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ANNA PAPKE, APPELLEE, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
No. 32711.

EMIL PAPKE ET AL., APPELLEES, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
No. 32712.

41 N. W. 2d 751

Filed March 10, 1950.

1. **Eminent Domain: Evidence.** In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation, and that the land so sold was substantially similar in location and quality to that condemned.
2. ———: ———. The productive quality and productivity of soil is one of the primary elements to be considered in the determination of farm land values.
3. ———: ———. Anything connected with the land that would influence the market value of the land in the mind of a good faith intending purchaser would be an element for consideration in determining damage.
4. ———: ———. In condemnation proceedings evidence of the prices paid for and received by a landowner for farm crops or garden produce raised on the land is inadmissible as an element of damage to be considered in determining the market or going value of the land being condemned.
5. ———: ———. In condemnation proceedings where the market value of real estate is in issue, evidence of prices paid by a condemner therefor is inadmissible in like proceedings involving other land, for the reason the same do not furnish a criterion for market or going value of land being condemned.

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

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellant.

William H. Thomas, for appellees.

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

MESSMORE, J.

These two cases were consolidated for trial in the district court for condemnation proceedings had by the metropolitan city of Omaha in taking and appropriating for public use certain lands of the plaintiffs for municipal airport purposes. Trial was had to a jury resulting in a verdict in favor of the plaintiffs and fixing an award in the amount of $6,500. Judgment was entered on the verdict, and interest added from the date of appropriation of such land by the city. Upon the overruling of defendant's motion for new trial, defendant appealed.

For convenience we will refer to the defendant as the city, and the plaintiffs as originally designated in the district court, or as Anna Papke or Emil Papke as occasion requires.

In 1922, the metropolitan city of Omaha adopted as its home rule charter, Chapter 116, Laws of 1921, in toto, under the provisions of Article XI, section 5, of the Constitution of the State of Nebraska. The original home rule charter and amendments adopted thereto pursuant to constitutional authority appear in Chapter 14, Revised Statutes 1943. In the opinion we will refer to the sections as the same appear in the Revised Statutes 1943. Strictly speaking, such sections of the statutes are not applicable to the city of Omaha as such, but as provisions of its home rule charter. We will have occasion to make reference to the Omaha charter amendment appearing as a note in volume 1, Revised Statutes 1943, p. 490 as such, in addition to the sections of the statutes pertinent thereto.

For the purpose of this appeal these cases have been consolidated and briefed as one case. The issues are the same in both cases, the difference being in the ownership of the land taken by the city in the exercise of its right of eminent domain.

The plaintiffs Anna Papke and her husband Emil Papke live in the northeast part of the city, referred to as the airport area. They have engaged in the truck-garden business for many years. In 1918, they purchased

a 5-acre tract of land which is the home place. In 1934, Anna Papke became the owner of Lots 1 to 24, inclusive, Block 10, Edgewood Park Addition. The plaintiffs jointly own Lots 1 to 12, inclusive, Block 7, Edgewood Park Addition. They also own jointly the north half of Block 16, Edgewood Park Addition, adjacent to Block 10 of such addition, which, together with other leased land, they use in their business of truck gardening. The total acreage owned by the plaintiffs is 12½ acres.

On December 23, 1947, the city approved an award of a board of appraisers appointed under ordinance 15727 of the city of Omaha, providing for appropriation of land for the Omaha Municipal Airport.

The Omaha charter amendment provides, as far as necessary to be considered here, that the city council may acquire by the exercise of the power of eminent domain, private property which is not at the time devoted to a specific public use, for needed public uses; and it further provides, whenever it becomes necessary to appropriate property for the purposes and as in this act provided, the purpose and necessity for such appropriation shall be declared by ordinance. Thereupon the council shall appoint three disinterested freeholders of the city, who, after having been duly sworn to perform the duties required of them by this act with fidelity and impartiality, shall give reasonable notice to the owners of and parties interested in the property to be appropriated, designating the time and place of hearing, and after the giving of such notice and hearing shall appraise and assess damages sustained by the taking of such property to the owners of and the parties interested therein respectively and make awards respectively of such damages. The appraisers shall thereupon report such appraisal and award to the city council for its action thereon. If the award is confirmed it shall be paid as in this act provided, but if rejected, proceedings anew may be commenced.

The pertinent sections of the statutes are sections 14-366 and 14-367, R. S. 1943.

The city, exercising the power of eminent domain, appropriated for municipal airport purposes Lots 1 to 24, inclusive, Block 10, Edgewood Park Addition, the record title of which was in the name of Anna Papke, and Lots 1 to 12, inclusive, Block 7, Edgewood Park Addition, owned by the plaintiffs jointly. The land so appropriated consisted of 36 lots, or approximately 7½ acres. The appraisers, appointed and acting as provided for in the city charter, made an award of $1,920 for the property owned by Anna Papke, and made a further award of $1,080 for the property owned jointly by the plaintiffs.

The evidence given in behalf of the plaintiffs is in substance as follows: Herman Stratbucker, a truck gardener cultivating 60 to 65 acres, testified that 1.1 acres of his land, which is approximately 2 blocks west of the plaintiffs' land, were appropriated by the city under condemnation proceedings, for which the city paid him $1,129.10. This land appropriated by the city was used with other land as a beam strip in connection with the municipal airport. The Papke land was about a block from this beam strip. There are red neon light signals erected on the beam strip for the purpose of guiding pilots at night or during a fog. The planes come in close to the beam standards, then drop down on the runway at the airport.

Ella Lesch, a sister-in-law of Anna Papke, testified that she and her husband owned Sub-Lot 1 of Tax Lot 16, comprising 10⅔ acres; and that the city by condemnation proceedings appropriated 2.12 acres out of the middle of their land for municipal airport purposes, primarily for the building of a beam strip, for which the city paid at the rate of $1,000 an acre. The 2.12 acres so appropriated divided this land so that less than 3 acres were on one side and about 3 acres on the other side of the land taken for the beam strip. This witness lives on Sub-Lot 1 of Tax Lot 16. Her house is one block distant from one part of the beam strip, and two blocks distant from the

other part of it, and this land is immediately south of the Stratbucker land.

The witness Charles Bahm testified that a realty company representing the city purchased 5 acres of land from him which he was using for general farming purposes in 1940, for the amount of $1,000 an acre, which now constitutes a part of the municipal airport. This land is located south and east of the Papke land. He was permitted to remove or wreck the improvements on the land, in addition to the amount paid him.

An expert witness, acquainted with real estate values in the area in which the plaintiffs' land was located, testified that such land was suitable for low-priced housing, factory sites, gardening, and for airport purposes which purpose he placed first in consideration; and that the reasonable market value of the land taken was $200 a lot. The plaintiff Anna Papke testified that the reasonable market value of the land here involved was $250 a lot. Emil Papke, Sr., testified that the reasonable market value of the plaintiffs' property was from $250 to $300 a lot.

Emil Papke, Jr., testified that he had been engaged in managing the plaintiffs' property for truck-gardening purposes since 1931, except during the time he spent with the military forces in the last war. He and his family live on the home place. He testified to the productivity of the land, the quantity and quality of crops raised thereon, that is, the number of bushels, bags, or pecks of the different vegetable products, which constituted a fair average of such crops for 1947 and for the years that he had marketed crops. This evidence was admissible. It went to the question of the productive quality of the soil, and productivity of soil is one of the primary elements to be considered in the determination of truck-garden land values. Anything connected with the land that would influence the market value of the land in the mind of a good faith intending purchaser would be an element in considering value and determin-

ing damage. See Wahlgren v. Loup River Public Power District, 139 Neb. 489, 297 N. W. 833.

This witness further testified as to the prices he received per bushel, per bag, or per peck for truck-garden products, and produced vendor's receipts showing what the crops produced sold for, representing the production from August 1947 for the balance of the gardening year. He also gave his opinion as to the fair estimate of the net profits from the lands for the last ten years, based on the percentage of crop receipts and the expenses necessitated by carrying on the business.

Anna Papke testified that she kept the books, and showed the gross income and the net income realized from the plaintiffs' land for the years 1946, 1947, and 1948.

In Wahlgren v. Loup River Public Power District, *supra,* this court said: "* * * the prices received for crops produced must be considered in an entirely different light. In the case of Wiles v. Department of Public Works, 120 Neb. 689, 234 N. W. 918, this court said: 'The compensation for land taken by right of eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner.' This statement was quoted with approval in In re Platte Valley Public Power and Irrigation District, 137 Neb. 313, 289 N. W. 383." The opinion, in discussing the evidence, stated that the prices paid for farm products were dependent upon many uncertainties, such as supply and demand, seasonal fluctuations, availability of markets, and wisdom in marketing. The same would be true with reference to the prices paid for truck-garden products sold by the bushel, bag, or peck. To permit a jury to consider the prices of farm products, or truck-garden products, in the determination of damages in eminent domain actions cannot be approved. Such evidence is too speculative to be of any real value and it was erroneously received.

In the instant case we hold that the evidence of prices paid for truck-garden products as heretofore shown, admitted over proper objections, constitutes prejudicial error.

There is evidence of severance of the plaintiffs' land that would interfere with their carrying on the truck-garden business. This issue was not submitted to the jury and need not be discussed.

Nickerson, a witness for the city, testified with reference to the purchase of the Bahm property consisting of 5 acres described as Lots 161, 169, 170, 171, and 172 in Woodland Acres, for which the company he represented paid $5,000. He demonstrated the manner by which the purchase was made, so much for acreage and so much for improvements. After the purchase, this land was deeded by his company to the city for municipal airport purposes.

The witnesses James F. Barrett and Frank Arndt, who appraised the land in question as freeholders appointed in connection with the condemnation proceedings, testified in behalf of the city. The witness Barrett testified to other sales of land in the vicinity and the prices paid therefor as compared to the market value of the plaintiffs' land, as did the witness Arndt. We deem it unnecessary to detail this testimony.

The witness Morton testified with reference to the value of the land used in connection with the beam strip condemned in 1942. He was not a member of the condemnation board. He explained that Mrs. Lesch's land was separated into two pieces; that the bright neon lights from the beam structures would be visible from her house; and that pilots seeking to land their planes and being guided by the beam lights constituted a nuisance to her premises, which was also the case with reference to the Stratbucker land.

The beam-strip structures are estimated by the witnesses to be 10 to 25 feet in height.

The city predicates error on the part of the trial

court in permitting the plaintiffs, over proper objections, to show the amount paid by the city for other land in other condemnation proceedings. This assignment of error relates to the testimony of the plaintiffs' witnesses, Herman Stratbucker and Ella Lesch, whose land was taken under condemnation proceedings for a beam strip in connection with the municipal airport. A summary of this evidence is heretofore set out. These witnesses were permitted to testify to the amount they received for their land by virtue of the awards made in such proceedings, also, the elements of damage to their land are distinct and different from that which would affect the plaintiffs' land by the taking.

In Langdon v. Loup River Public Power District, 142 Neb. 859, 8 N. W. 2d 201, this court held: "In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation and that the land so sold was substantially similar in location and quality to that condemned. * * * Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned." Any decisions of this court holding or tending to hold to the contrary were overruled.

We adhere to the above-stated rule.

It is apparent from the language quoted from Langdon v. Loup River Public Power District, *supra,* that the awards made, as testified to by plaintiffs' witnesses in this case, in other condemnation proceedings and the elements of damage considered with respect thereto, furnish no fair criterion of the reasonable market or

going value of the plaintiffs' lands, and such evidence should not have been admitted.

It is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands which are the subject of condemnation proceedings however similar they may be to that in controversy, whether payment was made in accordance with the award of the appraisers or verdict of a jury, because the price paid under such circumstances is not a fair test of true market value. See, Langdon v. Loup River Public Power District, *supra;* Yonts v. Public Service Co., 179 Ark. 695, 17 S. W. 2d 886; City of Los Angeles v. Cole, 28 Cal. 2d 509, 170 P. 2d 928.

We hold that the trial court committed prejudicial error in admitting the evidence complained of in this assignment of error.

The plaintiffs advance the proposition that under the city charter the city selects its own appraisers and may approve or reject the award filed by them; that acceptance of the award by the city council is an admission and declaration that the award is fair and reasonable, which distinguishes condemnation proceedings under the city charter from proceedings brought under other statutory provisions relating to other governmental agencies or railroads; and therefore, the evidence of awards made to other condemnees for their land and the amount paid is admissible in evidence as it relates to the market value of plaintiffs' land, as applied to the facts in the instant case.

The contention made by the plaintiffs is without merit. Section 14-813, R. S. 1943, a section pertinent to the city charter, provides that condemnees may appeal to the district court in the event there is dissatisfaction with the award of the appraisers, and outlines the procedure to perfect appeal. The trial in the district court involving such an appeal is no different in the procedure had or the

rules governing evidence than in any other condemnation proceedings.

The trial court should refrain from stating the amount of an award in an instruction to the jury. Evidence of amount of award made by appraisers in condemnation proceedings is barred. See Langdon v. Loup River Public Power District, *supra*. This being true, it is erroneous to instruct on this phase of the case.

The approved practice for the purpose of preserving the right of the landowners to interest is 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. Langdon v. Loup River Public Power District, *supra*. The trial court followed this practice, so in any event there would be no occasion to inform the jury as to the award made by the appraisers.

The judgment of the district court entered on the verdict is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

TENA E. GLISSMANN ET AL., APPELLANTS AND CROSS-APPELLEES, V. EDMOND H. ORCHARD, APPELLEE AND CROSS-APPELLANT, SERENA E. GRABOW ET AL., APPELLEES.

41 N. W. 2d 756

Filed March 10, 1950. No. 32738.

1. **Evidence.** Where cases are interwoven and interdependent and the controversy involved has been considered and determined by the court in former proceedings involving one or more of the parties presently before it, the court has the right to examine its records and take judicial notice of its proceedings and judgment in the former action.
2. **Mortgages.** In a suit to foreclose an agreement, the character of which is an equitable mortgage on the real estate affected, the execution of the agreement, the breach thereof, the identity of the real estate described therein, and the amount due thereon,

are material and necessary issues to be determined by the decree.

3. **Judgments.** It is a general rule that a judgment is a new debt and that the cause of action on which it is founded is merged therein.
4. ———. Any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
5. ———. If the district court attempts to render a judgment on a subject matter within its general jurisdiction but which is not properly before it, such a judgment is a nullity.
6. ———. A judgment of personal liability must be supported by a pleading alleging it as a cause of action.

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

Samuel L. Winters, Oscar Doerr, and *Henry Glissmann,* pro se, for appellants.

Gray & Brumbaugh, and *Edmond H. Orchard,* pro se, for appellees.

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

BOSLAUGH, J.

Tena E. Glissmann and Henry C. Glissmann, appellants, and Edmond H. Orchard, appellee and cross-appellant, are the parties now interested in this case. Serena E. Grabow and John J. Grabow have disclaimed any interest, and by their request this appeal has been as to them finally dismissed. Harriet C. Orchard died during the pendency of this case and Edmond H. Orchard, appellee, succeeded to any rights she had in the subject matter of the controversy.

Appellants claim they gave notice of their desire to exercise the option to purchase and offered to surrender possession of the premises described in the lease and

option agreement made a part of their pleadings and hereinafter referred to; that they requested appellee to advise them the amount of credits and security received by him for their benefit; that he contended that he held nothing for their benefit; that by action in court he dispossessed them of the premises; that appellee violated the terms of the agreement and failed to hold the $5,500 assigned to him as security; that appellants are entitled to the benefits of the $5,500 and the $1,500 equity transferred to appellee as provided by the agreement; and they ask for an accounting of the securities transferred to appellee.

Appellee denied all claims of appellants, except he conceded and pleaded the lease and option agreement; that Serena E. Grabow transferred to appellee the properties as security as evidenced by it; that appellants were dispossessed of the premises on January 23, 1942; that appellants and Serena E. Grabow and John J. Grabow were obligated to perform the terms of the agreement; that they were liable because of the agreement for rent, taxes, insurance premiums, waste, and expenses of litigation in which appellee had been involved which had accrued during the years of 1939, 1940, 1941, and to February 12, 1942; and he asked judgment for the amount thereof with interest against them.

The district court found that appellants were entitled to recover from appellee $1,500 (without interest), the undisputed value of the equity in the five-acre tract; that the lease option and agreement was terminated by foreclosure on October 31, 1939; that Edmond H. Orchard had succeeded to all rights and liabilities of Harriet C. Orchard; that there was due from appellants to appellee $5,963.13, composed of rent, taxes, and insurance premiums accrued during the period from June 15, 1939, to February 12, 1942; that the $1,500 should be offset against said amount; and that there was a net balance due appellee from appellants of $4,463.13 and judgment was entered therefor in harmony with the findings. There

was no motion for a new trial. There is no bill of exceptions. The case is here for review on the transcript.

