaser as the trustee of the purchase money for the vendor. This rule rests upon the doctrine that equity considers that done which ought to be done. * * * In an executory contract for the sale of real estate the title retained by the vendor is security for the payment of the unpaid purchase money." Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531. See, also, Dodge County v. Burns, 89 Neb. 534, 131 N. W. 922, 35 L. R. A. N. S. 877. This seems to be the general rule in most jurisdictions. See Inghram v. Chandler, 179 Iowa 304, 161 N. W. 434, L. R. A. 1917D 713, and Griggs Land Co. v. Smith, 46 Wash. 185, 89 P. 477.

And, even though the foregoing was not here controlling, it would appear that the general rule is the law of Wyoming. In the case of Baldwin v. McDonald, 24 Wyo. 108, 156 P. 27, it was held: "In equity, the vendee of land is treated as the beneficial owner, and the vendor

as owner of the purchase money, becoming, as to the land, trustee for the vendee, subject to the latter's performance, and the vendee, as to the purchase money, trustee for the vendor, who has a lien on the land or the vendee's equitable estate."

Having determined, under this doctrine, that the contract of sale is personal property its course of descent is controlled by the laws and courts of Nebraska where the owner was a resident. We said in Richards v. Estate of Gilmore, 140 Neb. 165, 299 N. W. 365, that: "Defendant contends that a determination of the litigants' rights involves the 'title to land' and that this is 'an action upon à contract for the sale of real estate,' subjects forbidden by statute to the jurisdiction of the county court. Under familiar equitable principles, where the owner of real estate enters into a valid contract for the sale thereof, the real estate is regarded as converted into personalty and it is so treated when the vendor dies. Davie v. Davie, 47 Wash. 231, 91 Pac. 950; Annotation, Ann. Cas. 1914D, 419; 19 Am. Jur. 11, 15, secs. 11, 15. Thus, not the title to land but the right to personal property, the money to be paid by vendee, is here involved." See Cleveland Trust Co. v. Armstrong, 3 Ohio O. 6.

We stated in Starr v. Fidelity & Deposit Co., 134 Neb. 240, 278 N. W. 478, that: "The county court is by the Constitution and statutes of the state given exclusive original jurisdictional of all matters relating to the settlement of estates of deceased persons." And in In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829, we said: "By the Constitution, article V, sec. 16, and section 27-503, Comp. St. 1929, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233. Section 27-504, Comp. St. 1929, provides in part: 'The county court shall have power: * * * Fifth. To require executors, administrators, and guardians to exhibit and settle

their accounts, and account for the estates and property that have come into their possession as such.' This court recently held in In re Estate of Jurgensmeier, supra, 'In carrying out this statutory authorization, it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction (and render to the parties interested in the assets of the estate such relief as their respective situations may justify). In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456; In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316.' See, also, 34 C. J. S. 965, sec. 840; 33 C. J. S. 1011, sec. 79; Dame, Probate and Administration (3d ed.) 12-15, secs. 13, 14, and 15. Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. In re Estate of Wilson, 98 Neb. 852, 154 N. W. 717; In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694; 3 Woerner, American Law of Administration (3d ed.) 1756, sec. 506, and 1963, sec. 572; 1 Woerner, American Law of Administration (3d ed.) 513, sec. 150; Dame, Probate and Administration (3d ed.) 578, sec. 567. * * * Therefore, the county court has the power to require an executor or an administrator, whose office is ended, to render a true and just account of all the assets and property that have come into his possession as such (34 C. J. S. 952, sec. 833), and if the executor or administrator is deceased, the citation may issue to compel his personal representative and his bondsmen to make such an accounting. Dame, Probate and Administration (3d ed.) 11, sec. 12; 24 C. J. 933; 34 C. J. S. 949, sec. 831."

In Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861, we approved the following: "'* * * The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third per-

sons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication become necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts.' 1 Woerner, American Law of Administration (2d ed.) sec. 151."

However, that is not the situation here. We do not find, nor has any opinion of this court been cited, directly passing upon the county court's jurisdiction when the issue as to ownership of personal property is between the representative of an estate, as such, and his individual right thereto. We are of the opinion that the general rule referred to in the case of Security-First Nat. Bank of Los Angeles v. King, 46 Wyo. 59, 23 P. 2d 851, 90 A. L. R. 125, is a proper application of the county court's authority under our Constitution and statutes. Therein the court said: "It is contended by counsel for defendants that the trial court, sitting in probate, had no jurisdiction to determine the title to the property in dispute, and that it was right in so holding. It is true that this is the rule in cases in which a third party claims property as against the representative of the estate. 24 C. J. 942. But, due mainly to the necessities of the case, the rule is, by the weight of authority, otherwise when the representative himself claims such property. Stevens v. Superior Court, 155 Cal. 148, 99 Pac. 512, 514; Estate of Fulton, 188 Cal. 489, 205 Pac. 681; Bauer v. Bauer, 201 Cal. 267, 256 Pac. 820; Estate of Kelpsch, 203 Cal. 613, 265 Pac. 214, 215; Estate of Roach, 208 Cal. 394, 281 Pac. 607; Linthicum v. Polk, 93 Md. 84, 48 Atl. 842, 844; In Re Martin's Estate, 82 Wash. 226, 144 Pac. 42; In re Parker's Estate, 189 Iowa 1131, 179 N. W. 525; Matter of Watson, 215 N. Y. 209, 109 N. E. 86. * * * '* * * It seems clear to us that the probate court must necessarily have the power to incidentally try and determine such an issue between the executor or administrator and the estate in the matter of the settlement of his exhibits or accounts.' (Stevens v. Superior Court, supra.)"

In order to carry out the exclusive original jurisdiction which our Constitution has given to county courts in all matters relating to the settlement of the estates of deceased persons it seems clear to us that these courts must necessarily have this power, as an incident thereto, in requiring executors and administrators to settle their accounts and therein account for all property that has come into their possession.

That the county court has the power to require executors and administrators to exhibit and settle their accounts and to account for all assets of the estate that have come into their possession and to hold them liable for the actual value of any property which they have unlawfully appropriated to their own use has been fully settled by this court. See, In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233, and In re Estate of Statz, *supra.*

Having come to the conclusion that the deceased, at the time of his death, was the owner of the contract of sale of the Wyoming ranch and that it was personalty and a part of the assets of his estate and subject to the jurisdiction of the county court of Douglas County the next question that arises is, did the executors properly handle this asset and account therefor? If not, for what amount are they liable and from what date? In the discussion of these questions we will not go into too much detail but refer only to major incidents because the record is voluminous and, except for the oral testimony of Shearer, is almost undisputed as it relates to these questions.

After Solon L. Wiley died the executors qualified and thereafter filed an inventory. In this inventory they reported the contract as a part of the assets. They also reported the contract of sale of the Sarpy County land. Thereafter, on December 20, 1926, the executors secured the county court's approval of a settlement of the Sarpy County contract for an amount sufficient to pay Shearer the $1,800 which he had advanced in 1923, and for which he held the contracts on both the Sarpy County land and Wyoming ranch as security. As a result of this approval

Shearer received the sum of $2,458 by check dated December 23, 1926. This was the full amount of his loan with interest thereon at the rate of ten percent.

In 1927 Trumbull sought to settle the amount due on the contract for $29,000. This offer was submitted to the heirs and beneficiaries under the will for their acceptance, subject to approval by the county court. While this compromise was never completed the executors at that time fully recognized the contract as an asset of the estate and sought the approval of the settlement by all parties interested in the estate.

Then, in 1930, because of default by Trumbull, Shearer brought an action in the Federal District Court for the District of Wyoming to foreclose this contract. Upon sheriff's sale he bid in his own name on all the lands and properties covered by the contract and upon confirmation thereof the sheriff's deed, dated November 21, 1931, was executed to him.

In 1932, after Shearer had acquired title in his own name to all of the properties covered by the contract, to wit, the ranch and the properties in Cody, he submitted to the heirs, who are the beneficiaries under the will, the question of whether or not he should transfer the properties in Cody, or a part thereof, in settlement of the J. D. Cook claim of $3,000. Subsequently these properties were transferred in settlement of that claim and attorney's fee due W. E. Mullen, who had acted as attorney for Shearer in the foreclosure of the contract in the Federal District Court for the District of Wyoming.

This Cook claim arose out of a settlement made with the creditors of Solon L. Wiley who had started an ancillary probate proceeding of his estate in Park County, Wyoming. This settlement had been approved by the county court of Douglas County on January 14, 1929.

The evidence establishes that for many years after Shearer took the title to this land in his own name he continued to treat it as belonging to the estate. As stated

by the administrator in his brief: "The record in this case contains no evidence whatever that Shearer at any time, from the death of Wiley in 1926, when he was appointed executor, until September of 1941, ever claimed title or ownership to the Wiley Ranch." The evidence also establishes that the heirs, who are the beneficiaries of the estate, were at all times fully aware that the contract was in Shearer's name and had been even prior to Solon L. Wiley's death. They were also fully aware that he took the lands in his own name at the time he foreclosed the contract and that he did so with their knowledge and approval.

Parties handling properties in a fiduciary character should not take them in their own name and to do so will ordinarily make them liable for a conversion thereof. See In re Estate of Boschulte, 130 Neb. 284, 264 N. W. 881. However, when it is done with the knowledge and approval of all parties having an interest therein we will not hold the party taking the property in his own name liable until such time as it is shown he actually intended to and did convert the property to his own use. This the evidence shows Shearer did on October 1, 1941, when he conveyed the ranch to Carl O. Thomsen for a consideration of $22,000 and thereafter failed and refused to account to the estate for the purchase price.

We also find that the $22,000 received for the ranch is the actual value thereof and that the proceeds of the sale must be accounted for by the executors as assets of the estate. The executors must also account for all other funds received and disbursements made by them, including all items handled either by the executors or their counsel. In view of the manner in which the executors handled the estate and since it was done with the knowledge and approval of all parties interested therein we shall make the accounting continuous from the time the executors were appointed and qualified up to October 1, 1941, when the ranch was sold, without figuring interest on any of the items thereof.

The record shows that during this period, other than the $22,000 received by Shearer for the ranch, the executors received the sum of $3,152.77 and properly expended the sum of $11,368.84. This leaves a net balance with which the executors are chargeable as of October 1, 1941, of $13,783.93.

To the answer filed by Thompson dated May 8, 1942, is attached a statement of receipts and disbursements had by him in connection with the estate. It would appear Thompson received funds for the estate, either direct or through the executors, and made disbursement therefrom. The evidence is insufficient to properly determine what balance is owing by Thompson to the administrator. Hearing should be had on this matter in the county court and the amount owing by Thompson should be determined and ordered paid by him to the administrator. If any balance is found due to the administrator from Thompson, both he and the executors should be made liable therefor because it was the duty of the executors to handle these funds. Of course, Thompson would be primarily liable.

Reference is made to the compromise settlement made with J. D. Cook. This arose in connection with the ancillary probate proceedings of the estate had in Park County, Wyoming. It is suggested that the executors' account be charged therewith because the county court of Douglas County did not have authority to approve the settlement. This settlement was made with full knowledge of all parties interested in the estate and with their approval. The properties in Cody were accordingly transferred in settlement thereof. These parties cannot now be heard to complain of what the executors did when it was done with their full knowledge and approval. We find no merit in this contention.

Appellees, by their cross-appeal, raise the question as to the interest rate with which executors should be charged. Section 45-103, R. S. 1943, in force at the time the property was converted by Shearer, provides for

interest at the rate of six percent. We said in In re Estate of Jurgensmeier, 145 Neb. 459, 17 N. W. 2d 155, that: "County courts should compel the representatives of estates to charge themselves with interest in their account when, by doing some unauthorized act they have abused their trust or have been guilty of some fault or wrong in its performance and are surcharged because thereof. Interest should be upon the amount so surcharged at the legal rate from the date of such unauthorized act." The executors should be charged interest at six percent from October 1, 1941, on the sum of $13,783.93 with which they are here charged.

In view of the record all costs should be charged to the appellant Shearer and, in consideration of the manner in which the estate was handled by the executors they are not entitled to any fees, statutory or otherwise, for their services as such.

The appellant contends that the trial court erred in finding that the waivers, assignments, and conveyances to William L. Shearer by Helen S. Saxe and Marion A. Chapman, heirs and beneficiaries under the will of Solon L. Wiley, deceased, were procured by misrepresentation and wholly without consideration. These instruments were made between parties standing in a confidential relationship. The evidence establishes that they were executed upon representations that the quitclaim deed was needed to cure a technicality in the title and the waiver and assignment on the basis that it was to be used by Shearer in a controversy with Thompson over attorney fees. As stated in 24 Am. Jur., Fraud and Deceit, § 258, p. 91: "It is said that a fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property." These instruments were given without consideration and it is clearly evident that

these parties never intended to thereby convey all their interest in the estate. They were given to Shearer to assist him in carrying on with the estate but not so limited because the heirs had full confidence that he would make proper accounting of the assets thereof. We find the evidence fully supports the trial court's findings and we find these instruments should be set aside and vacated to the extent necessary to permit these heirs as beneficiaries to take whatever their interest in the estate may be.

Appellants contend there was a breach of duty by the attorney who acted for the executors. We are not here concerned with the relationship between Shearer and Thompson as individuals but only as their actions affect this estate and the court's proper administration thereof to the end that the assets thereof may be properly accounted for and distributed to those who are entitled thereto. Insofar as Thompson represented the administrator in this litigation or should do so in the future we think what was said in McCormick v. McCormick, *ante* p. 192, 33 N. W. 2d 543, is applicable. Therein we said: "It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case to accept the retainer as lawyer in that case. And where, after retainer, it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation."

Appellants complain that the request of Shearer for conclusions of fact separately from conclusions of law made pursuant to the provisions of section 25-1127, R. S. 1943, was not complied with by the trial court. This request was made on June 4, 1947, and after the court had announced its decision. We think, under this situation, that the request came too late. See State ex rel.

Sorensen v. Mitchell Irrigation District, 129 Neb. 586, 262 N. W. 543. But even if not too late it could not be error in an equity case that would require a reversal and retrial. Such findings of fact and conclusions of law would be helpful to this court but the absence thereof, even when requested, could not be prejudicial because we consider the matter here de novo.

In view of what has been said in the opinion we affirm that part of the decree of the district court which holds the executors liable in their account for certain assets of the estate which it found had been converted by Shearer, one of the executors, to his own use but fix the date of the conversion, the rate of interest to be charged thereon, and the amount for which the executors are liable because thereof as in the opinion set forth and direct that the executors be charged in their final account with the sum of $13,783.93 with interest thereon at six percent from October 1, 1941. We further direct that Thompson be required to account for the funds he handled for the estate and that the executors be charged therewith in their account as in the opinion set forth. We also affirm that part of the decree of the trial court finding that the waivers, assignments, and conveyances executed by Helen S. Saxe and Marion A. Chapman were procured by misrepresentation and without consideration and because thereof should be vacated, canceled, and set aside but direct that they be vacated and set aside only to the extent necessary to permit these parties to take whatever interest they may have in the estate.

It is therefore ordered that the trial court be directed to modify its decree in accordance herewith and when so modified that it stand affirmed. Costs are taxed to appellant Shearer.

AFFIRMED AS MODIFIED.

PAINE, J., not participating.

INDEX

Actions.

The existence of a right is one matter; the availability of a particular remedy in which that right may be asserted is distinctly a separate matter. *In re Application of Dunn* 669

Adverse Possession.

1. The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the full statutory period of ten years. *Hallowell v. Borchers* 322
2. Where one by mistake enters upon and takes possession of the land of another, claiming it as his own to a definite and certain boundary, and continues in the open, notorious, and exclusive possession thereof under such claim, for ten years or more, he acquires title thereto by adverse possession although the land was not enclosed. *Hallowell v. Borchers* 322
3. The purchase or attempted purchase of an outstanding title by one in adverse possession, after the expiration of the statutory period, is not alone sufficient to break the continuity of possession or divest it of its adverse character, although the occupant may believe that he is thereby acquiring the true title. *Hallowell v. Borchers* 322

Aliens.

1. The Trading with the Enemy Act abrogates the provisions of the treaty with Germany of December 8, 1923, granting freedom of access to the courts of this country by nonresident German nationals. *Meier v. Schmidt* 383
2. The Trading with the Enemy Act bars a nonresident enemy alien from instituting an action during the continuance of the war, or from prosecuting an action instituted before its commencement. *Meier v. Schmidt* 383

Appeal and Error.

1. To be entitled to review of denial of petition for new trial based on newly discovered evidence, unsuccessful party must preserve both evidence at former trial and newly discovered evidence in bill of exceptions. *Foley v. Wescott* 49
2. On appeal from an order sustaining motion for judgment notwithstanding verdict, Supreme Court may direct entry of judgment reinstating verdict. *Patrick v. Union Central Life Ins. Co.* 201
3. If no prejudicial error appears in the record, and the verdict returned by the jury has sufficient competent evidence to support it, the judgment entered on such verdict will not be disturbed on appeal. *Willoughby v. Swett* 258
4. When the jury was properly instructed and a verdict returned which is supported by the evidence, the judgment will not be reversed on appeal even though the evidence on material points was highly conflicting. *Trask v. Klein* 316
5. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Remmenga v. Selk* 401
6. In a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong. *Remmenga v. Selk* 401
   Webber v. City of Scottsbluff 446
7. The giving of an instruction which places on the wrong party the burden of proving an essential fact put in issue by the pleadings is reversible error. *Myers v. Willmeroth* 416
8. Error committed in the giving of an instruction unless prejudicial to the rights of a defendant may not be considered as ground for reversal. *Wilson v. State* 436
9. An instruction to a jury the effect of which is to invade or abridge a substantial right of a defendant in a criminal case is reversible error. *Wilson v. State* 436
10. Instructions not complained of in such a way as to be reviewable in Supreme Court will be taken as the law of the case, and if, when tested by such instruc-

tions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Webber v. City of Scottsbluff* 446

11. It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *Webber v. City of Scottsbluff* 446

12. An exception to a group of instructions collectively in a motion for new trial shall be deemed for the purposes of review in the Supreme Court separately an exception to each instruction included within the group, and the prior rule to the contrary is abrogated. *Klause v. Nebraska State Board of Agriculture* 466

13. A motion for new trial not filed in ten days may not be considered by the Supreme Court on review. *Klause v. Nebraska State Board of Agriculture* 466

14. A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for errors appearing in the record. *Western Smelting & Refining Co. v. First Nat. Bank* 477

15. An order affecting a substantial right made in a special proceeding is a final order which may be reversed, vacated, or modified, even though it does not terminate the action nor constitute a final disposition of the case. *Western Smelting & Refining Co. v. First Nat. Bank* 477

16. A substantial right creating an appealable interest is an essential legal right as distinguished from a mere technical one. *Western Smelting & Refining Co. v. First Nat. Bank* 477

17. An order of the court which determines the rights of the parties and leaves no further questions to be decided by the court rendering it, except such as are necessary to be determined in carrying it into effect, is a final order affecting a substantial right. *Western Smelting & Refining Co. v. First Nat. Bank* 477

18. Generally, an appealable interest in the subject matter of litigation exists whenever the interest of the party may be enlarged or diminished, or his rights or liability affected by the result of the appeal. If a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal from any final order entered against him.

Western Smelting & Refining Co. v. First Nat. Bank 477

19. In a case tried to the court, whether at law or in equity, the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant. The Supreme Court will not reverse a case so tried because other evidence was admitted. *Western Smelting & Refining Co. v. First Nat. Bank* 477

20. The jurisdiction of the district court in an error proceeding extends only to reviewing the record made in the trial court, and affirming or reversing in whole or in part the judgment of the trial court or ordering that the accused be discharged upon the record there made. *Clark v. State* 494

21. In an error proceeding, original evidence cannot be received in the district court to support or defeat the judgment of the trial court. *Clark v. State* 494

22. An agreement not to appeal a judgment or final order is valid, binding, and enforceable, if the intention to waive the right clearly appears from the terms of the agreement and it is supported by a sufficient consideration. *Phelps v. Blome* 547

23. An objection to an appeal upon the ground that the parties agreed not to appeal from the judgment or final order may be made for the first time in the appellate court by a motion to dismiss, and affidavits or other competent evidence dehors the record may be received to establish the facts with relation thereto. *Phelps v. Blome* 547

24. The theory adopted at the trial by the parties and the court, as to the issues, will be followed on appeal. *Mayer v. Homestead Fire Ins. Co.* 556

25. Under statute and rules of court consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. *Hartman v. Hartmann* 565

26. In a case where the verdict is the only one which the evidence or lack of evidence will support the giving of erroneous instructions will not be held to be prejudicial error. *In re Estate of Drake* 568

27. In a will contest on the ground of undue influence which has been submitted to a jury on conflicting evidence on that issue the verdict of a jury finding that the will was procured by undue influence will not be disturbed on appeal unless it may be said

that there was no competent evidence to sustain it. *In re Estate of Farr* 615

28. Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed. *Dryden & Jensen v. Mach* 629

29. The Supreme Court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions. *Dryden & Jensen v. Mach* 629

30. The statement of errors required by new bill of exceptions statute contemplates a more specific designation than that required in a motion for a new trial. An assignment of errors, such as is required to be set out in an appellant's brief on appeal to the Supreme Court, more nearly represents the intent and purpose of this section of the statute. *Guyette v. Schmer* 659

31. Ordinarily a violation of the requirement of the statute as to the serving and filing of a statement of errors to be relied upon on appeal can be protected against in the manner provided in the statute itself; that is, by designating such additional witnesses, exhibits, and trial proceedings as the situation may require. *Guyette v. Schmer* 659

32. The judgment or final order appealed from will not be affirmed for a failure to serve and file the required statement of errors unless such failure is shown to have prejudiced the rights of the appellee. *Guyette v. Schmer* 659

33. It is error for trial court to fail to instruct on issue of contributory negligence when raised by the pleadings and supported by the evidence. *Fimple v. Archer Ballroom Co.* 681

34. When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them though expressed in language different from that used by the court. *Fimple v. Archer Ballroom Co.* 681

35. Instructions are to be considered together to the end that they may be properly understood and, when

so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same. *Fimple v. Archer Ballroom Co.* 681

36. Whether the decision in the trial court was to grant a new trial or deny one, the questions in Supreme Court are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining. *Greenberg v. Fireman's Fund Ins. Co.* 695

37. Rules of law will be applied to those assignments of error in Supreme Court with the same requirements whether the decision granted or denied a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

38. An order granting a new trial will be scrutinized in Supreme Court with the same care as one denying a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

39. In consideration of motions for new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. *Greenberg v. Fireman's Fund Ins. Co.* 695

40. If the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant in Supreme Court to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment. *Greenberg v. Fireman's Fund Ins. Co.* 695

41. If the trial court gave no reasons for its decision in granting a new trial, the appellant meets the duty placed upon him when he brings the record to the Supreme Court with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting

those contentions. *Greenberg v. Fireman's Fund Ins. Co.* 695

42. Alleged errors in ruling on motion for new trial will be considered and determined in Supreme Court so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned. *Greenberg v. Fireman's Fund Ins. Co.* 695

43. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule applies to the district court when reviewing its own proceedings on motion for a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

44. The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of Supreme Court. *Bastian v. Weber* 709

45. A correct decision of the district court will not be disturbed on appeal because the court gave a wrong or insufficient reason therefor. *Bastian v. Weber* 709

46. The rule that a correct decision will not be disturbed because a wrong reason was given has no application where it is the decision that is attacked as distinguished from the reason given for the decision. *Bastian v. Weber* 709

47. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. *Knihal v. State* 771

48. In the absence of a bill of exceptions and a motion for a new trial a judgment will be affirmed where the pleadings state a cause of action or defense and support the judgment rendered. *Mantell v. Jones* 785
McQueen v. Jones 853

49. In a hearing in the district court on appeal from a determination of an appeal tribunal set up under the provisions of the Placement and Unemployment Insurance Law, the trial is required to be de novo, or in other words anew. *Beecham v. Falstaff Brewing Corporation* 792

50. In appellate proceedings the examination of the Supreme Court, whether on appeal or writ of error, will be confined to questions determined by the trial court. *Edgerton v. Hamilton County* 821

51. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be

drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong. *Rueger v. Hawks* 834

52. Where the trial court admits evidence over objection, on the promise of counsel that he will make it competent by the introduction of connecting evidence, or where it conditionally sustains or overrules an objection to the introduction of evidence because it is unable to decide the question of its competency at the time, and no further ruling is requested or made, the question of the competency of the evidence cannot be raised on appeal. *Rueger v. Hawks* 834

53. A verdict of a jury may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Rueger v. Hawks* 834

54. While the Supreme Court is obliged in an equity action to try the issues of fact de novo upon the evidence and reach an independent conclusion with reference to the findings of the district court, yet when the testimony of witnesses upon the material issues involved is in irreconcilable conflict, the appellate court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. *Kuenzli v. Kuenzli* 855

55. Damages sustained by a landowner for right-of-way condemned is a question to be determined by a jury, and the Supreme Court will not ordinarily disturb the verdict if it is based upon the evidence in the case. *Little v. Loup River Public Power District* 864

56. Errors assigned but not discussed will not be considered by the Supreme Court. *Little v. Loup River Public Power District* 864

Appearances.

1. A party may raise the question of jurisdiction over his person for the first time in his answer. If instead of answering he files a motion attacking the petition, he thereby waives the question of jurisdiction over his person. *Rueger v. Hawks* 834

2. Where a party files a motion attacking the petition instead of answering and obtains some relief thereby, and subsequently answers the petition not raising

the question of the jurisdiction of the court over his person, he cannot afterwards make such defense in an amended answer. *Rueger v. Hawks* 834

Attorney and Client.

1. When a lawyer becomes a witness for his client, except as to merely formal matters, he should leave the trial of the case to other counsel. *McCormick v. McCormick* 192
2. It is unethical for attorney to both try cause and testify as witness. *McCormick v. McCormick* 192
3. It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case to accept the retainer as lawyer in that case. And where, after retainer, it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether or not he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation. *In re Estate of Wiley* 898

Automobiles.

1. Generally it is negligence as a matter of law for a motorist to drive an automobile at night so fast that he cannot stop in time to avoid collision with an object within the area lighted by the headlights of the motor vehicle. To this general rule there are well-established exceptions. *Floyd v. Edwards* 41
2. Driver of automobile must exercise reasonable care in its operation. Where pedestrians are numerous and traffic congested, the degree of care must be commensurate with the danger reasonably to be anticipated. *Johnson v. Griepenstroh* 126
3. While pedestrian must look to the right and left in crossing an intersection, he has no duty to maintain a lookout to the rear. *Johnson v. Griepenstroh* 126
4. Where an occupant of a motor vehicle is engaged in a common or joint enterprise with the driver and has an equal right to direct and control the operation of the vehicle, the contributory negligence of the driver is imputable to the occupant. This is so although one takes no actual control while the other is driving. *Remmenga v. Selk* 401
5. To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest

in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle. *Remmenga v. Selk* 401

6. A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances. *Remmenga v. Selk* 401

7. A violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence that may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Remmenga v. Selk* 401

8. It is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights. *Remmenga v. Selk* 401

9. Where there is other evidence in the record sufficient to sustain the finding by a jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been met in all respects. *Koutsky v. Grabowski* 508

10. Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony. *Koutsky v. Grabowski* 508
Kraft v. Wert 719

11. A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same. *Koutsky v. Grabowski* 508

12. When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility. *Vaca v. State* 516

13. A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent of him to proceed into the intersection. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

14. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

15. A corporation is liable for the negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

16. A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in employer's or principal's business with his knowledge and direction. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

17. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Kraft v. Wert* 719

18. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Kraft v. Wert* 719

19. When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he

fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. *Kraft v. Wert* 719

Bailments.

1. The general rules of bailment apply to aircraft. *Fuelberth v. Splittgerber* 309
2. Where recovery upon a contract of bailment is sought the burden is upon the party who seeks recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated. *Fuelberth v. Splittgerber* 309
3. If bailor's action is to recover for the bailee's failure to exercise the required care, whereby the property became injured, the burden is on bailor to prove negligence. *Fuelberth v. Splittgerber* 309
4. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence. *Fuelberth v. Splittgerber* 309
5. A bailee for hire has the duty to exercise due care to prevent damage to bailor's property, and if he fails to exercise due care he is liable for any damage resulting by reason of such failure. *Fuelberth v. Splittgerber* 309

Banks and Banking.

1. Whether there was an agreement that a bank should not be a mere agent of the depositor for collection within the Bank Collection Code depends upon the intention of the parties which may be gathered from the form of the endorsements on the paper itself, the right accorded the depositor to draw unrestrictedly upon the funds credited to him in advance of collection, and the general course of dealing between the bank and the depositor. *Western Smelting & Refining Co. v. First Nat. Bank* 477
2. A printed provision on a bank deposit book or deposit slip, stating that all items are accepted for collection only, is not controlling, since such provision is subject to a contrary agreement between the parties as evidenced by their conduct, and being solely for the

benefit of the bank, may be waived by it. *Western Smelting & Refining Co. v. First Nat. Bank* 477

3. Under the Bank Collection Code when any bank allows any revocable credit for an item to be withdrawn, the agency relation of the bank to its depositor continues except that the bank has all the rights of an owner thereof against prior and subsequent parties, to the extent of the amount withdrawn. *Western Smelting & Refining Co. v. First Nat. Bank* 477

Carriers.

1. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest, and will be authorized only for compelling reasons. *In re Application of Effenberger* 13
2. Where an established common carrier is ready, willing, and able to furnish adequate service, an order denying a certificate of convenience and necessity to a new competing carrier is not arbitrary. *In re Application of Effenberger* 13
3. Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *In re Application of Meyer* 455
4. A certificate of public convenience and necessity issued to a carrier is not property in any legal sense, but is simply a permit or license to do business as therein limited. The Nebraska State Railway Commission has the sole power in this state to grant or amend such a certificate. *In re Application of Meyer* 455

Conflict of Laws.

In the absence of pleading and proof to the contrary Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law. *In re Estate of Wiley* 898

Constitutional Law.

1. The word "appoint" used in article II, section 1, of the Constitution of the United States grants to the Legislature the broadest power of determination. *State ex rel. Beeson v. Marsh* 233
2. The words "in such Manner as the Legislature thereof may direct" in article II, section 1, of the Con-

stitution of the United States operate as a limitation upon the state in respect of any attempt to circumscribe the legislative power. *State ex rel. Beeson v. Marsh* 233

3. In testing police power regulations, the court should inquire whether they have some relation to the public health, safety, or welfare, and whether such is in fact the end sought to be attained. *Clough v. North Central Gas Co.* 418

4. The prohibition contained in constitutional provisions against impairing the obligation of contracts is not an absolute one, is not to be read with literal exactness like a mathematical formula, and does not prevent a city of the second class from imposing regulations governing a gas company furnishing its product to the city's inhabitants where such regulation is not unreasonable and arbitrary and does not take such company's property without due process of law. *Clough v. North Central Gas Co.* 418

5. The Legislature may not validly in a regulatory act under the police power invade the right of contract, impair rights of property, or restrict the courts in the consideration of evidence and the determination of title and ownership of property and contractual rights and obligations. *Snyder v. Lincoln* 580

6. Mere difficulty of application in the processes of litigation is not enough to enable a court to say that a statute is unconstitutional. *Hill v. Kusy* 653

7. In the exercise of and within the limits of its police power, the Legislature may forbid that which it deems to be an existing evil and it may limit its prohibitions to the matters which in its judgment menace the public welfare. *Hill v. Kusy* 653

8. An act of the Legislature declaring a prima facie case or a statutory presumption of guilt of a defined criminal offense upon proof of certain facts is valid and not subject to attack on constitutional grounds if in the light of the common circumstances and experiences of life there is a rational connection between the facts thus to be proved and the ultimate fact to be presumed. *Mantell v. Jones* 785

Contracts.