An agreement bearing date of March 28, 1929, made by appellee and his wife, as first parties, and Serena E. Grabow and John J. Grabow, as second parties, evidenced the transfer to Edmond H. Orchard by Serena E. Grabow of $5,500 of her interest in the estate of Hans C. Glissmann, deceased, and an equity of the value of $1,500 resulting from a transaction involving a five-acre tract of land described in detail in the agreement. The agreement provided that these items were to be held by first parties as security for the performance of the obligations of the agreement by second parties and to be disposed of, in the event of their failure to purchase the premises described in the contract under an option granted by it, and the surrender by them of the possession of the premises to first parties, by their surrender and transfer of all funds held by them as security to second parties, less any part thereof applied to the satisfaction of any items designated in the agreement then due and unpaid to first parties. This instrument was a lease and option agreement made on behalf of, and for the benefit of appellants as the real parties of the second part.

Litigation involving the lease and option agreement, the subject matter thereof, and transactions relating to and induced thereby, has been frequent and long, and has been determined by this court in several cases. They were interwoven, and in many respects interdependent. Appellants and appellee have been principal adversaries therein. This is a proper case for application of the doctrine that: "'* * * where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.'" Koehn v. Union Fire Ins. Co., *ante* p. 254, 40 N. W. 2d 874.

It had been adjudicated before this case was commenced that appellants had no interest in or right to any part of the $5,500 furnished to appellee by Serena E. Grabow as shown by the lease and option agreement as security for the performance of the obligations thereof by second parties named therein. Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612. That this was the effect of the decision in that case is made certain by the language of a later case. Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The equity of $1,500 because of the transaction involving the five-acre tract of land was the property of Tena E. Glissmann and was assigned by her to Serena E. Grabow to enable her to transfer it as security to appellee and his wife. Appellee recognized that he was not entitled to retain this. He asked for instructions of the court for its disposition in the case in which he sought and secured foreclosure of the lease and option agreement. Glissmann v. Orchard, *supra*. Serena E. Grabow has, by her disclaimer and motion to dismiss the appeal in this case, conceded the correctness of the finding and judgment of the district court awarding this to appellants. It was said by this court in the last case in this litigation that such rights as remained because of the lease and option agreement having existed belonged to Tena E. Glissmann. Glissmann v. Bauermeister, *supra*. This equity was at the inception of the agreement the property of Tena E. Glissmann, and under the terms thereof was to be returned by appellee if the option of purchase was not exercised and the title to the premises, the subject thereof, conveyed by appellee. The option was not exercised and the title to the premises was made complete in appellee as a result of the foreclosure. The appellants are entitled to the benefit of the value of this equity, $1,500 with interest thereon at legal rate from October 31, 1939.

The attempt of appellee to secure an accounting and a recovery herein for rents, taxes, insurance, waste, and

expenses incurred by him in former litigation under and because of the terms of the lease and option agreement, is futile and without legal warrant. An accounting as to all items of liability because of the agreement was the purpose and final result of a former case by the parties to this case. The amount of the liability under the agreement was put in issue, litigated, and determined by the district court and this court. Glissmann v. Orchard, *supra*. It was said by this court that the matter of the accounting on the lease and option agreement was finally adjudicated in that case. Glissmann v. Bauermeister, *supra*. That was necessarily true because it was the very purpose of the litigation and every liability provided for by the agreement was an issue therein whether specifically or actually raised or not. Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342; Columbus Land, Loan & Bldg. Assn. v. Wolken, 146 Neb. 684, 21 N. W. 2d 418, 165 A. L. R. 1285. When that case was finally concluded the agreement was exhausted and terminated. The general rule of merger applies without limitation or exception. State ex rel. Spillman v. Citizens State Bank, 115 Neb. 593, 214 N. W. 6; Restatement, Contracts, § 444, p. 831; 30 Am. Jur., Judgments, § 151, p. 903. No new liability or indebtedness could possibly accrue because of the fact that the agreement had existed. The result of the litigation was a victory for the appellee, and he accepted and has retained the benefits thereof. He cannot now be heard to contend otherwise. The date of the exhaustion and termination of the agreement by final adjudication was as of October 31, 1939. The district court was in error in finding any amount due appellee in this case because of any claim pleaded by him. What he claimed was barred by a final adjudication, and the judgment awarding it to appellee was a nullity. It was said in Glissmann v. Bauermeister, *supra*: "Any right, fact, or matter in issue, directly adjudicated or necessarily involved in the determination of an action before a competent court in

which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. * * * If the district court attempts to render judgment on a subject within its general jurisdiction but which is not properly before it such judgment is a nullity."

Appellee asserted no claim of liability against appellants by pleading or otherwise for the value of the use or for damages for waste or injury to the real estate because of the occupancy of it by them from the date of the foreclosure of the agreement as an equitable mortgage until the time they were dispossessed January 23, 1942, or for any other period. A judgment of personal liability must be supported by a pleading. There was no cause of action pleaded by appellee that sustains the finding and judgment of personal liability of appellants. Columbus Land, Loan & Bldg. Assn. v. Wolken, *supra*.

The judgment in this case should be, and is, that the judgment of the district court is reversed and that appellants have and recover from appellee Edmond H. Orchard the sum of $1,500, with interest thereon at six percent per annum from October 31, 1939.

REVERSED.
JUDGMENT FOR APPELLANTS.

JOHN BODEMAN ET AL., APPELLANTS, V. OPAL CARY ET AL., APPELLEES.

41 N. W. 2d 797

Filed March 16, 1950. No. 32727.

1. **Wills.** It is the court's duty in the construction of a will to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law.
2. **Estates.** An estate given or conveyed to two or more persons

for their use and benefit so long as they live ordinarily continues during the life of each, and is terminated only at the death of the survivor.

3. **Partition.** When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate.

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

Torgeson, Halcomb & O'Brien, for appellants.

Jack H. Hendrix, for appellees.

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

CHAPPELL, J.

Plaintiffs brought this action to partition the southwest quarter and the east half of Section 19, Township 6 North, Range 33 West of the 6th P. M., located in Hayes County, and to secure an accounting as against defendant Amy Bodeman of one-half the rentals therefrom, collected by her after June 22, 1943. Defendants Gerald A. Bodeman, Verle J. Bodeman, and Amy Bodeman demurred to plaintiffs' petition, both generally and upon the ground that the petition showed on its face that there was an outstanding life estate in the entire real estate involved, thus plaintiffs were not entitled to partition. The demurrer was sustained, and plaintiffs elected to stand upon their petition, whereupon the trial court dismissed plaintiff's action. Plaintiffs appealed, assigning that the trial court erred in so doing. We conclude that the assignment should not be sustained.

Concededly, defendants' demurrer admitted only facts well pleaded, and not conclusions of either law or fact. Bearing that in mind, the petition discloses as follows: One Gustaf Bodeman, who died testate October 17, 1928, was, on that date, the owner in fee simple of the property involved. His will, duly admitted to probate on

November 26, 1928, copy of which was attached to plaintiffs' petition and made a part thereof, provided, among other things:

"SECOND: I give, devise, and bequeath unto my daughters, Sophia Bodeman and Amy Bodeman, who have so kindly cared for me during my declining years, all of my real estate of every kind and nature and wheresoever situated for their use and benefit so long as they live.

"THIRD: I give, devise and bequeath, on the death of said Sophia Bodeman and Amy Bodeman, all of my real estate of every kind and nature and wheresoever situated to my following named childrren (children) and grandchildren, share and share alike, to-wit: Andrew G. Bodeman, Lee Bodeman, John Bodeman, Alfred Bodeman, Anna Wahlstrom, Nellie Wynant, and Clarence Bodeman, to be theirs absolutely. That is to say, on the death of Sophia Bodeman and Amy Bodeman, it is my desire that my children and grandson in this paragraph named, shall have the fee simple and absolute title to the land owned by me at the time of my death."

The probate proceeding involving the will had been completed approximately 15 years before this action was commenced, and all claims against the estate had been paid or barred by law. Sophia Bodeman died June 22, 1943.

Plaintiffs John Bodeman and Nellie Wynant are children of testator, named in his will. Defendants included Clarence Bodeman, the grandson named in the will, Amy Bodeman, the daughter of testator, and the respective heirs or representatives of other named children. All persons named in the will survived the testator, but his children Sophia Bodeman, Andrew G. Bodeman, Lee Bodeman, Alfred Bodeman, and Anna Wahlstrom, all died prior to the filing of this action.

As we view the record, the primary question for decision here is whether or not the fee simple title to any part of the real estate involved vested in the remainder-

men free from the burden of the life estate, before the death of both life tenants Sophia Bodeman and Amy Bodeman. We conclude that it did not.

Plaintiffs argued that Sophia Bodeman and Amy Bodeman, life tenants under the will, were tenants in common of a life estate as distinguished from a joint tenancy. Consequently, they contended that upon Sophia Bodeman's death, her life interest ceased, and the fee simple title to an undivided one-half interest in the property then vested in the remaindermen or their heirs, with the right to the use and enjoyment thereof freed from the burden of the life estate, and that plaintiffs John Bodeman and Nellie Wynant thus became tenants in common with Amy Bodeman, with the right to partition and an accounting for one-half the rents collected by Amy Bodeman after Sophia Bodeman's death.

On the other hand, defendants argued that under the will the fee simple title to no part of the property vested in the remaindermen freed from the burden of the life estate, until the death of both life tenants, and that Amy Bodeman, as survivor, still having an exclusive estate for life in the whole of the premises of which partition was sought, the remaindermen could not maintain partition. We sustain that contention.

Section 25-2170, R. R. S. 1943, provides in part: "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed."

This court has recently held: "While as between joint tenancies and tenancies in common the law prefers the latter, yet if the purpose to create a joint tenancy is clearly expressed in an instrument of conveyance or ownership, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created." In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677.

Section 76-205, R. S. 1943, which is declaratory of our

rule for the construction of wills, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

In Lancaster County Bank v. Marshel, 130 Neb. 141, 264 N. W. 470, it was said: "In the application of this legislative formula, this jurisdiction is committed to the view that 'No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. * * *' " See, also, Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159.

In the light of the foregoing rules, we have examined testator's will, the provisions of which were not ambiguous in any manner. The testator's intention clearly appears from the language used. The second paragraph of the will is the simple statement that both of testator's "daughters, Sophia Bodeman *and* Amy Bodeman," were given "*all* of my real estate of every kind and nature and wheresoever situated for *their* use and benefit *so long as they live.*" (Italics supplied.)

Thereafter, the third paragraph settled the question of termination of their life estates, by saying: "I give, devise and bequeath, *on the death of said Sophia Bodeman and Amy Bodeman, all* of my real estate * * * to my following named childrren (children) and grandchildren * * * to be theirs absolutely. That is to say, *on the death of Sophia*

Bodeman and Amy Bodeman, it is my desire that my children and grandson in this paragraph named, shall have the fee simple and *absolute title* to the land owned by me at the time of my death." (Italics supplied.)

As we view it, the will specifically provided, and it was clearly the intention of testator, that the fee simple title to no part of the real estate involved should vest in any devisee free from the burden of the life estate, until both life tenants were dead. Amy Bodeman still lives, and as survivor she has a life estate in all of the real estate. To hold otherwise would not give full meaning to all the language used by the testator, and thus defeat his intent.

As stated in 31 C. J. S., Estates, § 65 (2), p. 78: "An estate for the tenant's own life terminates immediately on the death of the tenant. An estate for the tenant's own life and for the life of another person does not terminate on the death of the tenant during the life of the other person but only on the death of the survivor of these two persons, and an estate to two persons for and during their natural life continues during the life of each, and is terminated only at the death of the survivor." See, also, Kenney v. Wentworth, 77 Me. 203. The text further states at page 79: "A usufruct is terminated by the death of the usufructuary, but if given to two persons during their lives no part of the usufruct ceases until the death of both usufructuaries." See, also, Arceneaux v. Bernard, 10 La. 529. Also, as stated in 21 C. J., Estates, § 111, p. 969: "An estate * * * for the tenant's own life and for the life of another person does not terminate on the death of the tenant during the life of the other person but only on the death of the longer lived of these two persons, and an estate to two persons for and during their natural life continues during the life of each, and is terminated only at the death of the survivor."

Philbert v. Campbell, 317 Mo. 556, 296 S. W. 1001, relied upon by plaintiffs, is not only distinguishable upon the facts but was also decided upon the basis of the pro-

visions of a specifically applicable statute, of which this state has no counterpart. In that connection, see, also, Dodd v. McGee, 354 Mo. 644, 190 S. W. 2d 231. Woolston v. Beck, 34 N. J. Eq. 74, Stoutenburgh v. Moore, 37 N. J. Eq. 63, Collins v. Wardell, 65 N. J. Eq. 366, 54 A. 417, and In re French's Estate, 292 Pa. 37, 140 A. 549, relied upon by plaintiffs, are distinguishable upon the facts, because provisions of the wills involved therein were not comparable with those at bar.

It is well established that "when there is an outstanding estate for life, vested in a third person, in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate." Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227; Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485. Such rule is controlling in the case at bar.

Other propositions of law are presented in briefs of counsel, but they require no discussion.

For the reasons heretofore set forth, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

GLENN KEAR ET AL., APPELLANTS, V. VERNON HAUSMANN ET AL., APPELLEES.

41 N. W. 2d 850

Filed March 16, 1950. No. 32746.

1. **Reformation of Instruments.** Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed.
2. ———. In a proceeding to reform a contract on the ground of mutual mistake the burden of proof is on the party interposing that plea.
3. ———. A preponderance of evidence sufficient to justify ref-

ormation of a written instrument requires proof that is clear, convincing, and satisfactory.

4. ———. A mistake for which a written instrument will be reformed must be mutual.
5. ———. A mutual mistake is one common to both parties, each laboring under the same misconception.
6. **Vendor and Purchaser.** A contract of sale and purchase of real estate, in which the time in relation to deferred payments of the purchase price is made of the essence of the contract and a forfeiture provided for nonperformance, may be enforced in accordance with the terms of the express stipulation.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Bernard Ptak, for appellants.

Hutton and *Mueting,* for appellees.

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

WENKE, J.

Glenn Kear and Ruth E. Kear brought this action against Vernon Hausmann and Irene Hausmann. The action was brought in the district court for Madison County and the petition was filed on April 8, 1949. The purpose of the action is to quiet plaintiffs' title, as joint tenants with right of survivorship, in and to a certain 80 acres of land in Madison County as against any and all claims of the defendants.

Defendants, by cross-petition, set up a contract which they had entered into with the plaintiffs for the purchase of said lands. They alleged a mutual mistake was made in drafting said contract with reference to the payment of a part of the purchase price and asked reformation thereof accordingly and for the right to perform the contract when so reformed.

The court found for the defendants on their cross-petition, decreed reformation, and granted defendants specific performance of the contract as reformed. Plain-

tiffs filed a motion for new trial and, from the overruling thereof, have appealed the matter to this court.

If the facts justify the trial court's action then the decree entered is proper for as stated in Smoke v. Pope, 119 Neb. 432, 229 N. W. 330: "Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed."

The action being equitable in its nature, the appeal brings the matter here for our consideration of the record de novo. See Shurtleff v. Pick & Co., 103 Neb. 414, 172 N. W. 46, and section 25-1925, R. R. S. 1943.

The record discloses that the appellants, Glenn Kear, who is single, and Ruth E. Kear, his widowed mother, were the owners of the west half of the northeast quarter of Section 14, Township 23 North, Range 1 West of the 6th P. M., in Madison County, Nebraska, as joint tenants with right of survivorship; and that on February 23, 1949, they entered into a contract for the sale of these premises with the appellees, Vernon Hausmann and Irene Hausmann, who are husband and wife. The consideration for the sale was $6,000. With reference to the payment of the purchase price the contract, insofar as here material, provides as follows: "Two hundred Dollars ($200.00) upon the signing of this contract, receipt of which is hereby acknowledged; One thousand eight hundred dollars ($1800.00) on or before April 1st, 1949, and the balance due in the sum of $4000.00 to be paid by the parties of the second part executing and delivering to the parties of the first part a real estate mortgage in said sum of $4000.00 on the above described premises * * *."

Appellees went into possession of the premises pursuant to the terms of the contract but failed to make the payment of $1,800 payable on or before April 1, 1949. Subsequently they made a tender thereof on May 24, 1949. Appellants refused to accept the tender when made.

The contract further provides: "The parties hereto

further agree that time is the essence of this contract, and that if said second parties shall fail to pay to said first parties the balance due under the terms of said contract, that this contract shall thereupon be cancelled and all payments made hereon shall be kept by said first parties as liquidated damages for the breach by said second parties under the terms of this contract."

The appellees, in their cross-petition, contend that the parties agreed, with reference to the payment of the $1,800, that it should be paid on April 1, 1949, or as soon thereafter as the corn of the appellees could be shelled and sold but, because of a mutual mistake, the agreement failed to so provide. In their cross-petition they ask that the contract be reformed accordingly by inserting therein, with reference to the payment of the $1,800, the following provision: "'or as soon thereafter as second parties' corn can be shelled and sold.'" The trial court reformed the contract accordingly.

The evidence shows that appellees, because of weather conditions, were not able to get their corn out of the field until about the first of May and could not get it shelled, hauled, and sold until shortly before they made the tender of $1,800 on May 24, 1949, which tender they renewed in court at the time of trial. It was again refused by appellants at the time of the trial.