1. In a broad sense a contract is an agreement, obligation, or legal tie whereby a party binds himself, or becomes bound, expressly or impliedly, to pay a sum

of money, or to perform or omit to do some certain act or thing. *McNally v. Ponce* 267

2. In order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement. *Bastian v. Weber* 709

Costs.

1. In a suit to quiet title in persons claiming adverse possession to specific real property, the costs follow the judgment. *Hallowell v. Borchers* 322
2. If on appeal from an award in condemnation proceedings to obtain a public highway, the amount recovered is less than the amount awarded by the appraisers, the owner of the property condemned is liable for all costs in the district court. *Kennedy v. Department of Roads and Irrigation* 727

Counties.

1. The statutory requirement that claims against a county shall be filed with the county clerk within ninety days attaches only to claims ex contractu. *McCollough v. County of Douglas* 389
2. The board of county commissioners acts quasi judicially in passing upon claims against the county when their action is not a mere formal requisite to the issuance of a warrant, but involves the determination of questions of fact on evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed. *McCollough v. County of Douglas* 389

Courts.

1. Federal question is not presented by assertion of insufficiency of information to charge offense under state law. *Anderson v. State* 116
2. County court has jurisdiction to construe will when necessary for benefit of executor in carrying out the terms of the will, but not for the purpose of determining the rights of devisees or legatees as between themselves. *Jones v. Shrigley* 137
3. Construction of will by county court will not affect controversies between adverse claimants under a devise or bequest. *Jones v. Shrigley* 137

Criminal Law.

1. Morality may have direct connection with veracity when one person charges another with a sex crime. *Redmon v. State* 62
2. Great latitude should be allowed in the cross-examination of a prosecuting witness to a sex offense. *Redmon v. State* 62
3. Where evidence is lacking as a matter of law in probative force to support a finding of guilt beyond a reasonable doubt, the defendant is entitled to be discharged. *Fielder v. State* 80
4. Evidence to rebut or disprove statements as to material facts, made by defendant on direct examination, is admissible. *Anderson v. State* 116
5. A preliminary hearing before a magistrate is a right to which one charged with an offense triable to a jury in the district court is entitled but it is a right which may be waived by the person charged. *Wilson v. State* 436
6. An objection after verdict that a preliminary examination has not been had comes too late to be considered by the Supreme Court. *Wilson v. State* 436
7. An objection that no preliminary examination was had must be raised by motion to quash the information or by plea in abatement before going to trial in order to be available for review. *Wilson v. State* 436
8. A conviction of a criminal offense may rest upon the testimony of an accomplice where, considered with all the evidence, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Wilson v. State* 436
9. It is not reversible error, in the absence of a showing that the defendant was prejudiced thereby, to sentence a defendant after verdict and before the motion for a new trial has been overruled. *Stapleman v. State* 460
10. A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as charged. It is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon. *Clark v. State* 494
11. A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of

which it is competent and relevant for a witness to give a verbal description. *Vaca v. State* 516

12. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Vaca v. State* 516

13. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon. *Vaca v. State* 516

14. The Supreme Court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it can be said, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Vaca v. State* 516

15. It is better practice for the trial court in its instructions to state in concise and informal language the material elements which must be proved beyond a reasonable doubt to authorize conviction of an offense, rather than to copy the information verbatim in the instructions, but it is not reversible error to do so unless the information contains some allegation prejudicial to defendant. *Frank v. State* 745

16. A prosecuting attorney in a criminal case is a competent witness, but his function as prosecutor and as a witness must be disassociated. Therefore, if it is discovered before trial that he is a necessary witness, he should withdraw from any active participation as attorney and have other counsel prosecute the case. *Frank v. State* 745

17. It is improper in a criminal prosecution for the court to allow one who testifies as a witness to the principal facts to also as attorney conduct the trial in the examination of witnesses or argument to the jury, or to conduct himself in any manner inconsistent with his position as a witness or his interest as an officer of the state. *Frank v. State* 745

18. When a prosecuting attorney becomes a witness, whether or not he conducts himself in a manner consistent with his position as a witness or his interest as an officer of the state is primarily a question for the trial court to decide, but defendant has the right by competent evidence to appropriately have the

record disclose the facts and circumstances relating thereto. *Frank v. State* 745

19. In cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and the accused is not restricted to proof of general reputation of prosecutrix for truth and veracity, but may adduce direct evidence of the general reputation of such witness for morality and may also adduce direct evidence not too remote in time of specific immoral or unchaste acts and conduct by her with others. *Frank v. State* 745

20. Evidence of immorality of a prosecutrix is admissible not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony but also as inferring the probability of consent, and to discredit her testimony relating to force and violence used by defendant in accomplishing his purpose and claimed resistance thereto by prosecutrix. *Frank v. State* 745

21. Ordinarily, it is prejudicial error for the trial court to instruct the jury in a criminal case that they should not reject the testimony of any witness unless they first find it irreconcilable with other testimony which they find to be true, because when applied to the state's witnesses, the rule imposes a burden upon a defendant which he is not required to assume. *Frank v. State* 745

22. An instruction in a criminal case that "You have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," is erroneous. *Knihal v. State* 771

23. A prima facie case is one which is established by sufficient evidence to require evidence to be adduced on the other side to overthrow it. *Mantell v. Jones* 785

24. In a criminal action a prima facie case is made when sufficient facts have been adduced to entitle the State to have the case go to a jury. *Mantell v. Jones* 785

Damages.

1. Where allegations of fact in petition show that plaintiff is entitled to damages of some sort, it is not a bar to recovery that pleader has mistaken the rule by which such damages should be measured. *Rothery v. Pounds* 25

2. Where property attached to realty is damaged, re-

moved or destroyed, and is capable of being replaced at a cost capable of reasonable ascertainment, measure of damages is the reasonable cost of repairing or replacing in like kind and quality. *Williams v. Beckmark* 100

3. The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury. The Supreme Court will not ordinarily interfere with the verdict if it is based upon the testimony. *Kennedy v. Department of Roads and Irrigation* 727

Death.

A presumption of death arises from continued and unexplained absence of a person for seven years, where nothing has been heard from or concerning him by those who would naturally do so. *Patrick v. Union Central Life Ins. Co.* 201

Deeds.

Court should not set aside disposition of property made by deed without good reasons, based upon clear, convincing, and satisfactory proof. *McCormick v. McCormick* 192

Depositions.

Admission contained in deposition of party taken before trial is not ordinarily conclusive, but it is admissible as evidence in contradiction and impeachment of his present claim and evidence given at trial. *Kipf v. Bitner* 155

Divorce.

1. A judgment in a default divorce action affecting the custody of children, where there was no appearance by the defendant who was served by personal service in another state where she and her children are domiciled, is subject to collateral attack by habeas corpus. *Hanson v. Hanson* 337
2. Court granting divorce decree on constructive service against nonresident defendant is without jurisdiction to fix the custody of the parties' minor children who were not living within the state where the divorce proceedings were instituted. *Hanson v. Hanson* 337
3. In a divorce case it is generally the best policy

to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child. *Syas v. Syas* 533

4. Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action. *Bath v. Bath* 591

Domicile.

Children domiciled with their mother in another state, temporarily visiting or residing in this state and not acquiring a residence herein, may be subjects of a habeas corpus proceeding to determine their custody. *Hanson v. Hanson* 337

Elections.

1. Presidential electors need not be elected by popular vote or voted for on a general ticket. *State ex rel. Beeson v. Marsh* 233
2. The Constitution of the United States leaves it to the Legislature exclusively to define the method of effecting the appointment of presidential electors. *State ex rel. Beeson v. Marsh* 233
3. The manner of the appointment of presidential electors contemplates (1) the creation and existence of political parties in this state, (2) the nomination by such parties of presidential electors, (3) the placing of the names of candidates for President and Vice President of such parties on the ballot with the party designation of each, and (4) the counting of the ballots cast for President and Vice President for the electors of the party. *State ex rel. Beeson v. Marsh* 233
4. The filing of a certificate of nomination of candidates for President and Vice President by the officers of a national convention of a political party is not alone sufficient to entitle its nominees to a place on the ballot in this state. *State ex rel. Beeson v. Marsh* 233

Eminent Domain.

1. The proper procedure in a condemnation action, where an appeal is taken from the award and the

case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in their verdict. *Webber v. City of Scottsbluff* 446

2. The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury. The Supreme Court will not ordinarily interfere with the verdict if it is based upon the testimony. *Kennedy v. Department of Roads and Irrigation* 727

3. If on appeal from an award in condemnation the amount recovered exceeds the amount awarded by the appraisers, the owner of the property condemned may have interest from the time of the taking, but if the condemner deposits with the county judge the amount of the award for the use of the owner before going into possession of the premises, and if by the appeal the amount of the award is not increased, the owner may recover interest on the judgment entered on appeal only from the date of the rendition thereof. *Kennedy v. Department of Roads and Irrigation* 727

4. If on appeal from an award in condemnation proceedings to obtain a public highway, the amount recovered is less than the amount awarded by the appraisers, the owner of the property condemned is liable for all costs in the district court. *Kennedy v. Department of Roads and Irrigation* 727

5. An unaccepted proposal in an application for condemnation of an easement right-of-way that condemner obligates itself to pay future crop damages caused by the maintenance, repair, or rebuilding of the improvement on the easement is not an agreement and is not binding on the condemnee. *Little v. Loup River Public Power District* 864

6. The condemner in the absence of an agreement between the parties must take the rights he appropriates unconditionally and must make full compensation to the condemnee for what he takes. *Little v. Loup River Public Power District* 864

7. Proprietary rights reserved to the landowner must be distinguished from unaccepted promises of the condemner to do something in the future for the benefit of the owner of the land affected by the condemnation. *Little v. Loup River Public Power District* 864

8. A landowner is assured by the Constitution of the state recovery in one action of the whole damage sustained by him because of the taking of his property by the power of eminent domain. *Little v. Loup River Public Power District* 864
9. When property is taken by the power of eminent domain the compensation of the owner is determined on the basis of the actual legal rights acquired by the condemner and not by the use he may make of them. *Little v. Loup River Public Power District* 864
10. Damages sustained by a landowner for right-of-way condemned is a question to be determined by a jury, and the Supreme Court will not ordinarily disturb the verdict if it is based upon the evidence in the case. *Little v. Loup River Public Power District* 864

Equity.

1. Prayer for general relief is sufficient to authorize any judgment to which parties are entitled under the pleadings and evidence. *McCormick v. McCormick* 192
2. While the Supreme Court is obliged in an equity action to try the issues of fact de novo upon the evidence and reach an independent conclusion with reference to the findings of the district court, yet when the testimony of witnesses upon the material issues involved is in irreconcilable conflict, the appellate court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. *Kuenzli v. Kuenzli* 855
3. Whether or not interests in land are equitably converted into personal property by dealings with the land depends upon the law of the state where the land is. *In re Estate of Wiley* 898

Estates.

1. Power granted by will to life tenant to dispose of fee title does not of itself enlarge the beneficial estate to a fee. *Jones v. Shrigley* 137
2. Where a conveyance creates a life estate and two future interests, only one of which can become a present interest, the estate which follows the life interest is an alternative vested remainder subject to defeasance in accordance with the terms of the will. *Jones v. Shrigley* 137

Estoppel.

1. The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss, must sustain it, if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment. *Snyder v. Lincoln* 580
2. Estoppel has no application in cases where the wrong was accomplished through the instrumentality of a criminal act, it being held in such cases that the crime, and not the negligent act, was the proximate cause of the injury. *Snyder v. Lincoln* 580
3. To constitute an equitable estoppel, there must exist a false representation or concealment of material facts, with actual or constructive knowledge by the party against whom estoppel is claimed, without knowledge or means of knowledge by the party to or from whom made, and reliance thereon by the party to or from whom made to his prejudice. *Bastian v. Weber* 709
4. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, mend his hold, and put his conduct upon another and a different consideration. *Brown v. Security Mutual Life Ins. Co.* 811

Evidence.

1. Evidence to rebut or disprove statements as to material facts, made by defendant on direct examination, is admissible. *Anderson v. State* 116
2. Testimony is admissible of a conversation between witness and defendant, even though witness had at some time read a memorandum of the conversation made by another which he knew to be correct. *Anderson v. State* 116
3. Inconsistent averments of superseded pleading may be offered in evidence as an admission of the litigant contrary to the claim in his amended pleading. *Johnson v. Griepenstroh* 126
4. Superseded pleading received in evidence as an admission against interest is not conclusive, but should be given such weight as trier of fact deems it entitled in the light of pleader's explanation of the circumstance under which the admission was made. *Johnson v. Griepenstroh* 126

5. An offer of compromise thereof is incompetent as evidence in an action subsequently instituted to enforce a claim. *O'Hare v. Peterson* 151
6. Statements made prior to trial by a party inconsistent to the facts alleged or testified to by such party constitute admissions against interest and are admissible. *O'Hare v. Peterson* 151
7. Admissions are concessions or voluntary acknowledgments made by a party to an action, and are ordinarily classified as judicial and extrajudicial. *Kipf v. Bitner* 155
8. An extrajudicial admission is an item of evidence along with other evidence adduced during the trial, received in contradiction and impeachment of the present claim and other evidence of the party making the admission. *Kipf v. Bitner* 155
9. In the absence of estoppel, an extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made. *Kipf v. Bitner* 155
10. Facts and circumstances which are the basis of a presumption are what the jury consider, not the presumption as such. *Patrick v. Union Central Life Ins. Co.* 201
11. Although presumption as such disappears from case when substantial countervailing evidence is produced, facts and circumstances which give rise to it remain and afford basis for like inference by trier of fact. *Patrick v. Union Central Life Ins. Co.* 201
12. Error cannot be predicated on the admission of certain testimony when ample testimony of the same nature was admitted without objection. *In re Estate of Kaiser* 295
13. If, when evidence is offered, the other party consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, he waives whatever objection he may have had thereto. *In re Estate of Kaiser* 295
14. A party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. *Trask v. Klein* 316
15. Where evidence offered by a party is contradicted, either expressly or by inference, by other evidence which would justify the trier of facts in arriving at a different conclusion, the party offering it is not ordinarily concluded thereby. *Trask v. Klein* 316

16. Opinion testimony as to value is not conclusive, although when uncontradicted it may be regarded by the jury as sufficient proof of the fact sought to be established. *Trask v. Klein* 316
17. Where the record of the passage of an ordinance has been lost or destroyed, proof of the publication thereof sworn to by the publisher of the newspaper in which such publication was printed constitutes sufficient secondary evidence to prove the existence and publication of the ordinance. *Clough v. North Central Gas Co.* 418
18. Where the nonexistence of an ordinance is proved by one who has made search therefor, and a copy of the original ordinance is found among the city records, such copy, when it is shown to have been published as required by law, is admissible with reference to the contents of the original ordinance as secondary evidence. *Clough v. North Central Gas Co.* 418
19. Testimony referring to prior gas leaks and repairs which appears to be introduced solely to establish that the gas company employees who performed the work in such respect were its authorized agents to receive notice of such defects and to make repairs for the company, and where it is apparent that such evidence is not offered to show prior negligence of the company, is properly admissible in evidence to show that the company had notice of leakage of gas in its consumer's lines. *Clough v. North Central Gas Co.* 418
20. It is the province of the jury to harmonize the testimony insofar as that is possible and, in case of conflict, to decide as to the weight to be given the testimony of the various witnesses. *Webber v. City of Scottsbluff* 446
21. Errors, if any, in receiving incompetent evidence are waived unless timely objection is made thereto when the evidence is offered. *Stapleman v. State* 460
22. Where there is other evidence in the record sufficient to sustain the finding by a jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been met in all respects. *Koutsky v. Grabowski* 508
23. Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give

an estimate. The opportunity and extent of his observation goes to the weight of the testimony. *Koutsky v. Grabowski* 508

24. A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same. *Koutsky v. Grabowski* 508

25. A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Vaca v. State* 516

26. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Vaca v. State* 516

27. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon. *Vaca v. State* 516

28. A presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it. When evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the determination of the issues depends upon the evidence with the requirement of civil actions that the party having the affirmative in order to succeed shall sustain his position by a preponderance of the evidence. *In re Estate of Drake* 568

29. The declaration of a person which is merely a narrative of a past transaction, made after the transaction to which it relates has been fully completed and shown not to have been spontaneously or involuntarily made, is not admissible in evidence as a part of the res gestae. *Muff v. Brainard* 650

30. Hearsay evidence which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. *Muff v. Brainard* 650

31. A photograph, when offered in evidence as proving

a thing to be as represented in the picture, is not admissible as original or substantive evidence. *Knihal v. State* 771

32. To be admissible a photograph must be verified by a witness or witnesses whose testimony it serves to explain or illustrate. *Knihal v. State* 771

33. An instrument otherwise admissible which comes from proper custody and appears valid on its face and which is more than thirty years old, the authenticity of which has not been brought into question, may be received in evidence without further identification under the "ancient document" rule. *Anderson v. Anderson* 879

34. The "ancient document" rule is not applicable to inauthentic copies of original instruments. *Anderson v. Anderson* 879

Executors and Administrators.

1. County courts have the power to require executors and administrators to exhibit and settle their accounts, to account for all assets of the estate that have come into their possession, and to hold them liable for the actual value of any property which they have unlawfully appropriated to their own use. *In re Estate of Wiley* 898

2. County courts, in carrying out their exclusive original jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. *In re Estate of Wiley* 898

3. County courts should compel the representatives of estates to charge themselves with interest in their account when, by doing some unauthorized act, they have abused their trust or have been guilty of some fault or wrong in its performance and are surcharged because thereof. Interest should be upon the amount so surcharged at the legal rate from the date of such unauthorized act. *In re Estate of Wiley* 898

Forcible Entry and Detainer.

In an action of forcible detainer the plea of not guilty requires the plaintiff to prove every fact necessary to entitle him to recover. *Myers v. Willmeroth* 416

Fraud.

1. The measure of general damages for fraud in in-

ducing the sale of property is the difference between actual value of the property at time of sale and the represented value. *Rothery v. Pounds* 25

2. A principal is liable for representations made by an agent if he intends that the agent shall make representations or should know that the agent will do so. *Wolford v. Freeman* 537

3. If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation. *Wolford v. Freeman* 537

4. As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud. *Wolford v. Freeman* 537

5. Where facts are known by the vendor that are not within reach of the reasonably diligent attention, observation, and judgment of the vendor, and are such as would readily mislead the purchaser as to the true condition of property, the vendor is bound to disclose such facts. *Wolford v. Freeman* 537

6. A contract procured by the intentional suppression or concealment of material facts touching the very substance of it by one party, which facts, if they had been disclosed, would have prevented the other party from entering into it, may be rescinded by the party deceived, and the guilty party is not entitled to its enforcement. *Wolford v. Freeman* 537

7. Whenever suppressio veri or suggestio falsi occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance. *Wolford v. Freeman* 537

8. To maintain an action for damages for false representation the plaintiff must allege and prove (1) what representation was made; (2) that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; (3) that the plaintiff believed the representation to be true; and (4) that he relied on and acted upon it, and was thereby injured. *Mayer v. Homestead Fire Ins. Co.* 556

9. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it, and upon failure to so prove the

party alleging fraud fails. *Mayer v. Homestead Fire Ins. Co.* 556

10. Fraud will not be imputed where circumstances and facts upon which it is based may be consistent with honesty of purpose. *Mayer v. Homestead Fire Ins. Co.* 556

11. In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed. If any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud. It does not devolve upon the party charged with committing the fraud to prove that the transaction was honest. *Mayer v. Homestead Fire Ins. Co.* 556

12. Where the owner of personal property is induced by fraud to part with its possession without intending also to part with the title, the transaction is larceny if the person so receiving the possession without the title has at the time a secret intention of converting it permanently to his own use and does so without the consent of the owner. *Snyder v. Lincoln* 580

13. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence. *Snyder v. Lincoln* 580

Frauds, Statute of.

1. Oral contract for sale of real estate, to be enforced in equity, must be shown to be clear, satisfactory, and unequivocal in terms, and when these elements are satisfied may be established by a preponderance of the evidence. *Riley v. Riley* 176

2. Party seeking to enforce in equity oral contract for sale of real estate has burden of showing that he performed the burdens imposed on him by the contract. *Riley v. Riley* 176

3. To enforce in equity an oral contract for conveyance of real estate, party must show that acts of part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract. *Riley v. Riley* 176

4. To remove oral contract for conveyance of real estate from operation of statute of frauds, proof

must be made of a contract which is clear, satisfactory, and unequivocal in its terms. *Riley v. Riley* 176

5. All acts of performance must be considered as a whole in the light of all relevant facts and circumstances in determining whether or not acts of part performance are referable to the contract sought to be enforced. *Riley v. Riley* 176

6. Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. *Lunkwitz v. Guffey* 247

7. Oral contracts to convey real estate are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. *Lunkwitz v. Guffey* 247

8. Where part performance is relied upon, the thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him. *Lunkwitz v. Guffey* 247

9. To enforce an oral contract to convey real estate, the burden rests upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Lunkwitz v. Guffey* 247

10. Each case is to be determined from the facts, circumstances, and conditions as presented therein. *Lunkwitz v. Guffey* 247

11. Where an attempt is made to enforce an oral promise the purpose of which is to establish an interest in land the attempt is to establish an oral trust in real estate and it must fail, since such a promise is void under the statute of frauds. *Anderson v. Anderson* 879

12. Courts of equity are empowered to compel specific performance of oral contracts for conveyances of real estate declared void by the statute of frauds

in cases where there has been part performance. *Anderson v. Anderson* 879

13. A party seeking specific performance of an oral contract within the statute of frauds must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, (2) part performance, referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further (3) that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. *Anderson v. Anderson* 879

Garnishment.

1. An action prosecuted under statute which directs the procedure to be followed in order to obtain ultimate relief in attachment and garnishment is a special proceeding. *Western Smelting & Refining Co. v. First Nat. Bank* 477
2. In an action against garnishee for unsatisfactory disclosure, failure of plaintiff to prove that the original answer of the garnishee was incomplete or false will not defeat the action against him if he has money or property of defendant in attachment in his possession, but does relieve him of liability for costs. *Western Smelting & Refining Co. v. First Nat. Bank* 477
3. A garnishee owes the duty to act in good faith and answer fully and truthfully all proper questions or interrogatories propounded to him, or in some appropriate manner to make proper disclosure of all relevant facts within his knowledge at the time of making answer concerning his present indebtedness to the debtor or concerning money or property of the debtor then in his possession. *Western Smelting & Refining Co. v. First Nat. Bank* 477
4. In an action against garnishee for unsatisfactory disclosure, the burden of proof is generally determined, as in other civil actions, from the issues presented by the pleadings. *Western Smelting & Refining Co. v. First Nat. Bank* 477
5. When the garnishee's original answer in garnishment is traversed, the burden is upon plaintiff to prove by a preponderance of the evidence that such answer was false or incomplete, in order to recover costs, and that there was property or credits, and the amount thereof, in the possession of the

garnishee in order to recover on the merits. *Western Smelting & Refining Co. v. First Nat. Bank* 477

Gas.

1. When a city of the second class by ordinance grants to a gas company the right to supply gas to its inhabitants and to use the streets, alleys, and public ways of such city, the ordinance is a franchise, and after its acceptance by the company, or by performance of the company in compliance therewith, it becomes a contract between the city and the company. *Clough v. North Central Gas Co.* 418
2. Natural gas belongs to the company which dispenses it until it is sold through the meter to the consumer. *Clough v. North Central Gas Co.* 418
3. A corporation like a gas company, dependent for the conduct of its business upon a license to use in part the streets, alleys, and public ways of a city of the second class, which are acquired avowedly for public use, is affected with a public interest for the reason that its business is public. *Clough v. North Central Gas Co.* 418
4. A city of the second class, as a means of protecting its inhabitants, may establish and enforce regulations that are not inconsistent with the essential rights granted by a franchise to a gas company. *Clough v. North Central Gas Co.* 418
5. A city of the second class may enact ordinances to protect the public from the dangers resulting from the use of natural gas by imposing certain obligations upon the company furnishing such product. *Clough v. North Central Gas Co.* 418
6. The power to regulate the use of streets, alleys, and public places of a city of the second class by a gas company is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent to use such streets, alleys, and public ways. It is a continuing power, and cannot be bargained away or parted with otherwise. *Clough v. North Central Gas Co.* 418
7. The legal duty of a gas company to third persons, in reference to the escape of gas from service pipes owned and controlled by others on private property, does not extend to making inspection of said service pipes, unless the company knew or should have known of a probable defective condition in such pipes, or unless the company is bound by contract,

franchise, or custom to make such inspection. *Clough v. North Central Gas Co.* 418

8. Where a public utility company engaged in the business of furnishing gas to its customers knows or should know that a service line owned by a customer is corroded to such an extent as to permit gas to escape, it is its duty either to cause the service line to be repaired by the customer, or to have the gas shut off at the street where the main is that furnishes the gas to the customer, in order to avoid the danger which might result. *Clough v. North Central Gas Co.* 418

9. Where the evidence discloses that the duly appointed agent of a gas company was charged with knowledge that gas transported through its pipes into a service line was leaking, the question as to whether or not the gas company had exercised such a degree of care and caution as was commensurate with the known danger of natural gas constitutes an issue of fact which under proper instructions should be submitted to a jury. *Clough v. North Central Gas Co.* 418

10. Testimony referring to prior gas leaks and repairs which appears to be introduced solely to establish that the gas company employees who performed the work in such respect were its authorized agents to receive notice of such defects and to make repairs for the company, and where it is apparent that such evidence is not offered to show prior negligence of the company, is properly admissible in evidence to show that the company had notice of leakage of gas in its consumer's lines. *Clough v. North Central Gas Co.* 418

Habeas Corpus.

1. Habeas corpus is a proper remedy to determine the controversy concerning the rights of custody of infants. *Hanson v. Hanson* 337

2. In a habeas corpus action involving the custody of children, the case stands before a district judge as if there had been no former decree and the matter was before him to determine as to what would be to the best interest of the children. *Hanson v. Hanson* 337

3. Children domiciled with their mother in another state, temporarily visiting or residing in this state and not acquiring a residence herein, may be sub-

jects of a habeas corpus proceeding to determine their custody. *Hanson v. Hanson* 337

4. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. *In re Application of Robinson* 443

5. Habeas corpus is a writ of right but not a writ of course, and probable cause must first be shown for its allowance, which rightly prevents the writ from being trifled with by those who manifestly have no right to be at liberty. *In re Application of Dunn* 669

6. In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine questions of fact presented. If relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied. *In re Application of Dunn* 669

7. The sufficiency of the allegations of relator's petition to support a writ of habeas corpus allowed by virtue thereof may be questioned before making return thereto by a motion to dissolve or quash the writ. *In re Application of Dunn* 669

8. Motion to quash writ of habeas corpus admits all ultimate facts well pleaded in relator's petition, as distinguished from conclusions of law therein, and when thus tested it is ascertained that the allegations thereof are not sufficient to warrant discharge, the motion should be sustained and the writ dissolved or quashed. *In re Application of Dunn* 669

9. The sole issue ordinarily presented upon an application for a writ of habeas corpus by a prisoner held pursuant to judgment, sentence, and commitment in a criminal case, is the validity of the judgment, sentence, and commitment involved therein. *In re Application of Dunn* 669

10. In the absence of a special statute authorizing it, habeas corpus is not available as a remedy for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in a proper or authorized jail or prison

under a valid existent and enforceable judgment, sentence, and commitment. *In re Application of Dunn* 669

11. A person convicted under statute prohibiting escape from custody is not entitled to the issuance of a writ of habeas corpus on a petition alleging that he broke custody and escaped jail for the reason that he was awaiting trial on a charge of burglary which he alleged was illegal, and which was subsequently dismissed. *Goedert v. Jones* 783
12. If the facts set forth in a petition for writ of habeas corpus disclose the relator is not entitled to relief, then the writ should be denied. *Goedert v. Jones* 783

Highways.

1. The term "highway" includes every way or place of whatever nature, open to the use of the public as a matter of right, for the purpose of vehicular travel. *Koutsky v. Grabowski* 508
2. Where a public highway joins a dirt road which leads to another highway, the place where the same join constitutes an intersection. *Koutsky v. Grabowski* 508

Homesteads.

1. Oral contracts for conveyance of a homestead are enforceable by specific performance. *Riley v. Riley* 176
2. The words "separate property" in the Homestead Act are used in the sense of an ownership of the homestead property in either the husband or the wife and not in the sense of the character of the title by which the ownership was acquired. *Edgerton v. Hamilton County* 821

Homicide.

1. Where physical facts undisputably demonstrate that act charged as manslaughter was not caused by the defendant, the case should be dismissed and defendant discharged. *Fielder v. State* 80
2. Time and place of death is not essential element of the crime of manslaughter. *Anderson v. State* 116
3. When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is

guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed can be invoked to relieve the former of criminal responsibility. *Vaca v. State* 516

Husband and Wife.

1. By common law and statute, husband is primarily liable for expenses of last illness and burial of wife. *In re Estate of White* 167
2. A married woman may by will impose primary liability on her estate for expenses of last illness and burial, but such testamentary provision cannot be availed of by a husband who elects to take under statute of descent. *In re Estate of White* 167
3. Conveyance of real property by husband to wife raises a rebuttable presumption of gift or settlement rather than of trust. *McCormick v. McCormick* 192

Improvements.

1. Party cannot invoke provisions of Occupying Claimants Act, where all his interests in the improvements have been divested by judicial sale prior to his demand for compensation for their value. *Hammond v. Harrington* 1
2. In absence of express agreement or estoppel, permanent improvements placed upon land by one having no title or interest therein became a part of the realty and belong to owner of the fee, and preclude the right of removal. *Williams v. Beckmark* 100
3. To recover compensation for improvements, three concurrent elements must exist: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession adversely to title of true owner; and (3) possession must have been held under color or claim of title. *Williams v. Beckmark* 100
4. Occupant of land is not entitled to compensation for improvements which he makes after notice or knowledge that his title is defective or of an adverse title or claim to the property in another. *Williams v. Beckmark* 100

Indictments and Informations.

1. The insufficiency of an information to charge an offense under state law does not present a federal question. *Anderson v. State* 116

2. It is improper to charge a defendant with a felony and a misdemeanor in the same information when the lesser charge is not wholly proved by evidence properly introduced in support of the greater. *Stapleman v. State* 460
3. Where an information improperly charges a felony and a misdemeanor, the trial court on motion will require the state to elect. If no motion is made, the objection is waived. *Stapleman v. State* 460
4. Statute which prescribes a short form information for charging the crime of manslaughter is constitutional, and an information drawn in the language of such statute is sufficient to properly charge the crime. *Vaca v. State* 516
5. The information in a criminal case should contain a plain and concise statement of the charge against defendant. Such necessary details may be set out therein, if without prejudice to substantial rights of defendant, as will enable the court to pass upon the question of whether or not it is sufficient to charge a criminal offense, and on the other hand be sufficient to inform defendant of all such facts as will correctly identify the entire transaction for which he is held to answer. *Frank v. State* 745
6. When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements therein, they may be treated as surplusage and be entirely rejected. *Frank v. State* 745

Infants.