The negotiations for the sale of the premises, the drafting of the contract, and the execution thereof, except the signing thereof by appellant Ruth E. Kear, all took place in the office of Mapes and Mapes in the city of Norfolk, Nebraska, on February 23, 1949. Ruth E. Kear is crippled and, because of that fact, did not go up to the office but remained in a car. After the contract had been drafted and signed by the others it was taken to her and she then signed it in the presence of her son and Robert Powers.

The following were present in the office of Mapes and Mapes at the time the negotiations for the sale of the premises were had: Glenn Kear, Vernon Hausmann,

Irene Hausmann, George Hausmann, Rose Hausmann, Leonard Gourley, Hans Rohwer, Robert Powers, and the stenographer who typed the contract. George Hausmann and Rose Hausmann are the parents of appellee Vernon Hausmann. Robert Powers, who has his place of business in the office of Mapes and Mapes, drafted the contract after the parties had advised him of the terms to be placed therein.

The evidence shows that in the selling of the land Glenn Kear was acting as agent for his mother and Leonard Gourley was acting as agent for the Kears. In considering their actions we shall take into consideration the principle that when the relation of agency exists the principal will be liable to third persons for all acts committed by the agent in his or her behalf in the course of and within the actual scope of their authority. See 3 C. J. S., Agency, § 231, p. 138.

In Beckius v. Hahn, 114 Neb. 371, 207 N. W. 515, 44 A. L. R. 73, we said: "In equity, the reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation, as a whole, should be to give all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute."

With reference to the right thereto we held in Paine-Fishburn Granite Co. v. Reynoldson, 115 Neb. 520, 213 N. W. 750, that:

"In a proceeding to reform a contract on the ground of mutual mistake, the burden of proof is on the party interposing that plea.

"A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing and satisfactory.

"A mistake for which a written instrument will be reformed must be mutual.

"A mutual mistake is one common to both parties, each laboring under the same misconception."

The evidence shows that while the parties were negotiating the terms of the sale that Glenn Kear, who will hereinafter be referred to as Kear, was advised of the fact that outside of the $200, which the appellees then had to apply on the contract, appellees would have to raise the balance of the purchase price to be paid in cash from the sale of their share of the 1948 corn crop. Appellees were farming on shares and part of their 1948 corn crop was still in the field due to weather conditions which had prevented their picking it. Appellees advised Kear they thought they could get the corn out of the field by the first of April but asked Kear if they didn't if it would be all right with him if they paid it after that date provided they paid the $1,800 as soon as they could get the corn picked, shelled, and sold. Kear advised appellees that would be all right.

Powers testified that the terms of the contract were given to him in the presence of all the parties; that such terms did not include the provision which appellees now contend was intended to be included therein; and that he drafted the contract in accordance with the instructions given him and consequently did not include such a provision.

After the contract had been drafted, but before it was executed, copies thereof were given to the parties and read by Vernon Hausmann's father, mother, and wife. The evidence establishes that appellees were fully aware of the provisions in the contract relating to when they were required to pay the $1,800 and the fact that the contract contained no such provision as is now sought to be inserted therein by reformation. Vernon Hausmann's father informed Vernon of the provisions in the proposed contract relating thereto and the effect thereof. With this knowledge on their part the appellees executed the contract. Why no objection was made at the time is not apparent. With the knowl-

edge appellees had of what the contract contained when they signed it they cannot be said to have been laboring under any misconception of what the contract provided in regard thereto. Consequently they are not now in a position to ask equity to help them out of a position into which they knowingly and voluntarily entered, although it apparently is not in accordance with the understanding they reached during the negotiations. We do not find the facts entitle the appellees to reformation of the contract and that the trial court was wrong in so ordering.

In regard to the provisions of the contract relating to time being the essence thereof and failure to pay the balance entitling the seller thereof to a cancellation and forfeiture of the payment made as liquidated damages we have held in Whiteman v. Perkins, 56 Neb. 181, 76 N. W. 547: "A contract of sale and purchase of real estate, in which the time in relation to deferred payments of the purchase price is made of the essence of the contract, and a forfeiture provided for non-performance, may be enforced in accordance with the terms of the express stipulation." See Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682; Yant Construction Co. v. Village of Campbell, 123 Neb. 360, 243 N. W. 77; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539; and Abbas v. Demont, *ante* p. 77, 40 N. W. 2d 265.

In Dodge v. Galusha, *supra,* we quoted from Gilbert v. Union Pacific R. R. Co., 79 Neb. 160, 112 N. W. 359, as follows: "Where a contract for the sale of real estate provides that time and punctuality are material and essential ingredients in the contract, and the non-payment of an instalment of the purchase price shall forfeit the purchaser's rights therein, and that the vendor shall thereupon have the right to take possession of the property, such default of itself operates as a forfeiture, and the vendor is not required to give notice to the purchaser."

The facts of this case entitle the appellants to the relief for which they prayed.

The decree of the trial court is reversed with direction to the trial court to enter a decree in favor of the appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, APPELLANT, V. WILLIAM MILDER ET AL., APPELLEES.
41 N. W. 2d 780

Filed March 16, 1950. No. 32651.

1. **Alteration of Instruments.** The filling in of a blank in a written instrument is not, strictly speaking, an alteration of it. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority so to do.
2. **Insurance.** If an application for insurance is prepared by an agent of insurer and he fills in false answers to the interrogatories contained therein, which are truthfully answered by the insured, the insurer cannot rely upon such answers in an action in equity to rescind or reform the policy issued upon the application.
3. ———. If the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity, and he is not prevented by the mere fact that he accepted and retained the policy and did not examine it until after a loss occurred.
4. ———. If insured states the facts correctly to the agent of the company, he is not bound to exercise vigilance thereafter to determine whether or not the agent exercised good faith or truthfulness in his transactions on behalf of the company.
5. ———. Where a question in the application for insurance calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insured will avoid the policy.
6. ———. Untrue representations made by the insured in his application where the questions eliciting such statement call for matters of opinion, judgment, or belief will not avoid a policy issued thereon unless it is shown that the misrepresentations were knowingly made with intent to deceive.
7. ———. Rejection of an application for insurance because the

applicant already had insurance exceeding insurer's limit is not material to the risk as respects necessity of disclosure in subsequent application to another company.

8. ———. In an application for accident and health insurance a representation that no other insurance issued to the applicant had been cancelled is not false because of the prior voluntary election of the applicant to surrender a policy which had been issued to him.

9. ———. A policy of insurance must be construed, as any other contract, in accordance with its general scope, its design, and the intention of the parties at the time it was made as disclosed by the whole instrument, and if its provisions are clear and unambiguous they must be understood in their ordinary meaning and applied in a reasonable manner.

10. ———. The entire contract must be regarded with a conscious effort to give effect to every part of it without disproportionate emphasis upon one to the neglect of other provisions.

11. ———. An insurance company may limit its liability in any reasonable manner which does not contravene public policy.

12. ———. The health indemnity provision of a policy that insured must, to be entitled to maximum benefits, be confined continuously within doors and have regular medical attendance therein should be reasonably and not literally construed, but it should not be abrogated or disregarded and a recovery allowed because he is totally disabled when he is not confined.

13. ———. The insured must be substantially confined within doors and have regular medical attendance therein by reason of illness to be entitled to the maximum benefits by virtue of such a provision, and if the insured is able to and does go about as he desires for purposes not connected with his sickness, he is not continuously confined within doors within the meaning of a provision requiring confinement continuously within doors and regular medical attendance therein.

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

Lyle Q. Hills, Edward A. Nelson, G. Robert Muchemore, and *Cleary, Horan & Skutt,* for appellant.

Jack W. Marer and *Norman Denenberg,* for appellees.

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

BOSLAUGH, J.

Mutual Benefit Health and Accident Association, appellant, instituted this action against William Milder and Rose Milder, appellees, to rescind, on the ground of fraud and misrepresentation, a policy of accident and health insurance for which William Milder made application and which it issued to him as insured. Rose Milder, the wife of William Milder, is the beneficiary named in the policy, and is a party only because of this fact. The contest is between appellant and William Milder, appellee, and no further mention of Rose Milder as a party is made herein.

Appellant alleged the policy was issued because of its reliance upon and in consideration of statements made by appellee in the application, which was, by a provision of the policy, made a part of the insurance contract; that the insured knowingly and purposely made untrue and incomplete answers to questions material to the risk contained in the application for the insurance for the fraudulent purpose of inducing the issuance of the policy; that if the answers of the questions had been true and complete, the application would have been rejected and the policy would not have been issued; that the answers were warranties by appellee of the truthfulness and completeness of each of the matters stated by him; and that when appellant learned of the fraud and misrepresentations of appellee it elected to rescind the policy and tendered return of premiums paid with interest, less amounts received by appellee on claims under the policy, which he refused. Appellant seeks a determination of the rights and liabilities of the parties, a rescission and cancellation of the policy, and general relief.

Appellee admits the issuance to him of the policy, the standard provisions thereof as recited by appellant, denies all other claims by it, and alleges as a basis of affirmative relief that the agent of appellant propounded to appellee the questions of the application which he

answered, as explained by him, and after the commencement of this case he first learned that the agent had not truthfully and correctly asked the questions or correctly inserted the answers to them as made by him; that four of the questions were not propounded to appellee or answered by him; and that the answers thereof were fraudulently and without his knowledge placed there by appellant. Thereby the application was materially altered, is not an application as required by statute, and is void and appellant is estopped from claiming or having any advantage because of it. Appellee requested reformation of the questions in controversy and relief in harmony with his version of the facts. He asserted he had paid all premiums due on the policy; that he was entitled to recover on it, when reformed in accordance with his claims, $100 a month during the time he suffered total disability and total loss of time from sickness or disease which confined him within doors and required visits therein by a legally qualified physician; that he had been since May 25, 1942, totally disabled, had sustained a total loss of time from disease, and had been confined indoors within the terms and conditions of the policy; that his disability was permanent; that he had performed all the obligations of the insurance contract; that there was due him thereon as health disability benefits $100 on May 25, 1942, and a like amount each month thereafter during total disability and loss of time; that he made demand therefor, which appellant refused, but, with knowledge of the facts, wrongfully claimed appellee was not confined indoors under the care of a physician, was entitled to only $50 a month under the terms of the policy, and offered settlement to him on that basis; and that because thereof appellant was estopped to claim any other ground of nonliability. Appellee asked judgment for the amount claimed with interest, costs, and attorneys' fees. He alleged that he paid the premium due August 1, 1942, of $52 to protect his rights in the policy; that it

provides that permanent total disability of insured resulting from sickness relieved him from the payment of any premiums due thereafter; and that he was entitled to judgment for $52 with interest thereon, and to an adjudication relieving him from the payment of any further premiums on the policy.

Appellant replied to the claims of appellee by denial of the new matter and by asserting that he had the policy in his possession, of which the application is a part, for more than six years; that he was barred from claiming that it did not state the answers given by him to the questions therein; and pleaded estoppels because appellee twice made and collected claims under the policy, because he sued appellant on the policy and alleged therein the issuance and validity of it and that a copy of the policy was in the possession of appellee, and because appellee, on at least three occasions since this case was commenced, changed his position in an effort to avoid the effect of evidence produced by appellant that informed appellee that appellant had discovered and knew the facts as to his fraud and misrepresentation in procuring the policy to be issued to him.

The court found in favor of appellees and against appellant; denied its petition and decreed reformation of the part of the policy consisting of a copy of the application as requested by appellee; that he was entitled to $100 a month, with interest on each installment from maturity thereof, as benefits for total, permanent disability and total loss of time, as provided by the policy, commencing with May 25, 1942, and as long as his disability continued; that he should recover $52, premium paid August 1, 1942, with interest; and that appellant should waive all premiums on the policy commencing with that date, and should pay all costs including $2,500 attorneys' fees. The motion of appellant for a new trial was denied, and it appealed.

Appellant contends that each of the findings and the

decree are contrary to the evidence and the law. This is a suit in equity. It must be tried de novo in this court and an independent determination made without reference to the findings or decree of the district court except that where the evidence on any question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider that the district court observed the witnesses and their demeanor while testifying, and accepted one version of the facts rather than the opposite. Kuenzli v. Kuenzli, 150 Neb. 855, 36 N. W. 2d 247; Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547.

Appellant claims it issued to appellee the policy in consideration of and reliance upon an application made by him and the truthfulness of the answers to certain questions therein. Questions 17, 18, and 12 may be considered together. They are in substance: (17) Do you agree that the policy applied for shall not be binding until it is issued and accepted but while you are in good health and free from injury? (18) Do you apply for a policy to be issued only in reliance on the questions in the application, and that the association is not bound by any statement by or to an agent unless written therein? (12) Have you had any of a large number of named diseases? The answers to the first two are in the affirmative, and to the last in the negative.

The evidence of appellant on the subject of these questions and the answers to them is that the agent who secured the application from appellee was told by him that the only policy he would buy must be noncancellable, and on condition that he be given an opportunity to examine it before he would be obligated. The agent agreed to proceed on that basis. It was because of this that the agent wrote "issued on approval" on the application before it was signed by appellee. The agent asked the questions of the application consecutively as they are numbered and in the order they appear, and wrote therein the answer to each as given by appellee, except the answers to questions 12, 17, and 18. The application

when signed by appellee, taken from his office, and delivered to appellant by the agent, had no answer to any of these questions. His explanation for not inserting an answer to question 12 was: "It was an approval policy" and as to questions 17 and 18, his explanation for the omission was: "I have an idea he was in a hurry and I was in a hurry to get out of there * * *." The application reached the home-office manager of appellant, and he wrote in pencil the answers to these questions. He did not know appellee, had never communicated with him, and did not obtain authority from him to answer the questions. The application was submitted to the underwriter of appellant. The questions were answered on the application when it came to him. He examined it, relied upon the truthfulness and accuracy of the answer to each of the questions, and approved it. The policy was issued and the agent who secured the application took the policy to appellee, called his attention to the insertion of the answers to these questions by the manager of appellant, and the photostatic copy of the application. Appellee read or looked over the application and the policy, retained it, and gave the agent a check for the first premium.

The evidence of appellee is that he did not read the application; that questions 12, 17, or 18, or any of them, were not asked by the agent, and there was no answer to any of them in the application when he signed it; that he relied on the agent to ask the questions, to insert the correct answers, and he relied upon each statement made by him to appellee; that the agent did not say that the policy was to be issued subject to approval by appellee, and he supposed if the application was accepted a policy would be issued; that he gave the agent a check for the first premium when he signed the application; that the policy came to him by mail; and that he did not read it or the photostat attached, but put it in his safe and did not look at the copy of the application attached to the policy until six or seven years later. He first discovered

the answers to these questions were inserted in the application when appellant produced the original application at the first trial of this case in 1944. A person present when the application was prepared in the office of appellee did not hear the agent ask either of the questions now being considered.

Appellant seeks application of the rule that the leaving of blanks in a written instrument after execution and delivery implies authority to fill them and creates an agency in the receiver of the instrument to do so in the manner contemplated by the maker, in the absence of fraud or violation of instructions. The propriety of making an insertion in a completed written instrument depends upon authority to do so. The rule in this jurisdiction is stated in Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. N. S. 423: "The filling in of a blank in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in, it is a question of authority so to do." See, also, Reilley Bros. v. Thompson, 127 Neb. 683, 256 N. W. 642; Holman v. Higgins, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916F 1263, Ann. Cas. 1917E 515; 3 C. J. S., Alteration of Instruments, § 62, p. 976. The weight of the evidence supports a finding that these questions were not propounded to or answered by appellee, and that there was no consideration of or statement concerning any of them by him. The assertion of the agent that he asked appellee the questions, and he gave answers to them as they were later placed in the application, is materially weakened and made improbable by the unsatisfactory and inappropriate explanation that he did not insert the answer to question 12 because the policy was to be issued subject to approval by appellee when the inquiry thereof did not concern any condition attached to the issuance of the policy, but was directed to the health of appellee, and the explanation of the agent that he did not show answers to questions 17 and 18 because he and the applicant were limited for time is not convincing in view of the

very short time required to write the one word answer. Appellant is deprived of the advantage of the rule it suggests by the absence of proof of authority to fill the blanks and the admission of the representative of appellant who supplied the answers to the questions that he did not know appellee, had never communicated with him, and had not been granted authority.

Appellant claims that the negative answer of appellee to question 9 in the application was incomplete and false because appellee had been declined life and disability insurance, and renewal of a disability policy held by him had been refused. The record contains evidence that appellee was not asked this or any similar question; that he was asked by the agent if he had been refused life insurance; he answered he had been by Reliance Life Insurance Company about 1918, and had since then obtained $60,000 of life insurance; and that the agent said: " 'Why, that's a long, long time ago, and since you have obtained all of that life insurance' * * * 'there's no use of my putting that down.' " Appellee believed and relied on his statement. He was corroborated by the person present at the time of the conversation who heard him tell the agent that he had applied to the Reliance Life Insurance Company for a policy which was refused and not issued or delivered. The application of appellee to Reliance Life Insurance Company about 1918 for a life insurance policy was not accepted. He applied to Aetna Life Insurance Company in 1926 for a life insurance policy of $25,000 and was later informed by its agent that the company had a regulation as to the amount it would carry on a risk, and the company would not issue the policy. The agent did not say that appellee as a risk for life insurance had been declined. The company had made extensive investigation because of the application of appellee. A letter of the company states: "* * * our inspection report is clear in every respect," but we do not "* * * care to increase our line inasmuch as we are now carrying $45,000. of insurance on Mr. Milder's life."