1. Habeas corpus is a proper remedy to determine the controversy concerning the rights of custody of infants. *Hanson v. Hanson* 337
2. In a habeas corpus action involving the custody of children, the case stands before a district judge as if there had been no former decree and the matter was before him to determine as to what would be to the best interests of the children. *Hanson v. Hanson* 337
3. Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home. *Hanson v. Hanson* 337
4. Where the evidence shows that the mother had the

custody of such children prior to the time that they were temporarily within this state, and she is not shown to be an improper or unfit person to have such custody, it should not be denied her. *Hanson v. Hanson* 337

5. In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse. *Bath v. Bath* 591

Injunction.

1. Injunction is proper remedy to prevent recurring injury by water unlawfully diverted from a natural watercourse. *Stocker v. Wells* 51
2. Where a dam or dike diverts floodwater from its natural plane, injunction affords proper remedy to relieve from continuing damage from recurring floods which are certain to occur in the future. *Stocker v. Wells* 51
3. When a person has been found to have committed acts in violation of a regulatory law he may be restrained from committing other related acts. *Hill v. Kusy* 653

Insurance.

1. In an action on a policy which provides that the insured should furnish proof of loss within a specified time after the loss accrued, it is necessary for the insured to prove at the trial that this requirement was performed or that it was waived by the insurer. *Morris v. American and Foreign Ins. Co.* 765
2. A fire insurance company waives the right to demand formal proof of loss if, after notice of the loss, it investigates the loss, enters into negotiations with the insured for a settlement thereof, and makes an offer of compromise, even though the negotiations do not result in a disposition of claims of the insured. *Morris v. American and Foreign Ins. Co.* 765
3. A provision in an insurance contract that the insured may apply up to ten percent of the amount of the policy to cover private structures appertaining to and located on the premises described therein means that if the insured suffers damage to or destruction of any such structure on the prem-

ises by any of the causes stated in the policy, he may, at his option, recover therefor in an action on the policy the amount of his actual damage not to exceed in any event ten percent of the amount of the policy. *Morris v. American and Foreign Ins. Co.* 765

4. Valued policy law has no application to a stipulation in an insurance contract that the insured may apply up to ten percent of the amount of the policy to cover private structures appertaining to and located on the premises described therein. *Morris v. American and Foreign Ins. Co.* 765
5. A policy of fire insurance on a dwelling "including building equipment and fixtures," while on the premises, covers a screen door belonging to the house, if located on the premises, though not in use on the house at the time of its damage or destruction by fire. *Morris v. American and Foreign Ins. Co.* 765
6. The language in a fire insurance policy including "outdoor equipment pertaining to the service of the premises," if the property of the owner of the dwelling, while on the premises described in the policy, covers a garden hose and shovel the property of the owner of the premises kept and used thereon. *Morris v. American and Foreign Ins. Co.* 765
7. Failure to give notice of disability under a provision in a life insurance policy waiving premiums during total disability did not invalidate claim where it was shown not to have been reasonably possible to give such notice during the lifetime of the insured and during the period of disability, and that notice was given as soon as was reasonably possible thereafter. *Brown v. Security Mutual Life Ins. Co.* 811
8. Where notice of a disability is received by an insurance company and the company acts upon such notice, it is immaterial what relationship existed between the sender of the notice and the beneficiary. *Brown v. Security Mutual Life Ins. Co.* 811

Interest.

1. Where there is no statute to the contrary, interest becomes a part of the fund by whose investment it was produced. *Bordy v. Smith* 272
2. The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for

the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict. *Webber v. City of Scottsbluff* 446

3. If on appeal from an award in condemnation the amount recovered exceeds the amount awarded by the appraisers, the owner of the property condemned may have interest from the time of the taking, but if the condemner deposits with the county judge the amount of the award for the use of the owner before going into possession of the premises, and if by the appeal the amount of the award is not increased, the owner may recover interest on the judgment entered on appeal only from date of the rendition thereof. *Kennedy v. Department of Roads and Irrigation* 727

Joint Tenancy.

Where an attempted devise of lands in joint tenancy by its terms excludes an essential or essentials to a joint tenancy, such an estate is not created. *Jones v. Shrigley* 137

Judges.

A judge before whom an action is tried is not disqualified under statute, because of previous marriage to a sister of a party to the action where, before the action was commenced, the sister had died, even though she left issue living at the time of trial. *Zimmerer v. Prudential Ins. Co.* 351

Judgments.

1. A judgment on the merits is a bar to a subsequent action on the same claim as to every matter that was or might have been received to sustain or defeat the claim. *Hammond v. Harrington* 1
Williams v. Beckmark 100
2. Where a court has jurisdiction over the person and of the subject matter of an action, such person may not collaterally attack the judgment rendered therein unless the judgment is absolutely void. *Pettijohn v. County of Furnas* 736
3. The rule is that a party should not be vexed more than once for the same cause of action. The doctrine of res adjudicata includes not only the things which were determined in the former suit but also any other matter properly involved which

might have been raised and determined therein. *Pettijohn v. County of Furnas* 736

Juries.

1. Jury trial is not demandable of right in a mandamus action. *State ex rel. Strange v. School District* 109
2. The right of counsel to interrogate jurors on their voir dire examination, in order to determine whether or not it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied. *Nama v. Shada* 362
3. It is the province of the jury to harmonize the testimony insofar as that is possible and, in case of conflict, to decide as to the weight to be given the testimony of the various witnesses. *Webber v. City of Scottsbluff* 446
4. It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Little v. Loup River Public Power District* 864

Larceny.

1. Where the owner of personal property is induced by fraud to part with its possession without intending also to part with the title, the transaction is larceny if the person so receiving the possession without the title has at the time a secret intention of converting it permanently to his own use and does so without the consent of the owner. *Snyder v. Lincoln* 580
2. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence. *Snyder v. Lincoln* 580

Lost Instruments.

1. A party seeking to recover upon a lost or stolen written instrument has the burden of proving the former existence, execution, delivery, loss and contents of the instrument by clear, satisfactory, and convincing evidence. *Kuenzli v. Kuenzli* 855
2. To obtain specific performance, a party must not only establish that he has a valid legally enforceable contract, but also must establish by a preponderance of the evidence that he has substantially

complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants imposed upon him. *Kuenzli v. Kuenzli* 855

Mandamus.

1. In mandamus, jury trial is not demandable of right. *State ex rel. Strange v. School District* 109
2. Court cannot control by mandamus the decision of matters which are left by statute to the discretion of the governing body of a governmental agency. *State ex rel. Strange v. School District* 109
3. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *State ex rel. Strange v. School District* 109

Master and Servant.

1. A master may be held liable for the act of a servant if the act concerning which complaint is made was performed or done with a view to the service for which the servant was employed. *Klause v. Nebraska State Board of Agriculture* 466
2. A master may not be held liable for the act of a servant if the act was not done or performed with a view to the service for which the servant was employed. *Klause v. Nebraska State Board of Agriculture* 466
3. A corporation is liable for the negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver. *Simcho v. Omaha & C. B. St. Ry. Co.* 634
4. A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in employer's or principal's business with his knowledge and direction. *Simcho v. Omaha & C. B. St. Ry. Co.* 634
5. In a hearing in the district court on appeal from a determination of an appeal tribunal set up under the provisions of the Placement and Unemployment Insurance Law, the trial is required to be de novo,

or in other words anew. *Beecham v. Falstaff Brewing Corporation* 792

Monopolies.

1. Intent denotes the purpose to use a particular means to effect a certain result. *Hill v. Kusy* 653
2. Intent is an essential element of the unlawful act or acts defined in the Unfair Sales Act. *Hill v. Kusy* 653
3. Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. *Hill v. Kusy* 653

Municipal Corporations.

1. A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it. *Reid v. City of Omaha* 286
2. The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects. *Reid v. City of Omaha* 286
3. Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power. *Reid v. City of Omaha* 286
4. Where petition alleged facts sufficient to disclose noncompliance with and violation of certain provisions of the home rule charter of a municipality by its duly authorized officers, it stated a cause of action to set aside transaction. *Reid v. City of Omaha* 286
5. The only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable. *Slepicka v. City of Wilber* 376

6. When a city or village has acquired an electric light plant and distribution system, the governing body thereof may contract to maintain, improve, extend, and enlarge the same and issue either warrants, revenue bonds, or debentures pledging the net earnings or profits thereof, without liability upon the city or village, in payment thereof. *Slepicka v. City of Wilber* 376
7. The ordinary business affairs of a municipality are committed to the corporate authorities, and the courts will not interfere except in a clear case of mismanagement or fraud. *Slepicka v. City of Wilber* 376
8. When a city of the second class by ordinance grants to a gas company the right to supply gas to its inhabitants and to use the streets, alleys, and public ways of such city, the ordinance is a franchise, and after its acceptance by the company, or by performance of the company in compliance therewith, it becomes a contract between the city and the company. *Clough v. North Central Gas Co.* 418
9. Where the record of the passage of an ordinance has been lost or destroyed, proof of the publication thereof sworn to by the publisher of the newspaper in which such publication was printed constitutes sufficient secondary evidence to prove the existence and publication of the ordinance. *Clough v. North Central Gas Co.* 418
10. Where the nonexistence of an ordinance is proved by one who has made search therefor, and a copy of the original ordinance is found among the city records, such copy, when it is shown to have been published as required by law, is admissible with reference to the contents of the original ordinance as secondary evidence. *Clough v. North Central Gas Co.* 418
11. In addition to the special powers conferred upon a city of the second class, it has the power to make all such ordinances not inconsistent with the laws of the state as may be expedient to maintaining the peace, good government, and welfare of such city in its trade, commerce, and manufactories. *Clough v. North Central Gas Co.* 418
12. Ordinances of cities of the second class are presumed to be valid, and the burden is upon the person attacking it to show that, having regard to the facts as may be disclosed with reference to it, such regulation so imposed is so unreasonable

and arbitrary as to amount to depriving such person of property without due process of law. *Clough v. North Central Gas Co.* 418

13. In the exercise of police power delegated by the state legislature to a city of the second class, the municipal legislature, within constitutional limits, is the sole judge as to what laws shall be enacted for the welfare of the inhabitants of such city, and as to when and how the police power shall be exercised. *Clough v. North Central Gas Co.* 418

14. A city of the second class, as a means of protecting its inhabitants, may establish and enforce regulations that are not inconsistent with the essential rights granted by a franchise to a gas company. *Clough v. North Central Gas Co.* 418

15. A city of the second class may enact ordinances to protect the public from the dangers resulting from the use of natural gas by imposing certain obligations upon the company furnishing such product. *Clough v. North Central Gas Co.* 418

16. The power to regulate the use of streets, alleys, and public places of a city of the second class by a gas company is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent to use such streets, alleys, and public ways. It is a continuing power, and cannot be bargained away or parted with otherwise. *Clough v. North Central Gas Co.* 418

Negligence.

1. Where there is no evidence to support pleaded defense of contributory negligence, it is prejudicial error to submit such issue to the jury. *Floyd v. Edwards* 41

2. Generally it is negligence as a matter of law for a motorist to drive an automobile at night so fast that he cannot stop in time to avoid collision with an object within the area lighted by the headlights of the motor vehicle. To this general rule there are well-established exceptions. *Floyd v. Edwards* 41

3. It is error to submit to jury a charge of negligence unsupported by any evidence. *Pierson v. Jensen* 86

4. Leaving an unlighted vehicle on highway at night without any warning constitutes gross negligence under comparative negligence statute. *Pierson v. Jensen* 86

5. A plaintiff who is guilty of contributory negligence,

which in itself or in comparison with negligence of defendant is more than slight, cannot recover. *Pierson v. Jensen* 86

6. Where contributory negligence has been established by evidence concerning which different minds may not reasonably draw different conclusions or inferences, it is duty of court to withdraw issue from jury and so find as a matter of law. *Pierson v. Jensen* 86

7. Where different minds may draw different conclusions or inferences, or where there is conflict in the evidence, upon question of negligence or contributory negligence, or the degree thereof, issues should be submitted to jury. *Pierson v. Jensen* 86
Remmenga v. Selk 401

8. Driver of automobile must exercise reasonable care in its operation. Where pedestrians are numerous and traffic congested, the degree of care must be commensurate with the danger reasonably to be anticipated. *Johnson v. Griepenstroh* 126

9. While pedestrian must look to the right and left in crossing an intersection, he has no duty to maintain a lookout to the rear. *Johnson v. Griepenstroh* 126

10. When contributory negligence is pleaded as an affirmative defense, burden rests upon party alleging such defense to prove it by a preponderance of the evidence pertinent to that issue. *Johnson v. Griepenstroh* 126

11. The emergency rule cannot be invoked unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be invoked by one who has brought the emergency upon himself or has not used due care to avoid it. *Johnson v. Griepenstroh* 126

12. In order to recover under the doctrine of the last clear chance there must be evidence to sustain findings that (1) the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) the party against whom it is asserted knew or ought to have known the other's peril, (3) the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine

is invoked and such failure was the proximate cause of the accident, and (5) the negligence of the party imperiled is neither active nor a contributing factor in the accident. *Whitehouse v. Thompson* 370

13. The doctrine of the last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff which is the proximate cause of the injury. *Whitehouse v. Thompson* 370

14. Whether or not a plaintiff in the exercise of ordinary care could have avoided the consequences to himself caused by the negligence of the defendant in failing to avoid the accident under the last clear chance rule is ordinarily a question for the jury. *Whitehouse v. Thompson* 370

15. Where there is no evidence to support the defense of contributory negligence it should not be submitted to a jury and to do so is prejudicial error requiring the granting of a new trial. *Remmenga v. Selk* 401

16. The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her. *Remmenga v. Selk* 401

17. Where an occupant of a motor vehicle is engaged in a common or joint enterprise with the driver and has an equal right to direct and control the operation of the vehicle, the contributory negligence of the driver is imputable to the occupant. This is so although one takes no actual control while the other is driving. *Remmenga v. Selk* 401

18. To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle. *Remmenga v. Selk* 401

19. The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. *Remmenga v. Selk* 401

20. The fact that a person was intoxicated is a circumstance which may be considered in determining

whether he exercised such care, but the mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. *Remmenga v. Selk* 401

21. A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances. *Remmenga v. Selk* 401

22. A violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence that may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Remmenga v. Selk* 401

23. Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover. *Remmenga v. Selk* 401

24. The doctrine of the last clear chance is not applicable where the negligence of the party seeking to invoke it is active and continuous as a contributing factor up to the time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct. *Remmenga v. Selk* 401

25. It is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by the lights of his automobile. *Remmenga v. Selk* 401

26. In an action for damages where there is no evidence upon which to base a finding of contributory negligence on the part of a plaintiff it is error for the court to instruct the jury on that subject. *Klause v. Nebraska State Board of Agriculture* 466

27. A spectator at a wrestling event is required to

exercise due care in protecting himself against known dangers or such as should be known and appreciated by a reasonable person in the exercise of due care. *Klause v. Nebraska State Board of Agriculture* 466

28. A spectator at a wrestling event assumes the risk only of such dangers as are incident to such events of which he has knowledge or which are or should be obvious and apparent to him as a reasonable person under the circumstances in the light of his information and knowledge. *Klause v. Nebraska State Board of Agriculture* 466

29. In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, alleged to be due to the negligent and improper construction of a railroad, the burden of proof is on the plaintiff to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto. *Krichau v. Chicago, B. & Q. R. R. Co.* 498

30. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected. *Krichau v. Chicago, B. & Q. R. R. Co.* 498

31. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

32. The proximate cause of an injury is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

33. When instructions are requested by either party to a suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own motion. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

34. The violation of any statutory or valid municipal

regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Fimple v. Archer Ballroom Co.* 681

35. Such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed. *Fimple v. Archer Ballroom Co.* 681

36. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Kraft v. Wert* 719

37. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Kraft v. Wert* 719

38. When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. *Kraft v. Wert* 719

New Trial.

1. Evidence of facts occurring after a trial ordinarily cannot form the basis for a new trial on the ground of newly discovered evidence. *Wagner v. Loup River Public Power District* 7

2. In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for new trial on the ground of newly discovered evidence. *Wagner v. Loup River Public Power District* 7

3. While trial court has discretion in granting of new trial, it is a judicial one. Where there is no newly discovered evidence, it is error to grant new

trial on that ground. *Wagner v. Loup River Public Power District* 7

4. Where petition for new trial on the ground of newly discovered evidence stands denied, petitioner is required to adduce both the evidence at the former trial and the newly discovered evidence. *Foley v. Wescott* 49

5. The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

6. The motion for a new trial is a statutory remedy, and a new trial can be granted by a court of law only upon the grounds, or some of them, provided for by the statutes. *Greenberg v. Fireman's Fund Ins. Co.* 695

7. The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered. *Greenberg v. Fireman's Fund Ins. Co.* 695

8. The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by motion or appropriate pleading. *Greenberg v. Fireman's Fund Ins. Co.* 695

9. Mere trifling errors are not sufficient to authorize the granting of a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

10. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Greenberg v. Fireman's Fund Ins. Co.* 695

11. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. *Greenberg v. Fireman's Fund Ins. Co.* 695

12. As applied to ruling on motion for new trial, judicial discretion means the application of statutes and legal principles to all of the facts of a case. *Greenberg v. Fireman's Fund Ins. Co.* 695

13. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. *Greenberg v. Fireman's Fund Ins. Co.* 695

14. The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied. *Greenberg v. Fireman's Fund Ins. Co.* 695

15. While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record. *Greenberg v. Fireman's Fund Ins. Co.* 695

16. Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. If a party desires a review of that determination, the showing thereon must be preserved in the record. *Greenberg v. Fireman's Fund Ins. Co.* 695

17. Statute conferring power on district court to grant new trial does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury. *Greenberg v. Fireman's Fund Ins. Co.* 695

18. The ruling of the court on a motion for a new trial is subject to review in Supreme Court. *Greenberg v. Fireman's Fund Ins. Co.* 695

19. Whether the decision in the trial court was to grant a new trial or deny one, the questions in Supreme Court are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining. *Greenberg v. Fireman's Fund Ins. Co.* 695

20. Rules of law will be applied to assignments of error in Supreme Court with the same require-

ments whether the decision granted or denied a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

21. An order granting a new trial will be scrutinized in Supreme Court with the same care as one denying a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

22. In consideration of motions for new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. *Greenberg v. Fireman's Fund Ins. Co.* 695

23. If the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant in Supreme Court to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment. *Greenberg v. Fireman's Fund Ins. Co.* 695

24. If the trial court gave no reasons for granting a new trial, then the appellant meets the duty placed upon him when he brings the record to the Supreme Court with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions. *Greenberg v. Fireman's Fund Ins. Co.* 695

25. Alleged errors in ruling on motion for new trial will be considered and determined in Supreme Court so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned. *Greenberg v. Fireman's Fund Ins. Co.* 695

26. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule applies to the district court when reviewing its own proceedings on motion for a new trial. *Greenberg v. Fireman's Fund Ins. Co.* 695

Officers.

1. The liability of a public officer for funds entrusted

to his care by virtue of his office is that of an insurer, except as it has been modified by statute. *Bordy v. Smith* 272

2. Where the salary or compensation of a public officer is fixed by statute no judicial action in that respect is required and in consequence the statutory requirement for consideration of claims has no application. *McCollough v. County of Douglas* 389

3. An "officer de jure" is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with full legal right and title to the office. In other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law. *McCollough v. County of Douglas* 389

4. A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; or (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. *McCollough v. County of Douglas* 389

5. The de facto officer doctrine does not rest upon a vindication of right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties. *McCollough v. County of Douglas* 389

6. The performance of the duties of an office by a de facto incumbent gives him no claim to the official compensation. *McCollough v. County of Douglas* 389

7. In this jurisdiction the right of a public officer to compensation of the office occupied by him is in-

cident to and dependent upon his right and title to the office. *McCollough v. County of Douglas* 389

8. It was the intent of the Legislature to designate the position of chief deputy clerk of the district court an office and the holder of the position an officer. *McCollough v. County of Douglas* 389

Parent and Child.

1. The natural rights of the parents are of important consideration and, in the absence of special circumstances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons. *Hanson v. Hanson* 337
2. Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstances is unable to furnish a good home. *Hanson v. Hanson* 337
3. Where the evidence shows that the mother had the custody of such children prior to the time that they were temporarily within this state, and she is not shown to be an improper or unfit person to have such custody, it should not be denied her. *Hanson v. Hanson* 337
4. Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother provided she is a fit and proper person. *Syas v. Syas* 533
5. A decree awarding one parent the custody of a child should, under normal circumstances, include a provision permitting the parent deprived of the custody to visit with the child under such conditions and in such manner as the circumstances may warrant and only under exceptional circumstances should the right be totally denied. *Syas v. Syas* 533

Parties.

A widow is an interested party in a proceeding to probate a will and as such may appear and contest the probate of a purported will of her deceased husband. *In re Estate of Drake* 568

Partition.

Where interests of parties in land are not in dispute, and only contested issues are incidental and collateral, attorney's fees should be allowed in partition action. *Lorenz v. Lorenz* 20

Partnership.

1. Partnership may not be dissolved by decree of court except on the grounds set forth in Uniform Partnership Act. *Riley v. Riley* 176
2. It is duty of a partner to account to the partnership, and hold as trustee for it, any profits derived from any transaction connected with the partnership or from use of its property. *Riley v. Riley* 176

Pleading.

1. Motion for nonsuit or dismissal will be granted where pleading fails to state a cause of action if defects are such that they cannot be amended, but should not be ordered without giving an opportunity to amend. *Rothery v. Pounds* 25
2. Pleadings, such as a petition for mandamus, injunction, and equitable relief, may be verified before attorney of record as notary. *State ex rel. Strange v. School District* 109
3. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, and concedes that the proposition of fact alleged by the opponent is true. *Kipf v. Bitner* 155
4. A judicial admission is ordinarily final and conclusive unless court, in the exercise of judicial discretion, timely relieves from that consequence. *Kipf v. Bitner* 155
5. A general demurrer admits all allegations of fact in the pleading to which it is addressed, if the allegations are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions, except if supported by, and necessarily resulting from, the facts pleaded. *Reid v. City of Omaha* 286
6. A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant. *Reid v. City of Omaha* 286
7. The law of amendments should be liberally construed in order to prevent a failure of justice. *Louis Hoffman Co. v. Western Smelting & Refining Co.* 524
8. When defendant offers in court an amended answer on an amended answer and cross-claim which is proper in form and in furtherance of justice, the court should ordinarily permit the same to be filed

upon such terms and conditions as are reasonable and just. *Louis Hoffman Co. v. Western Smelting & Refining Co.* 524

9. Except as otherwise provided by statute or rule of court, a party seeking to amend a pleading is not required to do so in any particular form or manner, nor to support his application therefor by affidavit, if the court is in some appropriate manner informed of the nature and purpose of the proposed amendment. *Louis Hoffman Co. v. Western Smelting & Refining Co.* 524

10. Requirement in Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co., 54 Neb. 241, 74 N. W. 592, that application to amend a pleading be supported by affidavit, is overruled insofar as it presumes to hold the contrary. *Louis Hoffman Co. v. Western Smelting & Refining Co.* 524

11. A litigant may not enlarge his rights or gain advantage by alleging unnecessary, immaterial, or improper matters in a pleading. *Little v. Loup River Public Power District* 864

Principal and Agent.

1. A principal is liable for representations made by an agent if he intends that the agent shall make representations or should know that the agent will do so. *Wolford v. Freeman* 537

2. The acts of a self-constituted agent may be ratified by the one for whom such agent has assumed to act, as of the date when the acts were performed. *Brown v. Security Mutual Life Ins. Co.* 811

Process.

Court granting divorce decree on constructive service against nonresident defendant is without jurisdiction to fix the custody of the parties' minor children who were not living within the state where the divorce proceedings were instituted. *Hanson v. Hanson* 337

Public Service Commissions.

1. Sole power to grant or deny a certificate of convenience and necessity to a common carrier rests with the Nebraska State Railway Commission. *In re Application of Effenberger* 13

2. Courts cannot interfere with findings and orders

of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. *In re Application of Effenberger* 13

3. Order of railway commission denying certificate of convenience and necessity to a new common carrier is not arbitrary where existing carrier is ready, willing, and able to furnish adequate service. *In re Application of Effenberger* 13

4. The term "willful failure," as used in the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *Union Transfer Co. v. Bee Line Motor Freight* 280

5. Where there is evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with an order of the commission had occurred, an order based on such finding is not unreasonable or arbitrary. *Union Transfer Co. v. Bee Line Motor Freight* 280

6. Unless an order of the railway commission is shown to be unreasonable or arbitrary, the Supreme Court is not authorized to interfere with the power of the commission to regulate common carriers. *Union Transfer Co. v Bee Line Motor Freight* 280

7. The operating rights authorized by a certificate of convenience and necessity are not subject to lease after the revocation of the certificate, and an order of the railway commission denying an application to lease is not unreasonable or arbitrary under such circumstances. *Union Transfer Co. v. Bee Line Motor Freight* 280

8. Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *In re Application of Meyer* 455

9. A certificate of public convenience and necessity issued to a carrier is not property in any legal sense, but is simply a permit or license to do business as therein limited. The Nebraska State Railway Commission has the sole power in this state to grant or amend such a certificate. *In re Application of Meyer* 455

Public Utilities.

1. A corporation like a gas company, dependent for the conduct of its business upon a license to use in part the streets, alleys, and public ways of a city of the second class, which are acquired avowedly for public use, is affected with a public interest for the reason that its business is public. *Clough v. North Central Gas Co.* 418
2. The legal duty of a gas company to third persons, in reference to the escape of gas from service pipes owned and controlled by others on private property, does not extend to making inspection of said service pipes, unless the company knew or should have known of a probable defective condition in such pipes, or unless the company is bound by contract, franchise, or custom to make such inspection. *Clough v. North Central Gas Co.* 418
3. Where a public utility company engaged in the business of furnishing gas to its customers knows or should know that a service line owned by a customer is corroded to such an extent as to permit gas to escape, it is its duty either to cause the service line to be repaired by the customer, or to have the gas shut off at the street where the main is that furnishes the gas to the customer, in order to avoid the danger which might result. *Clough v. North Central Gas Co.* 418
4. Where the evidence discloses that the duly appointed agent of a gas company was charged with knowledge that gas transported through its pipes into a service line was leaking, the question as to whether or not the gas company had exercised such a degree of care and caution as was commensurate with the known danger of natural gas constitutes an issue of fact which under proper instructions should be submitted to a jury. *Clough v. North Central Gas Co.* 418

Rape.

1. An accused charged with rape cannot be convicted solely on the uncorroborated testimony of the prosecutrix. *Stapleman v. State* 460
2. If the prosecutrix is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act, the inference of

guilt may be drawn, the corroboration is sufficient. *Stapleman v. State* 460

3. Evidence examined and held sufficient to support a sentence of eight years in the penitentiary for statutory rape. *Stapleman v. State* 460

4. Upon a charge of assault with intent to commit rape, the two essential elements of an assault and an intent to commit the act charged must always co-exist and be established by the state beyond a reasonable doubt before defendant can be found guilty thereof. *Frank v. State* 745

5. The intent of accused must be not only to have intercourse with prosecutrix, but to do so by force, without consent, and notwithstanding her resistance. *Frank v. State* 745

6. To constitute assault with intent to commit rape, there must be an effort by accused to carry out or accomplish such intent by the execution of an overt act amounting to an assault upon prosecutrix, i. e., an attempt with force and violence to overcome her resistance. *Frank v. State* 745

7. Force by accused, as distinguished from mere preparations, requests, and solicitations which are insufficient, and appropriate resistance thereto by prosecutrix, in cases wherein consent is an issue, are essential constituent parts of the offense. Therefore consent or failure to resist when opportunity appears is an absolute defense in such cases and the jury should be so instructed. *Frank v. State* 745

8. Resistance by prosecutrix must be in good faith, to the utmost or limit of her ability, with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so. *Frank v. State* 745

9. Where assault with intent to commit rape is charged, the testimony of prosecutrix must be corroborated by facts and circumstances established by other competent evidence to justify conviction. *Frank v. State* 745

10. Where prosecutrix testifies unequivocally to facts which would constitute the offense assault to commit rape, a sufficient corroboration is shown if opportunity and inclination on the part of defendant to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix. *Frank v. State* 745

Sales.

One obtaining possession of property by larceny cannot convey good title even to an innocent purchaser for value. *Snyder v. Lincoln* 580

Schools and School Districts.

1. Statutory provisions requiring consent of county superintendent to closing of school apply to rural schools but not to schools in cities and villages. *State ex rel. Strange v. School District* 109
2. Compulsory Attendance Act and act permitting closing of school under certain circumstances each deal with separate and distinct subjects. The former act is not supplementary to the latter. *Batterman v. Bronderslev* 875
3. Plaintiff's petition examined and held to state a cause of action to recover board, transportation, and expenses of pupils because of closing of school. *Batterman v. Bronderslev* 875

Set-off and Counterclaim.

The adjustment of defendant's demands by cross-claim in plaintiff's action rather than by independent suit is favored and encouraged by law. *Louis Hoffman Co. v. Western Smelting & Refining Co.* 524

Sodomy.

In prosecution for sodomy, evidence of immoral character of prosecuting witness may be shown as bearing on credibility of witness. *Redmon v. State* 62

Specific Performance.

1. To obtain specific performance of an oral contract for the conveyance of real estate, a contract must be proved which is clear, satisfactory, and unequivocal in its terms. *Riley v. Riley* 176
2. Party seeking specific performance of oral contract to convey real estate must show that he has performed the burdens imposed on him by the contract. *Riley v. Riley* 176
3. Party seeking specific performance of oral contract for conveyance of real estate must show that acts of part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract. *Riley v. Riley* 176

4. Burden of proving an oral contract, the terms of which are clear, satisfactory, and unequivocal, is one of quality, and may be sustained by a preponderance of the evidence when these elements are satisfied. *Riley v. Riley* 176
5. In determining whether or not acts of part performance are referable to the contract sought to be enforced, all acts of performance must be considered as a whole in the light of all relevant facts and circumstances. *Riley v. Riley* 176
6. The rule that one seeking specific performance of an oral contract for the conveyance of real estate must show that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, is satisfied when by his own evidence he has thus shown. If his position is assailed he has the further burden of sustaining his position by a preponderance of the evidence. *Riley v. Riley* 176
7. Specific performance may be had of an oral contract for the conveyance of a homestead. *Riley v. Riley* 176
8. To obtain specific performance, a party must not only establish that he has a valid legally enforceable contract, but also must establish by a preponderance of the evidence that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants imposed upon him. *Kuenzli v. Kuenzli* 855
9. Courts of equity are empowered to compel specific performance of oral contracts for conveyances of real estate declared void by the statute of frauds in cases where there has been part performance. *Anderson v. Anderson* 879
10. A party seeking specific performance of an oral contract within the statute of frauds must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, (2) part performance, referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further (3) that nonperformance by the other party would amount to a

fraud upon the party seeking specific performance. *Anderson v. Anderson* 879

Statutes.