The inspection report referred to physical, moral, and financial hazards, and the statement that it was clear meant that the physical examination, moral, and financial position of the applicant were satisfactory. The company was curtailing on larger policies, it had the limit it wanted, and this was the sole reason given for not accepting the offer of appellee. He did not understand or believe that he had been rejected for life insurance. The appellant produced the testimony of its agent who secured the application to the effect that he asked appellee all the questions on it and the answers that appear in it are the answers to the questions as made by him, and that appellee did not state he had been rejected for life insurance by the Reliance Life Insurance Company or the Aetna Life Insurance Company. The appellant also produced the testimony of its underwriter that he relied upon the truthfulness, accuracy, and completeness of the answers to the interrogatories of the application and would not have approved the application or the issuance of a policy to appellee if he had known that he had been declined life insurance and denied renewal of an accident and health policy.

The evidence as to what was or was not said concerning the refusal of Reliance Life Insurance Company to accept the application of appellee for life insurance is in irreconcilable conflict. Appellee claims he informed the agent of appellant of the fact that an application had been made and refused, and that the agent thought the rejection of the application was unimportant and inserted a negative answer to the question in the application. The agent denies this and positively asserts that appellee denied he had ever been refused either life or disability insurance. The trial court saw and heard the witnesses, and obviously accepted the version of the facts given by the appellee. He was corroborated; the agent was not. It is concluded from the entire showing in this regard that appellee informed the agent that he had been rejected for life insurance by the Reliance Life Insurance

Company about the year 1918, and the agent incorrectly answered the question. This situation is not new in this state, and it has been held that where the applicant makes a truthful disclosure and the solicitor of insurance writes a false answer in the application, he acts as the agent of the insurance company, and it is estopped from claiming fraud or misrepresentation. If an application for insurance is drawn by an agent of the insurer and he fills in false answers to the interrogations contained therein which are truthfully answered by the insured, the insurer cannot rely upon the falsity of such answers in seeking to avoid liability under the policy issued upon the application. The agent acts for the insured and it is estopped to base any right upon the default of its agent. Russell v. Glens Falls Indemnity Co., 134 Neb. 631, 279 N. W. 287; Roth v. Employers Fire Ins. Co., 123 Neb. 300, 242 N. W. 612; Fadden v. Sun Ins. Office, 124 Neb. 712, 248 N. W. 62; Rubinson v. North American Accident Ins. Co., 124 Neb. 269, 246 N. W. 349; Metropolitan Life Ins. Co. v. Alterovitz, 214 Ind. 186, 14 N. E. 2d 570, 117 A. L. R. 770; 29 Am. Jur., Insurance, § 242, p. 238.

Appellant refers to and quotes Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496, in reference to its assertion that appellee should not have been permitted to contradict, by oral evidence, parts of the application for the insurance. The discussion of that subject and the rule adopted in that case are limited to actions at law for a recovery on the policy and are not pertinent to this or any case in equity to reform, cancel, or rescind an insurance contract. This appears from the language therein: "The proper rule of law is that in an action at law on an insurance policy an assured may not, by parol evidence, impeach the written statements of the assured in the application in those cases where the application has become a part of the contract * * *." Likewise, the reference therein and quotation from the case of Lumber Underwriters of New York v. Rife, 237 U. S. 605, 35 S. Ct. 717, 59 L. Ed. 1140, as follows:

"Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting a jury strike out a clause." The terms of a written contract may not be varied or contradicted by parol evidence. A party may not generally avoid the effect of a written contract by showing he signed it without reading it or in ignorance of its provisions, but he may have relief from its terms for fraud or any other recognized equitable ground. The general rule referred to is not applicable in an action between the parties to the contract where the basis of the relief sought is that the writing by reason of fraud or other recognized equitable ground does not express the agreement actually made. Reilley Bros. v. Thompson, *supra.*

The evidence above summarized shows that appellee made an application to Aetna Life Insurance Company for a policy of life insurance. It was not accepted because the company did not desire to increase the amount of insurance that it then had on his life. The reason for the failure to issue the policy had nothing to do with appellee's desirability as a risk. It is generally considered that a false answer to the inquiry of whether or not the applicant had been rejected for life insurance is material to the risk and affords ground for avoiding the policy upon proof of falsity of the answer. It is a matter peculiarly within the knowledge of the insured. In Muhlbach v. Illinois Bankers Life Assn., 108 Neb. 146, 187 N. W. 787, this court said: "Where the question in the application calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer will avoid the policy. * * * In Swanback v. Sovereign Camp, W. O. W., 103 Neb. 34, the insured falsely stated

that he had never been rejected by any other insurance company in applying for life insurance, and it was held that the false statement avoided the policy. It will be observed that the questions asked in these cases called for information peculiarly within the personal knowledge of the applicant." See, also, Gillan v. Equitable Life Assurance Society, *supra;* George v. Guarantee Mutual Life Co., 144 Neb. 285, 13 N. W. 2d 176.

The situation here is entirely different. The non-acceptance of the application of appellee by the Aetna Life Insurance Company was because he already had insurance equal to the limit it desired to accept. This did not require him to disclose the facts in a subsequent application for insurance. Such a declination of an application for insurance is not material to the risk in the sense that it must be disclosed by the applicant for subsequent insurance. In Solez v. Zurich General Accident & Liability Ins. Co., 54 F. 2d 523, the facts were that the insured had been issued an accident policy by the defendant and suit was brought thereon by his beneficiary. It was contended that he had been guilty of fraud and misrepresentation by denying in his application for insurance to defendant that a prior application made by him to Metropolitan Life Insurance Company for a health and accident policy had been rejected. The evidence disclosed that his application to that company was rejected because at that time it had issued indemnity policies to him in excess of the limit under the rules of that company. The court held that the insured had not made a misrepresentation or been guilty of fraud as a matter of law. It said: "Rejection of application because insured already had insurance exceeding insurer's limit held not material to risk as respects necessity of disclosure in subsequent application to another company." In the opinion the court observed: "The last application to the Metropolitan Life Company was indeed rejected, but the plaintiff learned of the reason, which had nothing to do with his desirability

as a risk. He could not have supposed that the question included such a transaction, and in fact it did not concern the risk at all." In 1 Appelman, Insurance Law and Practice, § 291, p. 326, the author says: "A rejection of an application for additional insurance * * * need not be disclosed, particularly where the reason for rejection is on the ground that the applicant already has insurance exceeding the insurer's limit."

Appellee had an accident and health policy in existence on April 1, 1926, by the United States Fidelity & Guaranty Company, and it was discontinued at the end of a policy period. The experience of the appellee with the company in the settlement of a claim by him under the policy was unsatisfactory and he told the agent of the company who had acted in reference to the insurance that when the time came for renewal of the policy he did not want it renewed. He explained these facts to the agent of appellant at the time the application was made for the policy involved in this case. A witness testified that he heard appellee tell the agent at the time the application was prepared that he had cancelled a policy issued to him by the United States Fidelity & Guaranty Company. The man who was agent for this company at the time the policy was issued to appellee and important to the discontinuance of the policy testified that he was then writing insurance, collecting premiums on business produced by him, and handling renewals for the company; that appellee told him that he was dissatisfied with the settlement of his claim made by the company and that the agent should not renew his policy with that company; and that the agent then notified the company that the appellee had informed him not to renew the policy and asked the company that the policy not be renewed. The agent of appellant denied the testimony of appellee that he had advised the agent the facts of the discontinuance of this policy of the United States Fidelity & Guaranty Company. It is claimed that the negative answer to the inquiry

in the application, has any renewal of disability insurance been refused, was false and a fraudulent misrepresentation of a material fact within the knowledge of the insured sufficient to avoid the policy here in controversy.

The evidence is convincing that putting an end to the policy issued to appellee by the United States Fidelity & Guaranty Company was at his request, by his direction, and with his consent, and that it was a surrender and not a cancellation or refusal to renew. There is no evidence in this record that the company did anything toward discontinuing the policy until it was informed not to renew or continue the policy. An insurance company might well regard it as a fact material to be known by it in passing upon the acceptance of a risk that insurance previously secured by the applicant had been regarded by the insurer as an undesirable risk and had been discontinued. The fact that there had been a previous voluntary surrender of an insurance policy by the insured would be of slight, if any, importance. If appellant regarded the previous surrender of a policy by the applicant as a fact material to be known by it, it should have specifically required information as to that, as well as concerning the prior cancellation or refusal to renew any policy. Rabin v. Business Men's Association, 116 Kan. 280, 226 P. 764, 38 A. L. R. 26. This objection cannot be sustained.

Appellee by his answers to inquiries of the application asserted that he was sound physically and that he had not had medical or surgical treatment or any local or constitutional disease not previously mentioned therein within five years of June 26, 1936. Appellant claims the representations thereby made were knowingly false and fraudulent and entitles it to be relieved of any liability because of the policy issued appellee by it in reliance on the truthfulness of his answers.

Appellant produced evidence that appellee was at the Mayo Clinic in Rochester, Minnesota, on the 16th day of August 1934, and talked with a specialist in internal

medicine who was also a senior consultant in digestive troubles. Appellee, at the suggestion of the doctor, talked with two other members of the staff. He did not go through the clinic. He had no laboratory work or physical examination, and no examination of his head. He was given advice and a prescription. He had been at the clinic before, and many times a person who has registered previously returns and does not have a complete recheck. That is what he did. He consulted the doctor as a specialist in allergies because he heard he was interested in this problem. Appellee complained of hives with which he had suffered except for periods of remission since the age of 16. He did not mention dizziness or deafness, and made no complaint of faulty hearing in 1934. The doctor had no memory or record that appellee had Meniere's syndrome in 1934. "I don't remember that we talked about the Meniere's." The discussion on his visit was hives. Appellee had a tendency to get big hives on any part of his body. He said once or twice he nearly lost his life because his throat swelled up, he would have a pain in his abdomen, and that is definitely associated in medical science with hives. The hives might come in his ears or brain or pinch the nerves in the ear. This gave the doctor the thought that the hives were connected with Meniere's disease. He suspected this, but could not prove it. He had a distinct memory of a consultation revealing appellee had Meniere's disease. "Oh, yes; very distinct with regard to 1941 and 1942 but not 1934." Such a conclusion was not made in 1934 because appellee was there one day to discuss with the doctor one problem—hives. A person might have hives and live a normal life. "In most instances they are not disabling * * *." It was in 1941 for the first time he had an opinion as to Meniere's syndrome. He and his associates in 1941 for the first time, after appellee had gone through the clinic very completely and four or five had examined him from different aspects, believed appellee had Men-

iere's syndrome with nerve deafness, and that the symptoms ran back for years. This is when appellee was told he had this disease. A specialist in nervous and mental diseases examined the nervous system of appellee at the Mayo Clinic in March 1941, and found some disturbance with the function of his eighth nerve on the right side which had to do with hearing and balance, but did not determine the cause of the trouble. The nature of the ailment was that he had a progressive dizziness involving the eighth nerve.

A specialist in diseases of the ear, nose, and throat made an examination of appellee at the Mayo Clinic on March 11, 1941, and it was negative except a bilateral nerve deafness with giddiness and some of the characteristics of Meniere's disease, but not definite at that time, and he did not conclude that the patient was afflicted with that disease. The doctor first testified he had no recollection of appellee, anything he said, or of the examination, except as shown by the record; that he had no memory of any statement made by appellee as to the duration of his trouble; but later testified that appellee said it had been 16 or 17 years. Appellee had no objective symptoms, and the doctor based his information upon what he claims appellee told him. He said giddiness may be produced by a great many things such as eye disorders, anemia, certain diseases involving the cerebellum, and other similar conditions.

The evidence of appellee was in substance that:

An eye, ear, nose, and throat specialist of Omaha who had been acquainted with appellee from childhood and had a professional relationship with him from 1936 until 1942, testified he gave him treatment in June of 1936 for sore throat and nasal cold; that appellee was not then afflicted with Meniere's syndrome, and that there was no evidence that he was at any time from then until sometime in 1941. An Omaha physician, a specialist in internal medicine, testified appellee had been his patient since February 10, 1942, until November 21,

1947. He made an examination of him on February 10, 1942, and found he had Meniere's syndrome. There is no specific treatment or known cure for it, and his opinion was that appellee is permanently and totally disabled. He testified that hives, or urticaria, are an allergic manifestation, cause not always known, characterized by skin eruptions, look like flea bites, come out spontaneously on the body, and produce itching. They come and go, usually in a matter of hours, sometimes over a long period, and sometimes don't recur for years. Hives are not serious and do not seriously affect the health of a person who has them, and they do not prevent a person afflicted from carrying on his usual business or occupation. When he took the history of appellee he stated that he had had hives, but the doctor did not recall that he had an attack of hives since he first saw him in 1942. Hives, or urticaria, are not a symptom of Meniere's syndrome. He never knew of any kind of hives causing the death of any person. Appellee did not suffer from angioneurotic edema at any time while appellee was his patient.

Appellee was 54 years of age on June 26, 1947, has a business education, and is a graduate pharmacist. He was employed in a retail pharmacy in Omaha from 1914 until 1915; he owned and operated a retail drug business from 1915 until 1918; he was in the Army from September 18, 1918, to February 15, 1919; from 1919 until February 8, 1933, he personally operated the retail drug business again; he was associated with his brother in the Milder Oil Company for about two years; and he was engaged in the wholesale liquor business as owner and manager from the spring of 1935 until April 30, 1942. He was active, worked long hours, performed arduous work, and lost no time from his employment or business because of illness of any nature from 1914 until the early part of 1942, except for about a week in 1925 when he was operated on for piles or fistula, about four or five months as a result of an accident in July of

1937 resulting in hernia, and about a year after he suffered the hernia, he was disabled for 12 days caused by a diseased appendix and an operation for its removal. He had hives all his life, but was never disabled or lost any time because of them. They would appear for an hour or two and would be gone. He always had periods of remission; sometimes he would not have an attack for as much as five or six years. They were evidenced by a breaking out about the size of a small sleeve button. He never had giant hives or a hive in his throat, never carried any instrument to administer injections to himself as a relief for hives, and never told anyone that he had. He was at Mayo Clinic in 1925 after his operation for piles, and had a check-up. He took his mother, his sister, and her daughter to the Mayo Clinic in 1934. His mother had been ill and was unable to get a diagnosis of her trouble. His niece was allergic, and she was trying to find the cause of it. Appellee did not go to the Mayo Clinic at that time for himself. While he was there he talked with Dr. Alvarez, who was a sufferer from hives. He was not given any treatment or prescription. He at that time made no complaint to anyone about loss of hearing, dizziness, or any condition, except a statement that he had had hives for 16 or 17 years. There was nothing said about dizziness, a hive in his throat, or a hive on his brain, and he made no statement that he was suffering from angioneurotic edema, and the fact was he had none of these conditions. He was not advised in 1934 by Dr. Alvarez or any other doctor that he was suffering from Meniere's disease or had a Meniere's syndrome. His contact with Dr. Alvarez in 1934 at the clinic was not more than ten minutes. He was examined at the Mayo Clinic in March of 1941. No one then told him that he had Meniere's disease, and he had no knowledge that he was suffering from any condition of that kind. He carried on his usual business and was in good health until about January 1942. He consulted Dr. Thompson

in February of 1942, who referred him to Dr. Young. Dr. Thompson told appellee that he had Meniere's syndrome, that he ought to get out of business and take a complete rest for six months or a year. His condition got worse, and he had his business liquidated by April 30, 1942. He had a severe attack on May 25, 1942, and since that time he has been disabled. He returned to the Mayo Clinic in June of 1942, and it was then that Dr. Alvarez told him that he and the consultants had concluded that he had Meniere's syndrome.

Appellee told the agent of appellant at the time the application was taken that he was at the Mayo Clinic in 1934 in reference to hives which he had had all his life, and the agent said: " 'one out of every ten people are allergic so,' * * * 'I don't have to put that down.' " Appellee was corroborated by the testimony of his wife, and his nephew, who worked with appellee beginning in 1934. He testified that he was present when the application for insurance was taken, and he heard appellee tell the agent of appellant about his hives and the fact that he had been at the Mayo Clinic.