1. In construction of a statute, effect must be given to all its parts, and language employed must be interpreted in its plain, ordinary, and popular use. *In re Guardianship of Kraft* 171
2. Where a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation, and the other of which avoids such result, the latter construction should be adopted. *In re Guardianship of Kraft* 171
3. Mentally ill statute imposes liability for maintenance where either income or estate of patient is sufficient to pay same. *In re Guardianship of Kraft* 171
4. In construing a statute, words should be given their usual meaning. *Slepicka v. City of Wilber* 376
5. Every legislative act comes before the Supreme Court surrounded with the presumption of constitutionality. This presumption continues until the act under review clearly appears to contravene some provision of the Constitution. *Clough v. North Central Gas Co.* 418
6. Intent denotes the purpose to use a particular means to effect a certain result. *Hill v. Kusy* 653
7. Intent is an essential element of the unlawful act or acts defined in the Unfair Sales Act. *Hill v. Kusy* 653
8. Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. *Hill v. Kusy* 653
9. The general rule in construing a statute is that the subject of the enactment should be taken into account with nothing avoided if that is possible and with the language employed considered in its plain, ordinary, and popular sense. *State ex rel. Hubbard v. Northwall* 894
10. The word "may" in public statutes should be construed as "must" whenever it becomes necessary in order to carry out the intent of the Legislature, but in all other cases the word must have its ordinary meaning. *State ex rel. Hubbard v. Northwall* 894

Taxation.

1. Before lands can be legally sold at private tax sale,

the treasurer must file with the county clerk a return of the public tax sale; otherwise an attempted private tax sale is invalid. *Pettijohn v. County of Furnas* 736

2. Owners and others interested in realty, sold under decree foreclosing a valid tax sale certificate where foreclosure was commenced more than two years subsequent to the issuance of the tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale. *Pettijohn v. County of Furnas* 736

Theaters and Shows.

1. A spectator at a wrestling event is required to exercise due care in protecting himself against known dangers or such as should be known and appreciated by a reasonable person in the exercise of due care. *Klause v. Nebraska State Board of Agriculture* 466
2. A spectator at a wrestling event assumes the risk only of such dangers as are incident to such events of which he has knowledge or which are or should be obvious and apparent to him as a reasonable person under the circumstances in the light of his information and knowledge. *Klause v. Nebraska State Board of Agriculture* 466
3. One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the circumstances, amounts to ordinary and reasonable care. *Klause v. Nebraska State Board of Agriculture* 466
   Fimple v. Archer Ballroom Co. 681

Treaties.

1. Treaties made by the United States are the supreme law of the land and the courts of every state are bound thereby. *Meier v. Schmidt* 383
2. Treaty provisions which require no legislation to make them operative are self-executing and they will ordinarily be enforced in accordance with their plain meaning unless they have been superseded or abrogated by a proper exercise of executive or legislative power. *Meier v. Schmidt* 383

Trespass.

Willful trespass means that the act must be done

knowingly or intentionally, that the act was committed with knowledge, and that the will consented to, designed and directed the act, as distinguished from a violation of the law where it appears to be in the honest and reasonable belief of the parties that they were acting within their legal rights and the conduct was rightful. *Hallowell v. Borchers* 322

Trial.

1. Where on the ground of newly discovered evidence a new trial is sought by means of a petition filed after the term at which the judgment or decree was rendered, and the petition stands denied, the petitioner is required to adduce the evidence at the former trial, when material, as well as the newly discovered evidence or other ground alleged therefor, and both must be preserved in a bill of exceptions in order to entitle the unsuccessful party to a review of such proceedings in the Supreme Court. *Foley v. Wescott* 49
2. Where request for directed verdict is made at close of all of the evidence and is overruled, trial court may, upon timely application, set aside verdict and enter judgment in accordance with motion. *In re Estate of Farr* 67
   Patrick v. Union Central Life Ins. Co. 201
3. Upon appeal from an order denying a motion for judgment notwithstanding the verdict, Supreme Court may direct judgment to be entered in favor of party who was entitled thereto. *In re Estate of Farr* 67
4. An inadvertent substitution of one word for another in an instruction is harmless error, where it is clear from the record that the jury could not have been confused or misled thereby. *Pierson v. Jensen* 86
5. When an instruction clearly states the law in language commonly used and understood, it is not necessary that the trial court on its own motion define the language used. *Johnson v. Griepenstroh* 126
6. It is duty of trial court, without request, to instruct jury upon all the material issues presented by the pleadings and evidence. *Johnson v. Griepenstroh* 126
   Patrick v. Union Central Life Ins. Co. 201
7. Generally, an offer of proof is required in order to predicate error upon refusal to permit a witness to testify or answer a specific question. However, when the form of the question itself shows that it

is relevant, material, and competent, no offer of proof is necessary. *Johnson v. Griepenstroh* 126

8. Where objecting party later introduces the same evidence or evidence of a like character, error cannot be predicated in overruling objection to evidence. *O'Hare v. Peterson* 151

9. Motion for directed verdict must be treated as an admission of truth of all material and relevant evidence on behalf of party against whom motion is directed. Such party is entitled to have every controverted fact resolved in his favor and the benefit of every inference that can reasonably be deduced from the facts in evidence. *Kipf v. Bitner* 155
Krichau v. Chicago, B. & Q. R. R. Co. 498
Mayer v. Homestead Fire Ins. Co. 556
Guyette v. Schmer 659

10. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury. *Kipf v. Bitner* 155

11. Extrajudicial admission in deposition of party may be admissible as evidence in contradiction and impeachment of evidence given at trial. *Kipf v. Bitner* 155

12. Triers of fact have the right to test the credibility of witnesses and weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken. *Patrick v. Union Central Life Ins. Co.* 201

13. Where from the facts adduced to sustain an issue reasonable minds can draw but one conclusion it is the duty of the court to decide the question as a matter of law rather than to submit it for determination to a jury. *McNally v. Ponce* 267

14. Where a motion for a directed verdict is made or where there is a motion for the discharge of the jury and for judgment in favor of the moving party, the evidence must be viewed in the light most favorable to the party against whom the motion is made. *McNally v. Ponce* 267

15. The trial court is not required to instruct upon matters not within the issues and upon which evidence was not permitted. *Trask v. Klein* 316

16. If there is testimony by which a verdict in favor

of the party on whom rests the burden of proof can be upheld, the trial court is not at liberty to disregard the testimony and direct a verdict against such party. *Nama v. Shada* 362

17. The giving of an instruction which places on the wrong party the burden of proving an essential fact put in issue by the pleadings is reversible error. *Myers v. Willmeroth* 416

18. An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgment of a substantial right of the defendant. *Wilson v. State* 436

19. Instructions not complained of in such a way as to be reviewable in Supreme Court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Webber v. City of Scottsbluff* 446

20. It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *Webber v. City of Scottsbluff* 446

21. Instructions should submit to a jury only issues of fact supported by evidence. *Webber v. City of Scottsbluff* 446

22. It is not error for the trial court to reject an offer of proof not within the limits of the question on which the offer is based. *Webber v. City of Scottsbluff* 446

23. An oral instruction to the jury to disregard all evidence in support of a count of an information which was dismissed at the close of the state's case is ordinarily sufficient to protect the defendant from prejudice arising therefrom. If the instruction given is not deemed sufficient, the claimed error may be preserved by making timely objection thereto; otherwise it is waived. *Stapleman v. State* 460

24. An exception to a group of instructions collectively in a motion for new trial shall be deemed for the purposes of review in the Supreme Court separately an exception to each instruction included within the group, and the prior rule to the contrary is abrogated. *Klause v. Nebraska State Board of Agriculture* 466

25. A motion for new trial not filed in ten days may not be considered by the Supreme Court on review. *Klause v. Nebraska State Board of Agriculture* 466
26. In a case tried to the court, whether at law or in equity, the presumption obtains that the trial court in arriving at decision, considered such evidence only as was competent and relevant. The Supreme Court will not reverse a case so tried because other evidence was admitted. *Western Smelting & Refining Co. v. First Nat. Bank* 477
27. If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him. *Krichau v. Chicago, B. & Q. R. R. Co.* 498
28. In every case, before submission to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Krichau v. Chicago, B. & Q. R. R. Co.* 498
29. The general rule in civil actions is that the party having the affirmative of an issue is required to sustain his position by a preponderance of the evidence. *In re Estate of Drake* 568
30. Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error. *Simcho v. Omaha & C. B. St. Ry. Co.* 634
31. Instructions to the jury should be considered together that they may be properly understood and when, as an entire charge, it appears that they do not limit recoverable negligence to that charged in plaintiff's petition, but authorize recovery for negligence generally, they will ordinarily be adjudged to be prejudicially erroneous. *Simcho v. Omaha & C. B. St. Ry. Co.* 634
32. Where two conflicting instructions are given on a question, one containing an incorrect and the other a correct statement of the law, the latter will not cure the former. *Simcho v. Omaha & C. B. St. Ry. Co.* 634
33. The stating of the issues in an instruction by substantially copying the pleadings of the parties is criticized and if such an instruction results in prej-

udice to the complaining party it is reversible error. *Simcho v. Omaha & C. B. St. Ry. Co.* 634

34. In a ruling on defendant's motion for a directed verdict, the court may not properly assume as a matter of law that the evidence of a witness for the plaintiff could not be contradicted or overcome. *Guyette v. Schmer* 659

35. If the evidence produced by plaintiff fairly tends to prove the material facts necessary to make a prima facie case, the fact that inconsistencies or contradictions exist in some of the testimony of his witnesses will not justify the court in directing a verdict for defendant. *Guyette v. Schmer* 659

36. A change in the testimony of a party from that given in a previous trial on an immaterial issue affords no basis for a ruling that the change was made from a fraudulent motive for the purpose of circumventing objections made at a previous trial or to meet the exigencies of the case. *Guyette v. Schmer* 659

37. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Fimple v. Archer Ballroom Co.* 681

38. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not. *Fimple v. Archar Ballroom Co.* 681

39. It is error for trial court to fail to instruct on issue of contributory negligence when raised by the pleadings and supported by the evidence. *Fimple v. Archer Ballroom Co.* 681

40. When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them though expressed in language different from that used by the court. *Fimple v. Archer Ballroom Co.* 681

41. Instructions are to be considered together to the end that they may be properly understood and, when so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same. *Fimple v. Archer Ballroom Co.* 681

42. Where a party has sustained the burden and expense

of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Greenberg v. Fireman's Fund Ins. Co.* 695

43. When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong. *Kennedy v. Department of Roads and Irrigation* 727

44. It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, "He who speaks falsely on one point will speak falsely upon all." *Knihal v. State* 771
Jennings v. State 828

45. An instruction in a criminal case that "You have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," is erroneous. *Knihal v. State* 771
Jennings v. State 828

46. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong. *Rueger v. Hawks* 834

47. Where the trial court admits evidence over objection, on the promise of counsel that he will make it competent by the introduction of connecting evidence, or where it conditionally sustains or overrules an objection to the introduction of evidence because it is unable to decide the question of its competency at the time, and no further ruling is requested or made, the question of the competency of the evidence cannot be raised on appeal. *Rueger v. Hawks* 834

48. A verdict of a jury may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record; or it is clear that the jury disregarded the evidence or rules of law. *Rueger v. Hawks* 834

49. It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Little v. Loup River Public Power District* 864

Trusts.

1. In determining whether or not a trust has been cre-

ated by will, the intent and purpose of the testator as disclosed by the language used is to be ascertained and given effect if not contrary to law or public policy. *Jones v. Shrigley* 137

2. In order to have a valid trust, there must be a trustee, an estate devised to him, and a beneficiary. The trustee and beneficiary must be separate and distinct entities. *Jones v. Shrigley* 137

3. If a trust imposes no affirmative or substantial duties upon the trustee of real estate, but seeks to convey to him the bare naked title, the legal title as well as the beneficial use passes to the cestui que trust. *Jones v. Shrigley* 137

4. The rule requiring that the trustee and beneficiary must be separate and distinct entities does not apply where several are named as trustees and the same persons are named as beneficiaries. *Jones v. Shrigley* 137

5. If a trust created by will is passive with no duties to be performed by the trustee, the beneficiaries are entitled to full control of the property. *Jones v. Shrigley* 137

6. If a party obtains the legal title to property by virtue of a confidential relation under such circumstances that he ought not hold and enjoy the benefits, a court of equity will raise a constructive trust and convert the offending party into a trustee. *McCormick v. McCormick* 192

7. A high degree of proof is required to engraft a trust by parol evidence on the legal title to real estate. *McCormick v. McCormick* 192

8. When a husband conveys real estate to his wife, a presumption of gift or settlement rather than a trust arises. This presumption is rebuttable. *McCormick v. McCormick* 192

9. Where the title to real estate is conveyed inter vivos subject to payments to be made to third persons, it constitutes an implied or constructive trust as between the trustee and the cestuis que trust. The trust may be enforced directly by a suit brought in the name of the cestuis que trust. *Maca v. Sabata* 213

10. A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other

to know in order to enable him to judge of the value of his property. *In re Estate of Wiley* 898

Use and Occupation.

Where an occupant cannot recover compensation for improvements made, he should be required to account only for rents and profits which might have been reasonably charged had the improvements not been made. *Williams v. Beckmark* 100

Vendor and Purchaser.

1. As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud. *Wolford v. Freeman* 537
2. Where facts are known by the vendor that are not within reach of the reasonably diligent attention, observation, and judgment of the vendor, and are such as would readily mislead the purchaser as to the true condition of property, the vendor is bound to disclose such facts. *Wolford v. Freeman* 537
3. Where a contract of purchase of real estate provides that the purchaser acknowledges that he has been advised as to the settling of a structure on the premises purchased and "is buying same as is," the "as is" phrase is limited to the knowledge of the settling of the structure and means that plaintiff purchased with knowledge of its then condition in that regard. *Wolford v. Freeman* 537
4. Where a contract of purchase of real estate provides that the purchaser acknowledges that he has been advised as to the settling of a structure on the premises purchased and "is buying same as is," the provision does not prevent fraudulent representations relied on by the buyer from invalidating the contract. *Wolford v. Freeman* 537
5. An executory contract for the sale and purchase of land, enforceable for and against vendor and vendee, is a present equitable conversion of land into personalty and of personalty into land. *In re Estate of Wiley* 898
6. Where an owner of realty entered into a binding contract for the sale thereof prior to his death, equity will treat the realty as personalty in distributing his estate. *In re Estate of Wiley* 898

Venue.

Action for tort is maintainable in the county where cause of action arose, or in which the plaintiff or a defendant resides at the time the action is commenced. *Pierson v. Jensen* 86

War.

1. The outbreak of war does not necessarily suspend or abrogate treaty provisions. When incompatibility between a treaty provision and the maintenance of a state of war exists, the treaty provision will not be given effect. *Meier v. Schmidt* 383
2. The Trading with the Enemy Act abrogates the provisions of the treaty with Germany of December 8, 1923, granting freedom of access to the courts of this country by nonresident German nationals. *Meier v. Schmidt* 383
3. The Trading with the Enemy Act bars a nonresident enemy alien from instituting an action during the continuance of the war, or from prosecuting an action instituted before its commencement. *Meier v. Schmidt* 383
4. The Supreme Court will take judicial notice of the fact that the war with Germany has not officially ended. *Meier v. Schmidt* 383
5. The existence of war and the restoration of peace are political questions to be determined by the legislative, supplemented by the executive, department of government. The failure to conclude a treaty of peace is binding upon the courts even though actual warfare has long since ceased. *Meier v. Schmidt* 383

Waters.