The evidence is convincing that the fact that appellee was affected with hives cannot be associated in any way with Meniere's disease with which he has suffered since 1942. There is a failure of proof that hives are a symptom, cause, or aggravation of Meniere's syndrome. These have not been in any way connected. There is no support by anything in the record of a claim that appellee had any reason to believe that he was affected by any disease except hives on June 26, 1936, the date of the application for the insurance. He at that time told the agent he had hives and had been to the Mayo Clinic. It was in the early part of 1942 that anyone formed an opinion that appellee had Meniere's disease, and he was for the first time so advised and charged with notice that he probably had it. It is this disease that caused the disability of appellee. Any ordinary, reasonable, disinterested person with knowledge of the facts as they

existed at the time the application was made, as shown by the record, would have believed appellee was then sound physically and that he had not had medical or surgical treatment for any disease not explained to the agent within five years of that time. He was justified in believing and saying he was sound physically. He had worked long hours without loss of time all his mature years, except for the three brief periods mentioned in the summary of the evidence. He was accepted for military duty; qualified for more than $50,000 of life insurance; and had operated and was then operating a successful business. There is absence of any fact from which intent or purpose to deceive in this respect could be inferred. In Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400, it is said: "Untrue representations made by the assured in his application, where the questions eliciting such statement call for matters of opinion, judgment, or belief, will not avoid a policy issued thereon, unless it is shown that the misrepresentations were knowingly made with intent to deceive." See, also, Muhlbach v. Illinois Bankers Life Assn., *supra.*

The appellant argues that the retention of the policy with a copy of the application attached thereto by appellee was a ratification and adoption of all statements appearing in the application; that appellee is estopped from asking or having reformation of the application; and that the insured was bound as a matter of law to know the contents of the application. When the insured states the facts correctly to the agent of the company, he is not bound to exercise vigilance thereafter to determine whether or not the agent exercised care, good faith, or truthfulness in his transactions on behalf of the company. The company is estopped from seeking to avoid its contract because of a mistake or fraud committed by its agent, if the insured acted in good faith, although he may have been negligent. The case of Robinson v. Union Automobile Ins. Co., 112 Neb.

32, 198 N. W. 166, is pertinent to this contention. Therein it is said: "It is next contended that, where a party accepts a contract of insurance and makes no effort to examine or read the policy until a loss occurs, he is bound by the terms of the policy as written. Several authorities are cited as sustaining this principle, * * *. The cases cited, however, in the main are actions on contracts as written and where one or the other of the parties seeks to avoid the legal effect of some clause in the contract of which he had no personal knowledge. They are not actions for reformation of the contract. In such an action, where one party seeks the aid of a court of equity to require the contract to conform to the actual intent and agreement of the parties, a different rule is applicable. It is a general principle, sustained by abundant authority, that if, by inadvertence, accident, or mutual mistake, the terms of the contract are not fully set forth in the policy, it may be reformed so as to express the real agreement." See, also, Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126.

Appellant has not established a right to have the policy rescinded or cancelled. The appellee has shown good cause for reformation of the policy in the respects requested by his final pleading herein.

Appellee claims he became totally disabled from disease or sickness on May 25, 1942, and because thereof, has since suffered total permanent disability and total loss of time, and is entitled to monthly payments of $100 a month commencing on that date and continuing during disability because of "PART J" of the contract of insurance, as follows: "For total disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, the Association will pay for such loss of time, beginning with the THIRTY-FIRST day of disability: (1) MONTHLY INDEMNITY AT THE RATE OF ONE HUNDRED ($100.00) DOLLARS. . .So long as the Insured lives

and suffers total disability and total loss of time from sickness or disease which confines the Insured continuously within doors and requires regular visits therein by a legally qualified physician, or (2) MONTHLY INDEMNITY AT THE RATE OF FIFTY ($50.00) DOLLARS. . .So long as the Insured lives and suffers total disability and total loss of time from sickness or disease which does not continuously confine the Insured within doors but requires regular medical attention. * * *"

The evidence is that on May 25, 1942, the insured suffered sudden, severe illness with unconsciousness and recurring unconsciousness at intervals for four or five hours resulting in disability which confined him to his bed for two or three days, and at his home the balance of that week. This was the first illness he had of this character. Dr. Romonek and Dr. Greenberg were called and attended him at his home on May 25, 1942, and Dr. Romonek saw him from time to time during his confinement at home because of this attack. About a week later, while he was shaving in the bathroom, appellee became unconscious, fell, injured himself, and was cared for by Dr. Romonek and Dr. Thompson in his home. On Saturday night following the bathroom incident, he had an attack resulting in unconsciousness, and was attended by Dr. Romonek. Early in June 1942, he, accompanied by his wife, made a trip by train to Rochester, Minnesota, was examined at the Mayo Clinic, and remained there about two weeks. The first part of July he made a trip with Dr. Romonek to Chicago and consulted with and was examined by Dr. Brunner, a specialist. He had an attack resulting in unconsciousness after he returned from Chicago. Dr. Thompson cared for him at his home. He made a trip to Chicago by train in August of 1942 accompanied by his younger son, and while there consulted with and was examined by Dr. Brunner a second time.

Appellee has been for many years afflicted with hives or urticaria, an allergic manifestation characterized by

an eruption of the skin and mucous membranes, on any part of the body, that produce severe itching. They are subject to extended periods of remission. Vasomotor disturbance or angioneurotic edema is a spasm of a group of large blood vessels at the base of the brain. It became known in February of 1942 that appellee had Meniere's syndrome, which means generally injury to some part of the hearing mechanism of the ear, or along the nerve back into the brain, and is associated with attacks of nausea, vomiting, dizziness, buzzing in the ears, and deafness, and accompanied by sudden and unpredictable spells of a few minutes to one-half hour of instability to the extent that the individual affected may fall and suffer unconsciousness. The balancing mechanism of the inner part of the ear is the labyrinth, and Meniere's disease may be due to its inflammation, or labyrinthitis, sometimes called vasomotor disturbance, resulting in a congestion of the blood vessels and a pressure on the inner ear. He was compelled to discontinue his business and all kinds of work, and since May 1942, has been prevented from engaging in any kind of gainful employment or activity. The cause of his disability is incurable and permanent.

Appellee, in February 1943, made trips from his home to a downtown office in Omaha, and conducted negotiations for the settlement of his claims against appellant on account of his disability. He, accompanied by his wife and daughter-in-law, went by automobile from Omaha to Florida the first of May 1943, and remained until June 21. There was provision for fishing where they stayed, and he fished two or three times a week. There is no showing that he saw, consulted, or was treated by a doctor while there. In December 1943, he, Mrs. Milder, his son, and daughter-in-law, made a trip from Omaha to California and lived at San Bernardino, California, several months. Dr. Romonek had moved from Omaha to California in June of that year. The distance between his office and where Milder lived was about 70 miles.

Milder made trips from there to the office of Dr. Romonek for treatments about three times a week while in California. He traveled by automobile and drove the car a part of the time on these trips. He did some fishing. The record does not show that any doctor called on Milder. Late in July 1946, he made a trip from Omaha to International Falls, Canada, in company with "Bill Boazberg and a friend of his" on a fishing trip. He made a trip from Omaha to Chicago soon after Thanksgiving in 1946 unaccompanied, so far as the record shows, and while there he saw and was examined by Dr. Brunner. He made a trip from Omaha to Pittsburgh, Pennsylvania, early in December 1946, alone so far as the record indicates, and while there consulted and was examined by a specialist recommended to him by Dr. Thompson. He, Mrs. Milder, and their daughter made a trip from Omaha to Kansas City, Missouri, by automobile in May or June 1947, the purpose of which is not shown, and he and his wife made a number of trips from Omaha to Kansas City, Missouri, after May of 1942, sometimes by train and sometimes by automobile. The purpose of these trips is not stated. He, accompanied by his wife, made a trip to New York by automobile in July 1947, to attend a business meeting and have a vacation. The trip was of ten days' or two weeks' duration. He operated an automobile sometimes when he was alone, but more often when someone was with him. He preferred riding in a car rather than walking, and drove a car lots of times when he was alone. "I just can't stay home." He made trips from his home in Omaha, at 4815 Davenport Street, to the tavern operated by his sons on North 16th Street, almost every day. "I might as well spend my time there as wearing some of my friends out in their other businesses * * *." He operated the cash register in the tavern, and he sometimes served himself and his friends with food in the tavern. Since May 25, 1942, he spent his time staying home, coming down town, visiting, fishing, and going for a walk frequently. The condition of appellee

during the trial of this case was worse than at any other time after June of 1942. He attended the trial and was a witness on seven days. The record does not show that he had occasion for, or received medical treatment while attending the trial, or that there was a recess or any postponement because of his ill health. It does show that he became emotional on one occasion, and a recess of ten minutes was taken, at the end of which he resumed the witness stand. Dr. Warren Thompson of Omaha was the appellee's doctor from February 10, 1942. He was, according to the record, at the home of appellee to render him professional services on two occasions—about a week after May 25, 1942, and on October 31, 1944. Appellee frequently visited the office of Dr. Thompson, but there were periods of three to six months during which Dr. Thompson did not see him.

The policy must be construed, as any other contract, in accordance with its general scope, its design, and the intention of the parties at the time it was made as disclosed by the whole instrument. There is no assertion that there is ambiguity or inconsistency in the part of the policy providing health or illness indemnity. These provisions are clear and unambiguous, must be taken and understood in their plain and ordinary meaning, and applied in a reasonable manner. Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81; American Life & Accident Ins. Co. v. Nirdlinger, 113 Miss. 74, 73 So. 875. The immediate problem is the amount of recovery permissible to appellee because of his disability resulting from ill health. The provisions of the policy containing and limiting the obligation of appellant on this subject have been set out. The answer to the problem turns upon two clauses in the part relating to total disability and total loss of time from sickness or disease "which confines the Insured continuously within doors and requires regular visits therein by a legally qualified physician" and "which does not continuously confine the Insured within doors but requires regular

medical attention." Appellee insists that the vital condition of recovery in accordance with the first provision of the part quoted is total disability, and if the insured is totally disabled, it can make no difference in the risk whether or not he is continuously confined within doors or departs therefrom frequently and repeatedly, if such departure and traveling about is for reasonable purposes with the approval and advice of his physician in an endeavor to restore his health. Similar clauses to these have frequently been considered by the courts, and different results reached. The decisions are not in harmony and cannot be reconciled. Each case depends largely on its particular facts and the language of the contract. Mackprang v. National Casualty Co., 127 Neb. 877, 257 N. W. 248. The contract of insurance with which this case is concerned plainly contemplates two degrees of illness —"one that confines the insured continuously within doors" and "one that does not continuously confine the insured within doors" although the insured must in either instance be totally disabled and require medical attention. Mere total and permanent disability of the insured by disease or illness is not sufficient. The contract makes total disability and total loss of time from sickness or disease which confines the insured continuously within doors and regular visits therein of the insured by a legally qualified physician an indispensable criterion of disability which entitles the insured to the maximum indemnity. Reeves v. Midland Casualty Co., 170 Wis. 370, 174 N. W. 475; Federal Life Ins. Co. v. O'Connell's Committee, 276 Ky. 606, 124 S. W. 2d 1043; Mutual Benefit H. & A. Assn. v. Ferrell, 42 Ariz. 477, 27 P. 2d 519; Sawyer v. Masonic Protective Assn., 75 N. H. 276, 73 A. 168; Carabelli v. Mountain States Life Ins. Co., 8 Cal. App. 2d 115, 46 P. 2d 1004; Garvin v. Union Mut. Casualty Co., 207 Iowa 977, 222 N. W. 25, 61 A. L. R. 633.

There are two provisions in the policy for illness disability benefits. Both require that the disease must occasion total disability and total loss of time, and that the

insured have regular medical attendance. The only difference in the conditions of these is that the first is mandatory that the disability shall confine the insured continuously within doors. The second requires only nonconfining disability. Obviously the feature which distinguishes confining disability and nonconfining disability within the terms of the policy is the continuous confinement within doors and regular visits and treatment by a physician. If the words "which confines the insured continuously within doors and requires regular visits therein by a legally qualified physician" are to have the meaning as contended by appellee, they are wholly disregarded and read out of the contract, and in that view there is no purpose for, effect, or meaning of the second provision relating to nonconfining disability. This may not lawfully be done. The parties agreed by the contract that insurance should be paid according to the degrees of sickness which incapacitated the insured, and that the maximum benefits should be measured by continuous confinement within doors. The court is not warranted in ignoring this unambiguous condition by construction or arbitrary disregard of the terms of the contract. The clause relating to nonconfining sickness can no more be disregarded than those limiting the time for which the insurance shall be paid. To do so would be to make a different contract than the parties made. Reeves v. Midland Casualty Co., *supra;* Mutual Benefit H. & A. Assn. v. Ferrell, *supra;* Federal Life Ins. Co. v. O'Connell's Committee, *supra.* The entire contract must be regarded with a conscious effort to give effect to every part of the instrument without disproportionate emphasis upon one to the neglect of other provisions. Smith v. United States Fidelity & Guaranty Co., *supra;* Central Nebraska Public Power & Irrigation District v. Tobin Quarries, Inc., 157 F. 2d 482.

A health and accident insurance company may limit its liability in any reasonable manner. The provisions of the policy involved in this case recognize that hazard

in health insurance is greater than in accident insurance. Ordinary knowledge and experience support that view. The symptoms of disease are frequently only subjective, while in cases of accident the evidence is more commonly objective. The terms of the policy also recognize that with unguarded health policies, slight illness might tempt an insured to seek relaxation from ordinary labor or activity at the maximum expense of an insurer. If, however, the claimant in order to enjoy the fruits of his simulations must be confined continuously within doors and have regular visits therein by a physician, he will quickly grow weary of them. It is to discourage doubtful claims of total disability from illness or the protraction of illness for the purpose of securing maximum benefits of insurance contracts that insurers condition full indemnity to confinement indoors accompanied by regular medical attendance. This is the character of the contract under which appellee claims. It does not unreasonably limit liability, and no principle of public policy is thereby contravened. Hamilton v. Mutual Benefit Health & Accident Assn., 133 Neb. 464, 275 N. W. 863; Stone v. Physicians Casualty Assn., 130 Neb. 769, 266 N. W. 605; Pirscher v. Casualty Co. of America, 131 Md. 449, 102 A. 546, L. R. A. 1918B 996; Rocci v. Massachusetts Accident Co., 222 Mass. 336, 110 N. E. 972, Ann. Cas. 1918C 529.

A construction of the contract sufficiently liberal to comprehend maximum recovery by appellee is urged. It is a sound principle of law that doubt and ambiguity in an insurance contract should be resolved in favor of the insured. Frequent decisions of this court affirm this rule, but this doctrine does not mean that a clear provision of the contract is to be ignored or words stretched to include gratuities. The language from another decision quoted with approval in Stone v. Physicians Casualty Assn., *supra,* clearly states this: " 'It does not follow, however, that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one

which only a new contract could have imposed, nor, indeed, that a court should indulge in scholastic subtleties to extend the rights of the insured. * * * Courts should not be "cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words," as manifestly intended by the parties.' "

The condition imposed by the contract that continuous confinement within doors with regular medical attendance is a requirement of recovery of maximum indemnity for total disability and total loss of time occasioned by illness or disease should not be literally but reasonably applied, and the insured is not thereby required to remain within doors constantly, but there must be a substantial confinement within doors and regular medical attendance therein by reason of the illness. There may be needful and beneficial interruption of the confinement with the approval and advice of his physician in attempts to restore the health of the insured, and there may be necessary deviation from confinement indoors on account of occurrences or emergencies over which he has no control, but this does not mean that the requirement of confinement within doors may be ignored or disregarded, and recovery had under this provision of the policy merely because insured is totally disabled and suffers a total loss of time. If an insured is able to and does leave his home and travels about as he desires for purposes not connected with his sickness, as the evidence summarized herein shows appellee did for the larger part of the time with which this case is concerned, he is not continuously confined indoors within the meaning of a policy of the kind involved herein. While the extent of the disability of insured to pursue his usual business activities could not well have been greater, nevertheless the record fails to show his disability falls within the contractual classification which entitles him to full indemnity for the entire time of his disability. Mackprang v. National Casualty Co., *supra;* Hines v. New England Casualty Co.,

172 N. C. 225, 90 S. E. 131, L. R. A. 1917B 744; Massachusetts Protective Assn. v. Picard, 76 F. 2d 684; Garvin v. Union Mutual Casualty Co., *supra;* Federal Life Ins. Co. v. O'Connell's Committee, *supra;* Pirscher v. Casualty Co. of America, *supra;* Mutual Benefit H. & A. Assn. v. Ferrell, *supra;* American Life & Accident Ins. Co. v. Nirdlinger, *supra.*

The finding is that appellee was disabled by a confining illness, within the terms of the policy, commencing May 25, 1942, and continuing until the first day of May 1943, and because thereof he is entitled to recover from appellant commencing on June 25, 1942, at the rate of $100 a month, as provided by the policy, with interest on each installment from the time due; that he has been disabled by nonconfining illness, within the provisions of the policy, from May 1, 1943, and is entitled to recover from appellant on account thereof at the rate of $50 a month from that date and as long as his said disability continues, with interest on each installment from the time it matures; that no premium on account of the policy of insurance became payable on or after August 1, 1942, and no obligation on appellee to pay any premium has since existed, or will exist while his total and permanent disability continues; and that appellee is entitled to recover the sum of $52 with interest thereon from August 1, 1942, on account of the premium paid that date on the policy.

The judgment should be, and is, that the decree of the district court is reversed and the cause remanded with directions to the district court to enter judgment as follows: That the petition of appellant be denied; that the policy of insurance involved herein be reformed in the respects requested in the last pleading of appellee, William Milder, in the district court; that appellee have and recover from appellant for the period of May 25, 1942, to May 1, 1943, $100 a month with interest on each installment from maturity; that the first payment became due June 25, 1942; that appellee have and

recover from appellant $50 a month from May 1, 1943, as long as his disability as herein found continues, with interest on each installment from the time it is due; that no obligation on appellee to pay premiums on the policy involved herein existed on August 1, 1942, or since, or will exist while appellee suffers total and permanent disability; and that appellee have and recover from appellant $52 with interest from August 1, 1942, and the costs of this appeal, including the sum of $2,500. allowed in the district court and the sum of $1,000 in this court as compensation for the attorneys for appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

UNDERWRITERS ACCEPTANCE CORPORATION, A CORPORATION, APPELLEE, V. WILLIAM A. DUNKIN, APPELLANT.

41 N. W. 2d 855

Filed March 23, 1950. No. 32692.

1. **Appeal and Error.** The rule is that no judgment shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.
2. **Usury: Sales.** A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
3. **Replevin.** Where the plaintiff in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

William A. Ehlers, for appellant.

Fitzgerald & Smith, and *James W. R. Brown,* for appellee.

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

WENKE, J.

This is an action in replevin brought by Underwriters Acceptance Corporation against William A. Dunkin. It is based on a chattel mortgage lien. It was brought for the purpose of recovering possession of a DeSoto automobile. After the automobile had been taken it was repossessed by defendant. The action then proceeded as one in damages. The court found for the plaintiff. Defendant filed a motion for a new trial and has appealed from the overruling thereof. Plaintiff has cross-appealed.

Appellant contends that the trial court erred in refusing to enjoin appellee from instituting and maintaining this action while an equity action, which he had instituted in the district court for Douglas County, was pending. He also contends the trial court erred in refusing to consolidate the two cases.

In order to clarify these contentions it should be stated that appellant, prior to the institution by appellee of this replevin action, had instituted an action in the district court for Douglas County against appellee and J. E. Samson, doing business as Crosstown Motors. The action instituted by appellant involved the same subject matter as here. Therein appellant sought relief which included the relief for which he asks here. We will refer to this action as the equity action.

We have searched the transcript in the replevin action for a ruling of the trial court on either of these issues but have failed to find any such ruling. A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was never presented and ruled on below, present anything for review. Horbach v. Butler, 135 Neb. 394, 281 N. W. 804; 4 C. J. S., Appeal and Error, § 321, p. 656.

The transcript herein filed contains most of the pro-

ceedings had in the equity action, although the actions were separately tried and this appeal is in the replevin action only. The records in the equity action show rulings were therein had on both questions which are here sought to be reviewed. It is apparently appellant's thought that the following stipulation consolidated the two cases for the purpose of appeal. Similar stipulations were made in both actions. The stipulation in the replevin action is as follows: "That the case of William A. Dunkin, as plaintiff, and against Underwriters Acceptance Corporation, as defendant, appearing on Docket 399, page 324, and the above entitled case of Underwriters Acceptance Corporation, as plaintiff, vs William A. Dunkin, as defendant, appearing in Docket 402, page 267, involving the same parties and the same issues, and having been considered and decided together, that on an appeal by either party in either case, that any part of the pleadings, orders of the court, and the evidence in the other case may be made a part of the clerk's transcript and the Bill of Exceptions, upon request of either party, as effectually as if a part of the case in which an appeal may be taken."

This stipulation does not have the effect of consolidating the two cases for the purpose of appeal.

While this stipulation permitted the parties on appeal to include in the transcript in the replevin action the pleadings and orders in the equity action, it did not thereby make them orders in the replevin action. Error cannot be predicated upon rulings which have never actually been made in the case appealed.

But assuming that such orders had been entered in the replevin action and that the trial court had refused to enjoin the appellee from instituting and maintaining the replevin action and had also refused to consolidate the two cases, could prejudicial error requiring reversal be based thereon? We think not. It appears that a full trial was had in both cases, that the trial court considered and decided them together, and that decrees were

entered in each case. That is all that a trial could have accomplished had the cases been either consolidated or the equity case tried alone.

Section 25-853, R. R. S. 1943, provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

We said in Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165: "The rule is that no judgment shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. § 25-853, R. S. 1943. We need not determine whether or not the action of the trial court was erroneous. It is not contended by defendant that any substantial right was affected, and it is not apparent to us that the ruling had any such effect. There is no merit in the assignment."

We find these contentions to be without merit.

The record discloses that appellant bought the car herein involved from J. E. Samson of Omaha, Nebraska, doing business as Crosstown Motors. It was a used 1940 DeSoto sedan. Appellant paid $370 in cash on the purchase price and executed his note and chattel mortgage for the balance. The note and mortgage are the subject matter of this action. The note is in the principal sum of $898.50 and is payable in 15 monthly installments of $59.90 each, commencing on July 14, 1946, and continuing to and including September 14, 1947. Three payments were made and the remaining 12 installments remain unpaid.

The appeal and cross-appeal present each of the parties' theory of why the trial court was wrong in entering the judgment that it did. The trial court entered a judgment for appellee in the sum of $550.30. This is the sum of $730, less the three installments which appellant had

paid. The $730 is more fully referred to and explained later in the opinion.

Appellant contends he bought the car for $1,100 and paid thereon the sum of $370, thus leaving a balance due of $730; that he financed this balance through the appellee; that appellee has a license to operate under the Nebraska statutes authorizing installment loans, referred to by the parties as the Small Loan Act, and was operating as such licensee; that it charged the sum of $168.50 as a finance charge in making the loan; that the amount charged for making the loan is in excess of that permitted by section 45-137, R. S. 1943; and that, by reason thereof, the provisions of that statute make the loan void and uncollectible.

Appellee contends that Samson in selling the car had two prices, one for cash and another if purchased on time; that the cash price was $1,100 and the time sale price was $1,268.50; that appellant purchased the car on time; that he paid thereon $370; that there remained owing on the time sale purchase price the sum of $898.50; that the note and mortgage were given in payment thereof; and that the question of interest or charges for making a loan is not involved in the transaction.

If the facts sustain this theory of the transaction then the appellee is right for we have often said: "'A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.' Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429." American Loan Plan v. Frazell, 135 Neb. 718, 283 N. W. 836. See, also, Fidelity Finance Co. v. Westfall, 127 Neb. 56, 254 N. W. 710.

However, we do not need to decide the question of whether appellant bought the car on a time sale price. Assuming the transaction was in fact a loan made to finance the unpaid balance of the cash payment, as appellant contends, he would not be correct because all of the

$168.50 was not added as finance charges. The $168.50 included $38.75 which was a premium paid for insurance on the car during the period of the loan. This insurance premium was a proper item to include in the loan. See section 45-139, R. S. 1943. It was not payable by the seller under the provisions of the invoice, as would have been the situation had the transaction been a time sale. Since the facts do not sustain appellant's contention that the $168.50 was all finance charges for making the loan, we find his contention based thereon to be without merit.

The car was returned to the appellant. We think the following principle is here applicable: "Where the plaintiff in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property." Hickman-Williams Agency v. Haney, *ante* p. 219, 40 N. W. 2d 813.

We find the note to be valid. The amount owing, with interest, is only a matter of computation. However, the record provides no satisfactory evidence upon which the value of the automobile can be determined. We therefore remand the cause to the trial court with directions to receive evidence solely as to the value of the car at the time of the original filing of this action in the municipal court of the city of Omaha and then enter a decree in accordance with the foregoing principle.

There are many other questions raised by appellant but in view of our holding herein they become immaterial and need not be discussed.

REVERSED AND REMANDED WITH DIRECTIONS.

ANNETTA M. HOLMES, APPELLANT, V. JOHN E. HOLMES, APPELLEE.

41 N. W. 2d 919

Filed March 23, 1950. No. 32724.

Divorce. In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Decree, when modified as directed, affirmed.*

Thomas J. Sheehan, Jr., for appellant.

Fitzgerald, Tesar & Welch, for appellee.

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

WENKE, J.

This is a divorce action tried in the district court for Douglas County. From a decree in her favor Annetta M. Holmes, plaintiff below and appellant here, appeals. John E. Holmes, defendant below and appellee here, cross-appeals.

Appellant's appeal relates itself to that part of the decree which fixes the amount of alimony awarded her and the form of the payment thereof; the amount of the allowance for the support of the four minor children, custody of whom was awarded to her; and the amount of attorney fees allowed her attorney and the form of the payment thereof. Appellee's cross-appeal

relates to the amount which the court fixed as alimony and the requirement that he pay the taxes, insurance, and upkeep of the home, the use of which was awarded appellant for the benefit of the children.

Since the action is in its nature equitable, and therefore considered here de novo, we shall consider both parties' contentions as they relate to these issues by a general disposition thereof.

The record discloses that these parties were married on June 16, 1934. Four children were born to this marriage. They are, with their respective ages as of the time of the trial, as follows: Jo Anne, a daughter, 14 years; John Ernest, a son, 12 years; Gerald Alvin, a son, 10 years; and Jeanne Alice, a daughter, 2 years. The custody of these children was awarded appellant. At the time of the trial appellant was 36 years of age and appellee 37.

Appellee is a son of Ernie and Rose P. Holmes of Omaha. He is one of three children. From the property of his parents, subsequent to their death, appellee received the residence property herein involved described as the south 40 feet of Lots 19 and 20, Block 12, Poppleton Park Addition to Omaha, and located at 502 North 43d Street, together with the furniture and furnishings therein, and the sum of $15,812.99. These parties moved into this home shortly after appellee's mother died in January 1940 and have resided therein since that time.

In January 1947 appellee entered into a partnership with Clifford R. Galley to conduct a steak house and bar. This business they were still operating at the time of the trial. It is referred to as the "Jack Holmes Steak House and Tavern" and located at 5002 Center Street in Omaha. Appellee has a two-thirds interest in the ownership thereof.

The decree, with reference to alimony, provides as follows: "Plaintiff be and hereby is awarded the sum of Fifty ($50.00) Dollars per month as permanent ali-

mony, * * * until the sum of Five Thousand ($5,000.00) Dollars is paid by the defendant to the plaintiff as permanent alimony, PROVIDED, HOWEVER, that in the event the plaintiff should remarry before the full sum of $5,000.00 is paid, any future installment payments due on such permanent alimony shall cease and any remaining balance due and owing on the date of the remarriage of the plaintiff shall be cancelled and defendant relieved from making any further installment payments upon the said alimony judgment and the said judgment for said alimony shall be fully satisfied as to said future installment payments due after her said remarriage upon the amount originally awarded to the plaintiff herein."

Appellant contends the sum of $5,000 awarded to her as alimony is too low, whereas appellee contends it is too high. Appellant also objects to the provision relating to the cancellation and satisfaction of any remaining balance in case of remarriage.

Section 42-318, R. S. Supp., 1949, provides in part as follows: "Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case."

With reference thereto, insofar as here applicable, we said in Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771: "Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the cir-

cumstances of the parties, and this obligation continues after their legal separation. Permanent alimony was unknown at common law, and in this state is based upon section 42-318, Comp. St. 1929 (now section 42-318, R. S. Supp., 1949), which declares that the court may award 'such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case.' It will be seen at once that, under such a liberal statute, the fixing of the amount of the alimony rests alone upon the sound discretion of the court. The first factor that should be taken into consideration is the financial circumstances of the parties, and all of the property owned by the parties should be considered and its value ascertained as of the time of the decree. Next, the income and productiveness of the property should be considered, together with the earning capacity and future prospects of the parties; the manner in which such property was acquired, whether through joint savings or by inheritance, and the contributions made by each, together with the value of the services rendered by each of the parties during their marriage. If evidence relating to the respective ages of the parties, the duration of and conduct during the marriage, their station in life, respective wants, circumstances and necessities, has been given, it should be considered, together with the health and physical condition of the parties, especially if the wife's health has been affected by the habits or conduct of the husband, * * *."

As held in Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625: "In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was

accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case."

The record discloses that at the time of the trial these parties had been married about 15 years. They are still comparatively young people and apparently in good health, although appellant has been somewhat affected by this trouble. They had very little property at the time of their marriage. Appellee afterwards, as has already been set forth, received substantial property from his parents. At the time of the trial the property owned consisted of the home, the furniture and furnishings therein, a two-thirds interest in the Jack Holmes Steak House and Tavern, and a 1948 Buick car. The evidence shows these properties were reasonably worth the following amounts: The home $9,500; the furniture and furnishings in the home $600; the two-thirds interest in the partnership, considering the obligations then owing, $10,366; and the car $1,900. The record shows these parties owed $2,200 personal obligations. This amount includes the sum of $750 owing on the car.

The appellee devotes his full time in helping to operate the partnership business. In 1947 both he and his partner withdrew therefrom the sum of $2,175 as salary. This resulted in the business showing an operating loss of $1,076.12 for that year. In 1948 each partner withdrew $4,160 as salary. In addition thereto the business showed an operating profit for that year of $4,234.48. This was left in the business and became part of the assets thereof. During the first five months of 1949 each partner withdrew $85 a week as salary. The business during this five-month period, although slightly down considering the same period in 1948, seems to have been fairly good. Just what profits, if any, it made during this period is not shown.

The home, although having a reasonable rental value

of $90 a month, will not produce any income for appellee for many years as its use has been awarded appellant for the purpose of making a home for the four children. This will be more fully discussed in connection with the award made with reference to their support.

The evidence fully sustains the divorce granted to appellant. To set out the nature of appellee's conduct, which caused the marriage to fail, would serve no useful purpose. This is particularly true in view of the fact there are four minor children involved in this proceeding. Suffice to say that in considering the question here involved we shall take into consideration the facts relating thereto.

Without further detailing what the record discloses, but taking into consideration all of the facts disclosed by the evidence that relate thereto, we find the amount fixed is neither too small nor excessive but, in our opinion, fair and reasonable. Likewise we think it should be paid in installments and that the provision therefor that it be paid at the rate of $50 a month is proper.

With reference to appellant's objection to the provision relating to cancellation and satisfaction of any balance remaining unpaid in case of remarriage, we find it well taken.

As stated in Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51: "We recognize that under our statutes the legislature has enabled the court to retain control over the financial situations of the parties, where it is necessary or advisable to do so. However, we do not think the purpose of divorce proceedings are designed or intended to prevent domestic misadventure from ever becoming a closed book financially as between the parties. There are cases, and we have so held, where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties and it is therefore proper for the court to provide for the payment of a

stated sum at fixed periods over an indefinite period. However, 'Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.' Martin v. Martin, decided February 16, 1945, *ante* p. 655, 17 N. W. 2d 625. See McGechie v. McGechie, 43 Neb. 523, 61 N. W. 692." See, Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238; Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908.

Having determined that the amount of alimony allowed is reasonable there is no reason why it should be made indefinite by a provision canceling or satisfying all unpaid balances in case of remarriage. The trial court's decree should be modified to remove this provision and, by so doing, make the amount allowed definite and certain.

With reference to the support allowed for the four minor children, custody of whom was awarded appellant, the decree provides as follows:

"Defendant shall pay to plaintiff the sum of One Hundred ($100.00) Dollars per month for the support and maintenance of said children, * * *. In this connection the sum of $25.00 per month is awarded for each of the four children herein, and upon any of said children becoming self-supporting, emancipated or deceased, that said payment be reduced accordingly for such child becoming self-supporting, emancipated or deceased.

"Plaintiff is awarded and granted the use of the home located at 502 North 43rd Street, Omaha, Nebraska, legally described as the South 40 feet of Lots 19 and 20, Block 12, in Poppleton Park, an Addition to the City of Omaha, Douglas County, Nebraska, for the benefit of said children, but that defendant shall pay all taxes levied and assessed against said property, both delinquent and as they accrue, and defendant shall pay for all necessary and reasonable repairs of said home. In this connection, it is further ordered that in the

event plaintiff should remarry, said home shall be vacated immediately and possession thereof delivered to defendant."

Appellant contends the cash allowances for the support of these children are inadequate whereas appellee contends that the requirement that he pay the taxes, insurance, and upkeep of the house is excessive. It appears the house needs considerable repairs and there are considerable back taxes thereon. The latter were included in the $2,200 debts which we have previously referred to as owing by these parties at the time of trial.

The facts disclosing the ability of appellee to pay have already been set forth. The amount awarded for the children's support is, under all the circumstances, fair and reasonable. It would unduly burden appellee to require him to pay more. As to the provision requiring appellee to pay the taxes and necessary and reasonable repairs on the home, we find it to be proper. Appellant is without means other than as herein provided for her and the children. The children, because of their age, will require most of her time. Appellee has ability to earn and can and should meet these obligations.