1. It is the continuing duty of those who build structures across natural drainways to provide for the passage through such obstruction of all waters which may be reasonably anticipated to drain there. *Stocker v. Wells* 51
2. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over adjacent lands in a broader stream retains its character as a live stream and the law relating to floodwaters applies. *Stocker v. Wells* 51
3. The flood channel is a part of the channel of a stream and cannot be obstructed. *Stocker v. Wells* .. 51
4. No one has the right by diversions or obstructions to interfere with the accustomed flow of a natural

watercourse to the damage of another. *Stocker v. Wells* 51

5. Proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water run as it is wont to run in the natural course of drainage. *Stocker v. Wells* 51
6. Unlawful diversion of water from a natural watercourse resulting in injury to lands of adjacent or adjoining proprietor may be enjoined. *Stocker v. Wells* 51
7. Continuing damage from recurring floods arising from diversion of floodwaters from its natural flood plane by a dam or dike may be relieved by injunction. *Stocker v. Wells* 51
8. In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, alleged to be due to the negligent and improper construction of a railroad, the burden of proof is on the plaintiff to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto. *Krichau v. Chicago, B. & Q. R. R. Co.* 498
9. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected. *Krichau v. Chicago, B. & Q. R. R. Co.* 498

Wills.

1. Right of citizen to dispose of property by will is assured. *In re Estate of Farr* 67
2. Where person has sufficient memory to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence or upon sentimental notions of equality. *In re Estate of Farr* 67
3. Burden of proving undue influence rests on contestants. Undue influence cannot be inferred alone from motive or opportunity, and mere suspicion thereof is insufficient to require submission of the question to the jury. *In re Estate of Farr* 67
4. Elements necessary to constitute undue influence are: (1) That testator was subject to such influence; (2) that opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Farr* 67

5. In will contest where evidence is insufficient to sustain charge of undue influence, trial court should withdraw that issue from jury. *In re Estate of Farr* 67
6. Will may be construed by county court when necessary for benefit of executor in carrying out its terms, but not for the purpose of determining rights of devisees and legatees as between themselves. *Jones v. Shrigley* 137
7. Construction of will by county court adjudicates nothing beyond rights and liabilities of executor, and does not affect controversies between adverse claimants under a devise or bequest. *Jones v. Shrigley* 137
8. In ascertaining whether or not a will creates a trust, the intent and purpose of the testator as disclosed by the language used must be examined and given effect if not contrary to law or public policy. *Jones v. Shrigley* 137
9. Where a will seeks to create a trust, there must be a trustee, an estate devised to him, and a beneficiary. The trustee and beneficiary must be separate and distinct entities. *Jones v. Shrigley* 137
10. Where a will creates a passive trust with no duties to be performed by the trustee, the beneficiaries of the trust are entitled to full control of the property. *Jones v. Shrigley* 137
11. The rule that a valid testamentary trust must have a trustee and beneficiary, with separate and distinct entities, does not apply where several are named as trustees and the same persons are named as beneficiaries. *Jones v. Shrigley* 137
12. A devise is not effective to create a joint tenancy which by its terms positively excludes an essential or essentials to such estate. *Jones v. Shrigley* 137
13. Where will granted power to life tenant to dispose of fee title to real property, this did not enlarge the beneficial estate to a fee. *Jones v. Shrigley* 137
14. By will, a married woman may relieve her husband from primary liability for payment of expenses of last illness and burial, but husband cannot take advantage of such provision in will after he has elected to take under statute of descent. *In re Estate of White* 167
15. Court should not set aside disposition of property made by will without good reasons, based upon clear, convincing, and satisfactory proof. *McCormick v. McCormick* 192
16. Pertinent facts and circumstances which may be

reasonably supposed to have influenced a testator in the making of a will are admissible to aid in ascertaining his intention. *Brandeis v. Brandeis* 222

17. Surrounding facts and circumstances which are so remote as to permit of only speculation as to the intent of a testator in the making of a will are not admissible. *Brandeis v. Brandeis* 222

18. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument if such intent is consistent with law. *Brandeis v. Brandeis* 222

19. Extraneous evidence is admissible for the purpose of construing a will only if there is a latent ambiguity occurring when the language of the will fails to comport with or is in conflict with the facts and circumstances on which the will operates. *Brandeis v. Brandeis* 222

20. Where on the basis of the language employed by a testator a will is capable of more than one interpretation, the ambiguity is patent and not latent, and extrinsic evidence is inadmissible to aid in its interpretation. *Brandeis v. Brandeis* 222

21. A remainder does not lapse on the death of the remainderman if by the will there is designated a substitute or alternate remainderman. *Brandeis v. Brandeis* 222

22. Where a will contains a patent ambiguity extraneous evidence is inadmissible for the purpose of explaining its meaning or the intent of the testator. The meaning and intent must be ascertained from an examination of the will and all of its parts. *Brandeis v. Brandeis* 222

23. In the construction of a will the generally accepted literal, natural, and grammatical meaning must be given to the words used. *Brandeis v. Brandeis* 222

24. A will speaks as of the date of the death of the testator. *Brandeis v. Brandeis* 222

25. The law favors the early vesting of estates. A remainder will be declared a vested one unless a contrary intent is apparent from the will. *Brandeis v. Brandeis* 222

26. If the intention of the testator is clear and a will so indicates, an estate may properly pass as of a special time or the happening of a named event to one described as heir without such person being in a technical sense an heir. *Brandeis v. Brandeis* 222

27. The rule of law which favors the early vesting of estates is not a rule of prohibition but one of direction of preference. *Brandeis v. Brandeis* 222

28. Issues of fact in will contest cases are determined in Supreme Court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the district court, and where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. *In re Estate of Kaiser* 295

29. The burden is upon proponent of a will, both in the county court and the district court on appeal, to prove by a preponderance of the evidence the lawful execution of the will and the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and adduce sufficient competent evidence to overcome the presumption arising therefrom, after which the burden of going ahead and proving those issues by a preponderance of the evidence, devolves upon proponent. *In re Estate of Kaiser* 295

30. Statutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative. *In re Estate of Kaiser* 295

31. The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator. *In re Estate of Kaiser* 295

32. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate. *In re Estate of Kaiser* 295

33. If the signing of a will is in fact the testator's own act with the intention of making a will, though with the assistance of another, it is not necessary to prove any express request for assistance on his part. *In re Estate of Kaiser* 295

34. A testator signs his will when he makes the physical effort and performs the act, even though his hand is steadied or guided by another, if something is produced upon the paper sufficient to identify his signature, and his own purpose to sign accompanied the

action while he was assisted and not controlled. *In re Estate of Kaiser* 295

35. A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will. *In re Estate of Kaiser* 295

36. A codicil signed, attested, and subscribed in substantial compliance with the statute, which codicil in express terms ratifies and confirms a will, is a republication and reacknowledgment thereof, and remedies all defects in its execution. *In re Estate of Kaiser* 295

37. A will may be valid if written on several sheets, provided: (1) They are connected physically by mechanical, chemical, or other means when executed; or (2) they are so connected by the meaning, adaptation, and coherence of their internal sense and subject matter that they may be thus identified as parts of one will; or (3) the disconnected sheets are appropriately identified by the testimony of the attesting and subscribing witnesses as connected parts of the will signed by the testator and attested and subscribed by them. *In re Estate of Kaiser* 295

38. A testator who is competent may dispose of his property as he pleases and he is not required to recognize relatives in his will. *In re Estate of Kaiser* 295

39. Testamentary capacity is tested by the state of the testator's mind at the time of the execution of the will. A testator is mentally competent to make a will if he knows the extent and character of his property, the proposed disposition of it, and the natural objects of his bounty. *In re Estate of Kaiser* 295

40. Where a will is executed in duplicate and one copy is shown to have been retained by the testator and the other deposited with another person, the failure to find the testator's copy after his death raises a presumption of its destruction by him with the intention of revoking the will, which presumption however may be overcome by evidence tending to a contrary conclusion. *In re Estate of Drake* 568

41. The evidence required to overcome the presumption of revocation of a lost will must be clear, unequivocal, and convincing. The burden is on the proponent in the first instance to adduce evidence which is clear, unequivocal, and sufficient in and of itself or prima facie, if believed, to convince. *In re Estate of Drake* 568

42. The determination of the question of whether or

not the proponent has in the first instance adduced sufficient evidence prima facie to overcome the presumption is for the court. *In re Estate of Drake* 568

43. On a determination by the court that sufficient evidence has been adduced, if believed, to overcome the presumption it disappears and thereafter the burden is on the proponent to sustain his right to have the will admitted to probate by a preponderance of all of the evidence, with the jury left free to weigh it and apply it to all elements involved, and to give to it such weight as they should deem it to be entitled. *In re Estate of Drake* 568

44. The rule requiring evidence to be clear, unequivocal, and convincing relates to the quality of evidence necessary to overcome the presumption of revocation rather than the quantum of proof necessary to admit a will to probate. *In re Estate of Drake* 568

45. A widow is an interested party in a proceeding to probate a will and as such may appear and contest the probate of a purported will of her deceased husband. *In re Estate of Drake* 568

46. In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence that (1) the testator was a person who would be subject to such influence, (2) there was opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was the effect of such influence. *In re Estate of Farr* 615

47. It is not error for the court to refuse or fail to set forth separately the four elements of undue influence in an instruction if their essentials are sufficiently contained in instructions given. *In re Estate of Farr* 615

48. The holding in Latham v. Schaal, 25 Neb. 535, 41 N. W. 354, and the like holding of other cases, that in a will contest on the ground of undue influence it must be shown that the circumstances of the execution of the will were inconsistent with any hypothesis but undue influence are overruled. *In re Estate of Farr* 615

49. In a will contest on the ground of undue influence the contestant is entitled to have the jury consider all facts adduced and also all reasonable inferences which may be drawn from such facts. *In re Estate of Farr* 615

50. In a will contest on the ground of undue influence

which has been submitted to a jury on conflicting evidence on that issue, the verdict of a jury finding that the will was procured by undue influence will not be disturbed on appeal unless it may be said that there was no competent evidence to sustain it. *In re Estate of Farr* 615

Witnesses.

1. Upon trial of a sex offense, great latitude should be allowed in the cross-examination of the prosecuting witness. *Redmon v. State* 62
2. Where offense charged involves a sex crime, prosecuting witness may be cross-examined as to prior immoral conduct. *Redmon v. State* 62
3. Cross-examination of a witness to show bias, hostility, or a spirit of revenge, is entirely distinct from impeachment, which is governed by its own rules of evidence. *Johnson v. Griepenstroh* 126
4. On cross-examination of a witness, any fact may be elicited which tends to show bias, hostility, or a spirit of revenge. If a witness denies the facts showing that such exist, the cross-examining party may call other witnesses to contradict the witness. *Johnson v. Griepenstroh* 126
5. Attorney who decides to become witness on behalf of client should immediately sever connection with the litigation. *McCormick v. McCormick* 192
6. Except where testimony relates to merely formal matters, attorney who takes witness stand on behalf of client should leave trial of case to other counsel. *McCormick v. McCormick* 192
7. As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable. *Trask v. Klein* 316
8. In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. *Wilson v. State* 436
9. The jury are the judges of the credibility of witnesses and of the weight of their testimony. *Guyette v. Schmer* 659
   Kennedy v. Department of Roads and Irrigation 727
10. Except where a party has been misled or entrapped into calling a witness, one who calls a witness im-

pliedly recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach such witness. *Guyette v. Schmer* 659

11. While a party who calls a witness cannot ordinarily impeach his character for veracity generally, he may show that the whole or any part of what he has sworn to is untrue, either by his own examination and the improbability of his story, or by other contradictory evidence material to the case. *Guyette v. Schmer* 659

12. A party may rely on part of the testimony of a witness he produces, although in other parts of his testimony the witness denies some of the facts sought to be established. *Guyette v. Schmer* 659

13. An expert or skilled witness may be properly reexamined as to matters concerning which he was cross-examined. *Greenberg v. Fireman's Fund Ins. Co.* 695

14. Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony. *Kraft v. Wert* 719

15. A prosecuting attorney in a criminal case is a competent witness, but his function as prosecutor and as a witness must be disassociated. Therefore, if it is discovered before trial that he is a necessary witness, he should withdraw from any active participation as attorney and have other counsel prosecute the case. *Frank v. State* 745

16. It is improper in a criminal prosecution for the court to allow one who testifies as a witness to the principal facts to also as attorney conduct the trial in the examination of witnesses or argument to the jury, or to conduct himself in any manner inconsistent with his position as a witness or his interest as an officer of the state. *Frank v. State* 745

17. When a prosecuting attorney becomes a witness, whether or not he conducts himself in a manner consistent with his position as a witness or his interest as an officer of the state is primarily a question for the trial court to decide, but defendant has the right by competent evidence to appropriately have the record disclose the facts and circumstances relating thereto. *Frank v. State* 745

18. In cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and the accused is not restricted to proof of general reputation of prosecutrix for truth and veracity, but may adduce direct evidence of the general reputation of such witness for morality and may also adduce direct evidence not too remote in time of specific immoral or unchaste acts and conduct by her with others. *Frank v. State* 745
19. Evidence of immorality of a prosecutrix is admissible not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony but also as inferring the probability of consent, and to discredit her testimony relating to force and violence used by defendant in accomplishing his purpose and claimed resistance thereto by prosecutrix. *Frank v. State* 745
20. The maxim, "he who speaks falsely on one point will speak falsely upon all," deals with the weight of evidence and the credibility of witnesses. *Knihal v. State* 771
Jennings v. State 828
21. It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, "he who speaks falsely on one point will speak falsely upon all." *Jennings v. State* 828
22. An instruction on the credibility of the witnesses, containing the following language, "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with the other testimony which you find to be true," constitutes error. When applied to the testimony of the state's witnesses, the rule imposes a burden upon the defendant which he is not required to assume. *Knihal v. State* 771
Jennings v. State 828
23. In the absence of a statute rendering children under a specified age incompetent, or presumably so, a witness is not disqualified because of his youth. *Rueger v. Hawks* 834
24. There is no precise age which determines the question of competency of a witness, it depending upon his capacity and intelligence and his appreciation of the difference between truth and falsehood. *Rueger v. Hawks* 834
25. The question of the competency of a witness rests

largely in the sound discretion of the trial court, whose decisions will not be disturbed in the absence of clear abuse. *Rueger v. Hawks* 834

26. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. *Rueger v. Hawks* 834

Workmen's Compensation.

1. When single judge of the workmen's compensation court enters an award which he is authorized by law to make, such judgment is conclusive on all parties when no appeal is taken, except as otherwise provided by statute. *Riedel v. Smith Baking Co.* 28
2. Statute authorizing increase or decrease in payment of compensation limits the basis for modification to that increase or decrease of incapacity which has occurred since the award was rendered. *Riedel v. Smith Baking Co.* 28
3. Upon application to modify an award, burden of proof rests upon the petitioner to establish by a preponderance of evidence that the disability has increased, decreased, or terminated. *Riedel v. Smith Baking Co.* 28
4. On review of pleadings and evidence, plaintiff did not establish increase of incapacity, due solely to his injury, arising since the award. *Riedel v. Smith Baking Co.* 28
5. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of the employment. *Muff v. Brainard* 650
6. Mere exertion which is not greater than that ordinarily incident to the employment cannot of itself constitute an accidental injury within the meaning of the Workmen's Compensation Act. *Muff v. Brainard* 650
7. Statute prohibiting device to escape relationship of employer and employee has no application to the relation of a bona fide vendor and vendee. *Heider v. Stoughton* 741
8. A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an

accident arising out of and in the course of the employment. *Simon v. Standard Oil Co.* 799

9. Whether or not an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. *Simon v. Standard Oil Co.* 799

10. An employee to be entitled to disability benefits because of the Workmen's Compensation Act must have received an injury which had its origin in or have been incidental to the employment, or it must have resulted from a risk which by reason of the employment exposed the employee to a greater hazard than if he had not been so employed. *Simon v. Standard Oil Co.* 799

11. The fact that the employee was at the place of the injury because of his employment is not sufficient if the injury resulted from a cause having no relation to the nature of the employment. *Simon v. Standard Oil Co.* 799

12. If an employee chooses to go to a dangerous place where his employment does not require him to be, and he thereby incurs a hazard of his own choosing foreign to any reasonable requirement of his position, the risk arising from such action is not incident to and does not arise out of or in the course of his employment. *Simon v. Standard Oil Co.* 799