There is, however, one change that should be made in this regard. The use of the home is properly awarded appellant "for the benefit of said children," but the decree provides that "in the event plaintiff should remarry, said home shall be vacated immediately and possession thereof delivered to defendant." Since the use is for the benefit of the children this provision should be changed to provide that appellant's use thereof shall not terminate until all of the children have either become self-supporting or emancipated. It should provide that when that event occurs then appellant shall immediately vacate the same and turn the possession thereof over to the appellee.

There is one further item in this regard. The findings of the court are to the effect that appellant should be awarded the furniture but the decree does not so

provide. It should be corrected accordingly by adding such a provision.

The decree, with reference to attorney fees for appellant's attorney, provides as follows: "Defendant shall pay to Thomas J. Sheehan, Jr., Attorney for plaintiff, * * * the sum of Six Hundred ($600.00) Dollars as attorney fees, payable at the rate of Twenty-five ($25.00) dollars per month to each, * * * until the full amount of $600.00 has been paid to each attorney."

In fixing the amount of attorney fees each case must be considered on its own merits. Such fees should be reasonable in amount considering the nature of the case. In so doing the court should consider the questions involved, the time reasonably necessary to properly prepare and present the case to the court, the amount involved, the results obtained, the character and standing of counsel, and all other factors bearing on or relating thereto.

In view of the foregoing we think the fee of $600, being in addition to the temporary allowance of $100 which has been paid, is reasonable and fair. However, we find the manner of its payment, which extends the time therefor over a period of two years, is unreasonable. It should be modified to make it payable at once, the same as the other costs.

We therefore direct that the decree of the trial court be modified as follows: That the provision therein relating to the cancellation or satisfaction of any unpaid balance of alimony, in case appellant remarries, be deleted therefrom and the payment of said installments be made definite and certain until the full sum of $5,000 has been paid; that the award of the use of the home to appellant for the benefit of the children be modified so it shall not terminate until all of the children are either self-supporting or emancipated; that the decree be made to include provisions in accordance with the court's finding that appellant be awarded the furniture; and that the provision with reference to the payment

of attorney fees awarded appellant's attorney be modified to make the fee allowed payable immediately. When modified in accordance herewith the decree of the trial court is affirmed.

The costs of this proceeding, including a fee of $250 allowed appellant's attorney for services rendered to her in this court, are taxed to appellee.

DECREE, WHEN MODIFIED AS DIRECTED, AFFIRMED.

IN RE CONDEMNATION BY THE STATE FIRE MARSHAL OF THE COUNTY JAIL LOCATED IN THE COUNTY COURTHOUSE IN OGALLALA, NEBRASKA. E. C. IVERSON, STATE FIRE MARSHAL, APPELLANT, V. KEITH COUNTY, APPELLEE.

41 N. W. 2d 858

Filed March 23, 1950. No. 32733.

Prisons: Buildings. In an appeal from an order of the district court determining the propriety of an order of the State Fire Marshal condemning premises as a fire hazard the review is de novo as in equity.

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

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for appellant.

Firmin Q. Feltz, for appellee.

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

YEAGER, J.

This is an appeal from a judgment or decree of the district court for Keith County, Nebraska, sustaining objections of the County of Keith, Nebraska, to an order of E. C. Iverson, State Fire Marshal of the State of Nebraska, condemning and requiring demolition of the county jail of the County of Keith and dismissing the action instituted by the State Fire Marshal. E. C. Iver-

son is appellant and the County of Keith is appellee.

The events which furnished the basis and the background for this action were substantially the following: On or about October 27, 1948, the appellant, by his assistant G. E. Ekstrand, issued an official order to the appellee commanding the proper officials, within 30 days, to make repairs to and correct conditions in the courthouse of the County of Keith in the basement of which is located the county jail. In the order it was substantially asserted that the jail and the courthouse in its existing condition endangered the life of prisoners in the jail and other occupants in the courthouse. By the order the jail was condemned and the officials of the county were commanded to close it.

Whether or not the command to close the jail was ever complied with does not appear in the record. Some but not all of the repairs directed by the order were made.

The appellant took no further steps until May 13, 1949, when through his first assistant an order was issued condemning forthwith the jail. It was ordered immediately closed. No information appears as to the response of appellee to this order.

Next we find on June 17, 1949, the appellant issued an order which contained a finding that the jail was, by reason of its condition, location, construction, and general arrangement, especially dangerous in case of fire or disaster, and was so situated as to endanger life, limb, and property. The command of the order was as follows:

"NOW THEREFORE, by virtue of the authority conferred upon the State Fire Marshal and pursuant to the laws of the State of Nebraska, said jail is hereby condemned and it is ordered that it be demolished and the materials therefrom be removed from the premises within thirty days from the date of the service of this order and notice upon the owners thereof."

The order was filed with the clerk of the district court on June 20, 1949. No question is raised as to service of this or any other order made by the appellant or as to

any procedural step taken by either of the parties to this action.

On June 20, 1949, the appellee filed an answer and objections to the order to close and demolish. On August 3, 1949, an amended answer and objections was filed. The hearing in the district court was based upon the amended answer and objections.

By the first paragraph of the answer the appellee denied the authority of the State Fire Marshal to issue the orders of October 27, 1948, and June 17, 1949, for the reason that there was no finding of the existence of defects as set forth in section 81-513, R. S. 1943, now section 81-513, R. S. Supp., 1949. The second paragraph amounts to a general denial of the factual statements in the orders. The third sets forth the location of the jail; it declares that the jail is in as good condition as could be expected considering the age of the courthouse, that there have been no fires or disasters in the building, that the county has reasonably complied with the order of October 27, 1948, and that the jail is reasonably safe for the confinement of prisoners under the surrounding conditions. The fourth paragraph is a declaration of impossibility to demolish the jail without destruction of the courthouse. The prayer is for annulment of the order of the appellant.

When the cause came on for trial in the district court the appellant through his attorney withdrew the portion of the order requiring demolition as follows: "The position of the State Fire Marshal is that we are not asking that the county jail be demolished and the materials removed, but that it be condemned and its further use as a county jail be prohibited from the date of taking of this order."

In this light and in the light of the substance of the answer and objections the only questions presented are those of whether or not the order of the appellant contained a finding of the existence of defects within the meaning of section 81-513, R. S. Supp., 1949, and whether

or not on the facts an order condemning and prohibiting the use of the premises as a jail was proper.

It will be noted that no question of authority to issue the order is presented if it contains findings of defects within the meaning of section 81-513, R. S. Supp., 1949.

The objection that there is no finding of defects is without merit. The order contains the following: "WHEREAS, the State Fire Marshal upon inspection of the County Jail located in the Keith County Court House, Ogallala, Nebraska, has found and determined that the said jail * * * is by reason of condition, location, construction, and general arrangement, especially dangerous in case of fire or disaster, and is so situated as to endanger life, limb, and property."

The order conformed to the requirements of the statute which requirements are found in section 81-515, R. S. 1943. This section provides that the order shall be in writing and that it shall recite the grounds therefor. It did so state.

In approaching the question of whether or not on the facts the order of the appellant should have been sustained the review here is de novo as in equity. In re Application of Iverson, 151 Neb. 802, 39 N. W. 2d 797. This requires a review of the evidence.

The Keith County courthouse is an old brick building which was constructed in 1888. It has two stories, an attic, and a basement. Its dimensions are not disclosed. The county jail is located in the west end of the basement. The jail is in two sections and is divided by a hallway extending from the west wall eastward. The north, west, and south walls of the courthouse serve as walls for the jail. Walls for the other sides are constructed within the basement. The north section is apparently lined with some type of composition material. The entrance to this section is by means of a steel door from the hallway. It is locked with a padlock. The south section is in part lined with steel. Inside this section is a steel cage. There is a space of about 18 inches between the cage and

the surrounding walls. There is a steel door from the hallway into the south section and a door in that end of the cage. There is also a door in the south end of the cage. In the wall of the building to the south of the south section is a door. This apparently opens into the areaway between the south wall and the south end of the cage. In practice all but one of these doors are locked with padlocks all of which require different keys. The steel door from the south section to the hallway has what is referred to in the record as a "regular" lock.

The jail may be reached by descending a wooden stairway located about the middle of the courthouse and then proceeding 30 to 50 feet west or by entering the door through the south wall. The door in the wall is however not used. Customary access is by the stairway.

The interior construction of the courthouse is of wood and the floors are oil-soaked and it appears reasonable to say from the evidence without detailing it that the interior condition is such as would lend itself to rapid spread in case of fire in the building.

After October 27, 1948, and before the trial herein an effort was made by the appellee to improve the condition of these premises in the respects under inquiry and it appears that the effort was in a measure successful.

It is the substantial position of the appellant however that notwithstanding this, the jail was still sufficiently a fire hazard when the order was issued to require condemnation of the jail for use as such.

The appellee has shown by its evidence that nothing further may reasonably be done, taking into consideration the age of the building and the cost of alteration and repair, to make the jail any less a fire hazard than it was at the time of the trial.

The concern of the district court at the trial was and of this court on review is therefore with regard to the question of whether or not this jail at the time the order was issued was a potential fire hazard or in the language of the statute (section 81-513, R. S. Supp., 1949) a "build-

ing or structure which by reason of age, dilapidated condition, defective chimneys, defective electric wiring, gas connections, heating apparatus, or other defect, is especially liable to fire and which, in his judgment, is so situated as to endanger life or limb or other buildings or property in the vicinity."

On this question the evidence discloses that the south section of the jail is at least in part lined with fire resistant material or steel. The north section is not. Entrance to the south section may be gained either from the stairway which was mentioned or the south door. Entrance to the north section may be gained the same way except that if it is sought through the south door it becomes necessary to pass through the south section and through the doors on the north side thereof before arriving at the north section. All doors of the jail except one are, as pointed out, locked with padlocks. To pursue this latter course in case of fire would require unlocking the outside door, passage through the section, then releasing the lock at the other side which obviously is on the outside. How this could be done is not apparent.

Of course the avenues of egress are the same as of entrance but the only one readily available from the inside is the stairway. The outside door would not be available even to the custodian of the jail from the inside.

In case a fire should start in the building which would prevent entrance or exit through the stairway the only recourse would be entrance through the south door by use of a key and then the unlocking of the other doors mentioned if under the conditions this could be accomplished. Whether this could be done or not would depend of course upon the severity of the fire or smoke resulting from the fire.

The evidence indicates that in reasonable probability a fire sufficient to prevent entrance through the stairway would also be sufficient to prevent any more than an opening of the south door and the door at that side of the

south section of the jail. It would not allow an approach to the other section.

Such a situation might bring about the escape of prisoners from the south section but not so for those in the north section. The north section would be a trap.

The use and occupancy of these premises as a jail under the evidence presents a constant danger to the inmates thereof, and in equity and good conscience and in the due regard which the public officials and the citizens of an enlightened community ought to have for human life they should not be employed for such purposes. They were rightfully condemned by the State Fire Marshal.

The judgment or decree of the district court, the effect of which has been to vacate and render for naught the order of condemnation made by the State Fire Marshal, is vacated and set aside and the court is directed to enter judgment sustaining the order of condemnation of the premises in question for use as a jail.

REVERSED WITH DIRECTIONS.

BETTY ANN PETERSON, APPELLEE, V. JOHN FRANCIS PETERSON, APPELLANT.

41 N. W. 2d 847

Filed March 23, 1950. No. 32748.

1. **Divorce.** An appeal lodged in this court from a decree rendered in a suit for divorce brings the case here for trial de novo upon the issues presented by such appeal as in other equity actions.
2. ———. Whether a wife should be granted alimony, where there is no accumulated property from the marriage, is not a question solely of the necessities of her situation, but equally one of fairness and justice, as between the parties, under all the circumstances.
3. ———. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect considering all the circumstances. Its amount rests upon the sound discretion of the court.
4. ———. In the division of property and allowance of alimony

in a divorce action, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such an award as appears to be fair and equitable.

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

Hamer, Tye & Worlock, for appellant.

Minor & Minor, for appellee.

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

CHAPPELL, J.

Plaintiff was granted an absolute divorce from defendant upon the ground of extreme cruelty, and awarded $4,500 permanent alimony, payable $75 a month beginning October 1, 1949, and continuing until paid in full. Defendant's motion for new trial was overruled, and he appealed, assigning as error solely that the judgment for alimony was excessive under the evidence, and was an abuse of judicial discretion. We affirm the judgment of the trial court as modified.

An appeal lodged in this court from a decree rendered in a suit for divorce brings the case here for trial de novo upon the issues presented by such appeal as in other equity actions. Section 25-1925, R. R. S. 1943; Westphalen v. Westphalen, 115 Neb. 217, 212 N. W. 429; Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901.

This court has held that: "Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to

expect, considering all of the circumstances. Its amount rests upon the sound discretion of the court." Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771. It has also been held that: "Whether a wife should be granted permanent alimony, where there is no accumulated property from the marriage, is not a question solely of the necessities of her situation, but equally one of fairness and justice, as between the parties, under all the circumstances." York v. York, 138 Neb. 224, 292 N. W. 385. See, also, Barton v. Barton, 126 Neb. 835, 254 N. W. 561.

It has been generally held that in the division of property and allowance of alimony in a divorce action, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such award as appears to be fair and equitable. Marquardt v. Marquardt, 151 Neb. 583, 38 N. W. 2d 403; Wade v. Wade, 149 Neb. 502, 31 N. W. 2d 420; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Haussener v. Haussener, 147 Neb. 489, 23 N. W. 2d 700; Munsell v. Munsell, 147 Neb. 590, 24 N. W. 2d 566.

In the light of the foregoing principles, we have examined the record. Plaintiff, 20 years of age, a high school and business college graduate, lived in Kearney with her parents, while employed at the Kearney Air Base in a secretarial capacity, with civil service rating of $2,799 a year. There she met defendant, a captain, A. U. S., only living child of his parents, 27 years of age, 6 feet 1 inch tall, a high school graduate with 3 years college training at William and Mary. After an arduous courtship from March 13 to December 3, 1948, they be-

came engaged. They were to be married sometime in April. However, four times, at defendant's insistence, the marriage date was advanced, and they were married on February 5, 1949, at an invitation church wedding in Kearney. In the meantime, defendant had told plaintiff, or plaintiff and her parents, that he owned $7,000 or more in bonds, approximately enough so that he could pay cash for a home they contemplated buying for $8,250, but that he preferred getting a G. I. loan; that he had $30,000 life insurance, of which he intended to make plaintiff the beneficiary; and that he would inherit one-half million dollars from his parents. He also told plaintiff after the marriage, while they were in California, that he had talked with his father about signing some of the bonds over to plaintiff.

At the trial, however, on June 25, 1949, defendant admitted that he told them he had $7,000 in bonds, which "was slightly exaggerated," since he did have approximately that much in bonds two years ago, purchased for him by his mother out of monthly allotments of $125 from his pay while overseas, but that he had spent it all, "especially in the last four months," and that he was then in debt and without any money. He also testified that he had only $10,000 of life insurance, and inferentially belittled his parents' wealth. He further testified that he owned an automobile which he was paying for by the month. Plaintiff testified that at the time of the marriage she knew that defendant had an allotment of $75 each month taken from his salary, which was sent back to San Diego and put in his savings account.

Both parties liked athletics, and during the courtship they swam, bowled, danced, and attended numerous social functions. Approximately six months prior to the marriage, however, defendant was informed that plaintiff was diabetic, which apparently did not affect her health or activity. Thereupon, defendant entered no objections but made a study of diabetes. He consulted with physicians relative to plaintiff's health and her ability to bear

healthy children. Prior to the marriage he went to the base hospital at Kearney and talked with a physician. There, at defendant's request, insulin was requisitioned through the army base for plaintiff. Plaintiff, prior to the marriage, left her employment, withdrew her retirement pay, and spent approximately $600 in preparation for the wedding. Some of the debts for the wedding were not yet paid at the time of the trial.

After the marriage ceremony on February 5, 1949, they left for a planned three-weeks honeymoon in San Diego, California. The trip was a very happy one and they arrived at the home of defendant's parents in San Diego on February 8, 1949. While there plaintiff visited with defendant's parents daily, but left the home with them only once and met only one of defendant's friends. However, defendant was considerate and affectionate as usual, and they were happy for a few days. Then he became a "changed person" and on February 15, 1949, told plaintiff that they should return to Kearney because "he wasn't happy about our marriage; he thought we should get a divorce;" that "we were not suited for each other." He also mentioned her health. In that regard, his own testimony was: "Part of my decision to cancel the marriage was because life in the military service is rather fast and rather active, and I didn't think that Betty would actually fit into that fast-moving life as well as some people might." Plaintiff's persistent pleas that he reconsider met with absolute refusal, and on February 16 they started back to Kearney. Contrary to plaintiff's wishes, defendant's mother accompanied them. As stated by defendant, "I brought my mother with me because Betty was very upset, and I was afraid that she might try to do something which would be very serious, and I wanted my mother there as a buffer." Upon their arrival, defendant's mother stayed in Kearney one night at a local hotel, and left for San Diego the next day without seeing plaintiff again.

During the course of the return trip, defendant refused

to live with plaintiff, and she occupied a room with his mother. Upon their arrival in Kearney on February 19, 1949, he took plaintiff to the home of her parents, where he told them, "it was a bad deal," that he "had decided to call it off," that "that was the way it was going to be, —that was all there was to it." There she was left by him, and although plaintiff continuously thereafter up until the time of the trial sought a continuance of the marriage relation, defendant refused.

Prior to the marriage plaintiff and defendant had rented and furnished an apartment in Kearney. After their return, he refused to permit her to live there. Without plaintiff's knowledge he sold the furniture in the apartment, except that personally belonging to plaintiff, and kept the money. However, he stayed in the apartment and used plaintiff's furniture until he was presently transferred to a Texas air base. Before leaving for that assignment, he told plaintiff, "If you don't put in for a divorce, I will go down to Texas and set up a residency and get one myself." Therefore, on February 24, 1949, plaintiff filed this action.

During the trip to San Diego defendant gave plaintiff $15, and upon their return, before this action was started, he gave her $100 at one time and $105 at another with which to reinstate her civil service rating and retirement pay. Upon her return to Kearney plaintiff was without dispute grieving, nervous, sleepless, depressed, humiliated, and embarrassed in the presence of friends and former fellow employees. Therefore, on March 22, 1949, she accepted employment at Offutt Air Force Base in Omaha, with the same rating. There, without sufficient funds of her own, and in debt, the disaster befalling her marriage impaired her health and efficiency.

Defendant testified at the time of the trial that he was then receiving as captain's base pay at least $253 a month, which was to be increased 5% by longevity in August 1949. He was also admittedly receiving at least $21 a month sustenance allowance for himself, and since the

marriage has drawn an additional $111 a month for sustenance and quarters by reason of the marriage. In that regard, on February 25, 1949, by stipulation, defendant was ordered to pay plaintiff $100 suit money and $100 a month, beginning March 1, 1949, as temporary alimony while she was unemployed, to be reduced to $75 a month upon her employment. Since her employment began on March 22, 1949, defendant paid her only $75 for that month, and has paid $75 a month since. We call attention to the fact, however, that the difference between $111 received by him because he was still married, and $75 paid to plaintiff, was $36, representing a net monthly profit for him resulting from the marriage. The final decree, which awarded plaintiff $4,500, payable $75 a month, was not superseded and defendant still continues to receive such profit.

The record discloses that plaintiff did her full marital duty, and was entirely blameless. Only defendant's undisputed, inexplicable cruelty destroyed the marriage, depriving plaintiff of its compensations, undermining her health and efficiency, and leaving her an unhappy and disillusioned young woman.

We are convinced that defendant at the time of the trial still had approximately $7,000 or more in bonds. His simple explanation that he had spent it lacks any corroboration or credence. Fairness and justice demand that he pay plaintiff one-half their value, or $3,500, as permanent alimony.

For the reasons heretofore stated, we conclude that the judgment of the trial court awarding plaintiff alimony should be and hereby is modified only to the extent that plaintiff have and recover from defendant the sum of $3,500, payable in the same manner as provided in the original decree. All costs are taxed to defendant.

AFFIRMED AS MODIFIED.

ANNA PAUL ET AL., APPELLANTS, V. BRYAN T. MCGAHAN ET AL., APPELLEES.
42 N. W. 2d 172

Filed March 30, 1950. No. 32699.

1. **Trial: Equity.** In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled.
2. ———: ———. In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case.
3. **Appeal and Error.** Where it appears that such dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial.

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

Kirkpatrick & Dougherty, and *George B. Hastings,* for appellants.

V. H. Halligan, for appellees.

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

MESSMORE, J.

The plaintiffs brought this action in equity to establish a constructive trust on lands owned by William McGahan at the time of his death; to set aside a conveyance made by the plaintiffs to Bryan T. McGahan, administrator with the will annexed and an heir of the deceased, which conveyance plaintiffs charge he procured by fraud and misrepresentation; and to appoint a testamentary trustee to carry out the provisions of the will of William McGahan, deceased.

For the purposes of this appeal the plaintiffs' amended petition alleged facts upon which they based their contention that a constructive trust was created. The facts alleged testified to, or so much thereof as may be necessary to a determination of this appeal, will be set forth in the opinion.

The allegations of the plaintiffs' amended petition allege in substance: That the defendant Bryan T. McGahan, in anticipation of his probable appointment as administrator with will annexed of his deceased father's estate, procured the plaintiffs to execute, acknowledge, and deliver to him a certain quitclaim deed conveying to him the real estate of which his father died seised and possessed. That the deed was without consideration, and was delivered to said defendant at his own express insistence and request and upon his representation to the plaintiffs that the immediate signing and delivery of the deed was necessary and was to serve only as an instrument to facilitate his management and administration of the estate and to protect the assets thereof, and with the promise and assurance upon his part to them that when the estate was settled it would be divided amongst and between all of the decedent's devisees as provided in the last will and testament. That the plaintiffs trusted and reposed confidence in this defendant and in his statements and representations as above set forth, and assumed and relied upon his good intentions as expressed by him that during the ten-year interim as provided for in the second paragraph of the decedent's will, he would faithfully fulfill his obligations as trustee as provided therein.

The answer of the defendant Bryan T. McGahan generally denied the allegations of the amended petition relating to the oral contract as set forth therein, and pleaded facts as to the agreement made by the heirs of William McGahan, deceased, wherein the real estate was conveyed to him for his use absolutely. The answer of the defendant John C. McGahan was to the same effect.

The plaintiffs' reply was a general denial of the allega-

tions of the answers of the defendants with respect to defendants' contentions as to the oral agreement.

William McGahan, a widower and resident of Perkins County, Nebraska, departed this life March 20, 1941. He was survived by Anna Paul and Mayme Baker, his daughters, John C. McGahan, Matt J. McGahan, and Bryan T. McGahan, his sons, who are the persons having an interest in the subject matter of the litigation, therefore other parties are not named in the opinion. At the time of his death he owned 496 acres of land located in Perkins County and described in the pleadings.

Anna Paul, Mayme Baker, and Matt J. McGahan appear as plaintiffs, and Bryan T. McGahan and John C. McGahan as defendants.

At the close of the plaintiffs' testimony the defendants moved to dismiss the plaintiffs' petition for the reason that the evidence introduced by plaintiffs was insufficient to sustain a cause of action against the defendants. Plaintiffs moved that the court enter judgment for them in accordance with the prayer of the amended petition. The trial court sustained defendants' motion and dismissed plaintiffs' action. Motion for new trial was filed by the plaintiffs and overruled. Plaintiffs appeal, predicating error on the trial court's part in sustaining defendants' motion on the ground that the evidence was insufficient in fact and in law to sustain a prima facie case.

Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according

to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. See Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9.

This case comes to this court for trial de novo subject to the rule that when defendant moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant thereupon admits the plaintiff's testimony to be true, together with every conclusion which may fairly and reasonably be drawn therefrom. The court must thereupon determine, as a question of law, whether plaintiff's evidence is sufficient to support a judgment for the plaintiff. See Meyer v. Platt, 137 Neb. 714, 291 N. W. 86. See, also, Schroeder v. Bartlett, 129 Neb. 645, 262 N. W. 447; Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Casper v. Frey, *ante* p. 441, 41 N. W. 2d 363.

The record discloses that at the time of the death of William McGahan the land in question was mortgaged in the amount of $7,500 to the Federal Land Bank of Omaha.

On September 5, 1935, William McGahan made and executed a will. For the purposes of this appeal the will provided: "I further direct that the remaining real estate of which I die seized (seised), be kept in trust for a period of 10 years. At that time, I authorize, empower and direct, my executor, hereinafter appointed to sell either at public auction or private sale, as he may deem for the best interests of my estate, and without order from the Court, all of my * * * real estate, * * * of which I die seized (seised), and said sale I direct to be made by my executor, as appears to him to be for the best interests of all parties concerned." The will then provides that at that time the proceeds of the sale be divided share and share alike between the living sons and daughters, and names them. The will provides further: "For the purpose of

carrying out my intentions, and for the best interests of preserving the value of my estate, I further authorize, empower, and direct that during the time of the 10 years that my estate is kept in trust, my executor, * * * make or have made, all necessary repairs, all property sufficiently insured, all taxes paid, all interest on mortgages and loans paid, from the proceeds and/or rentals * * *. In the event of the death, removal, resignation or renunciation of my executor, hereinafter appointed, all the powers herein conferred upon him, may be exercised by an Administrator with the Will annexed."

The sons and daughters of the deceased were present at their father's funeral. They did not at that time discuss the estate of their father or any matter with reference to it. The sons paid the burial expenses.

The testimony is also to the effect that the sons and daughters have a limited education and are unacquainted generally with legal matters, the daughters being unacquainted also in business matters.

Matt McGahan testified that previous to and at the time of his father's death one Leon McQueen was the tenant on the farm. In April 1941, Matt and Bryan had a conference about their father's estate. Bryan wanted to buy the land for the amount of the encumbrance against it. Matt thought it was worth more money. As a result of this conference they went to Ogallala to consult the agent of the Federal Land Bank. He informed them that the land was not productive and was of little value. Nothing was said about foreclosing the mortgage against the land. Matt and Bryan also talked about getting McQueen off the land, and as a result of this conversation they went to Grant to consult an attorney. Matt wanted Bryan appointed administrator. It was suggested that the matter might be handled by having the heirs deed their interests in the land to Bryan.

Matt further testified that Bryan agreed to take the land, get McQueen off and put his son on it, and by the use of the land try to pay off the indebtedness against

it before offering their father's will for probate, and that after the encumbrance against the land was paid, the land would be sold and the proceeds of the sale would be divided equally among the heirs. Matt relied upon this agreement made by Bryan and had a deed prepared which was executed and delivered to Bryan. Matt knew that his father had made a will, he was informed so by the scrivener and by his father. He did not know the contents of the will. He signed a declination to serve as executor of his father's estate, which was filed in the estate proceedings. Bryan was appointed administrator with will annexed September 29, 1941.

On May 21, 1947, Matt and his wife went to Bryan's home, Matt for the purpose of inquiring about the estate. Bryan told him that he knew what he had come for, and that he would get his share of the estate but that his sisters would not get their shares. Matt took issue with Bryan about the sisters' shares and was ordered from the premises.

In the winter of 1947, Matt had a conversation with Bryan about their brother John who was suffering from an asthmatic condition, and Bryan told Matt there were sufficient funds in the estate to send the brother John to Arizona for his health.

On cross-examination Matt testified that he had kept his father who was without personal funds for a number of years until his death. He believed the encumbrance against the land to be about $6,800, and the indebtedness in arrears $800. He did not want to act as executor of his father's estate for the reason that he felt the heirs would not get along with each other. His father and Bryan were indebted to him in large amounts. He was informed by the Bakers that his sister Mayme had borrowed $100 from Bryan on her share of the estate. He wrote two letters in December 1946, to the agent of the Federal Land Bank to the effect that his sisters would like to sell their shares, but the heirs did not want to sell the place out of the family and that he and Bryan would buy the sisters'

shares. He asked how much there was an acre against the land. In the letter of December 24, 1946, he wrote that the heirs had conveyed their interests in the land to Bryan as "times were tough"; that no money changed hands by the conveyances; that they did not want to sell; and that no shares of the heirs had been purchased by any other heir. He was aware that Bryan had borrowed $900 from his wife's people to take care of estate matters. McQueen had offered to take over the land for the amount of the encumbrance against it, and the heirs did not favor him having it. He had signed an affidavit that he was acquainted with the signatures of the witnesses to his father's will, but he had not seen the original will nor did he know the contents of it until it was read to him by an attorney who brought it to his house in September 1947. He had received no accounting of the estate from Bryan and did not know that Bryan claimed absolute title to the land until 1947.

Lena McGahan, the wife of Matt McGahan, corroborated his testimony that Bryan said Matt would get his share of the estate but that the girls would not get any part of the estate.

Anna Paul testified that she was employed as a domestic in Omaha. In the spring of 1941, Bryan sent her a letter with a deed enclosed. In the letter he asked that she sign the deed and return it to him, and stated that she should not be afraid to sign it as no part of her interests would be affected, it was for the purpose of having him appointed administrator. He enclosed five dollars for expenses. Without consulting anybody about signing the deed, she signed, acknowledged, and returned it to Bryan by mail. She further testified that she wrote Bryan three or four times a year with reference to the estate and the condition of the mortgage. She received no reply or accounting from him. The first she heard that Bryan claimed the land as his absolutely was in 1947. She wrote Bryan about the estate, received no reply, and then wrote to

Matt asking him about it. She also wrote to an attorney in Grant. From the attorney she received a copy of the will. She contracted to employ counsel in a suit against Bryan. After the suit was commenced, Bryan came to Omaha and talked to her about the estate. He promised to settle with her for $2,000, and pay her $1,000 either in the spring or fall. He did not want her to sue him because he could not pay for the accumulated rents and profits. Later he came with a paper which he asked her to sign. This was an affidavit to the effect that she disclaimed any interest in the land, did not employ counsel to represent her in the suit, and asked dismissal of the case with prejudice. She testified that she did not read the instrument, nor was it read to her. However, she signed it.

On cross-examination she testified that she had written Bryan to the effect that she was happy that McQueen was not getting the land and that Bryan was, and that she was having a religious service held for him. In October 1947, she wrote Bryan with reference to perfecting settlement of the suit out of court, and of the views of the attorneys representing her about the suit.

Mayme Baker testified that she was a housewife; that the first she heard about her father's estate was when she received a letter from Bryan in which he enclosed a quitclaim deed; and that he requested her to sign the deed to enable him to get money to pay off the debts of the estate and said that he was not taking her share of the estate from her. In the letter he wrote that after everything was settled the estate would be divided and the heirs would each get their share. She wrote requesting $100 to pay a hospital bill, this amount was to be taken out of her share of the estate. She signed and acknowledged the deed and gave it to her husband to deliver to Bryan. The first she knew about the provisions of her father's will was after the suit had started when the attorney representing her brought her a copy of the will. She had never received an ac-

counting from Bryan nor had she written him with reference thereto. She also testified that Bryan and an attorney came to her house after the litigation had started. They talked about the estate. As a result of this conversation she went with them to another attorney's office where an instrument was prepared wherein she disclaimed any interest in the estate and asked that the suit be dismissed with prejudice, and that she had not employed counsel to represent her in the case. She did not remember whether the instrument was dictated in her presence nor if she was asked to read it, nor if she said it was all right. Her evidence is in conflict with reference to the employment of counsel to represent her, and as to what was said at the time she signed the dismissal of the action with prejudice.

Don Baker, Mayme's husband, testified he had seen the letter in which the deed was enclosed, and he corroborated Mayme's testimony as to its contents. He delivered the deed to Bryan and received the $100. No demand was ever made thereafter for the payment of the $100, and no offer to pay it was made by his wife. In conversations he had with Bryan about the estate, Bryan did not know in what manner the loan could be handled, whether it could be renewed or another loan obtained until it was partly paid off, but when the land was sold the heirs would get their equal shares. He further testified that he handled his wife's business, and Bryan had made no accounting of the rents and profits received from the land.

The motions to dismiss with prejudice filed in this case by Anna Paul, Mayme Baker and Don Baker, were set aside upon motion to reinstate the action. John C. McGahan, as plaintiff, filed a motion to dismiss the petition with prejudice to any further action. As previously stated, he filed an answer in this case as a defendant.

The final decree of the county court filed January

18, 1943, decreed the lands to the five heirs as tenants in common, in equal shares. The personal property was decreed in the same manner, subject to a lien in favor of Bryan T. McGahan in the sum of $1,393.53 as evidenced by his final accounting from September 29, 1941, to December 1, 1942, as administrator with the will annexed.

A review of the evidence discloses that Bryan T. McGahan did not take any affirmative action to notify the other heirs of his deceased father that he claimed absolute ownership of the land constituting the estate until 1947. It is apparent that he made the oral agreement as pleaded in the plaintiffs' amended petition, and the heirs, in performance of the agreement on their part, conveyed to him their respective interests in the land. He endeavored to settle with one of the heirs for her share in the estate, and promised a settlement and payment of the amount she claimed, which he did not fulfill. He procured from two of the heirs disclaimers of any interest in the land and a dismissal of the suit with prejudice, which the court set aside, apparently for the reason that these heirs were not apprised of the effect of a dismissal of the suit with prejudice or of their rights in such respect, or that they were waiving any interest they might have in the estate. He informed the heirs at the time the conveyance of their interests was made to him that they were not signing away or disposing of any interest they might have in the estate. He promised the heirs they would get their respective shares of the estate, as provided for by their father's will. We deem it unnecessary to summarize the evidence further.

Being mindful of the rule heretofore set out, when defendant moves to dismiss plaintiff's case at the close of the plaintiff's evidence, the defendant thereupon admits the plaintiff's testimony to be true, together with every inference which may fairly and reasonably be drawn therefrom, we conclude, in the light of this

rule and from the plaintiffs' evidence and the authorities cited, the plaintiffs have made a prima facie case.

There is no doubt but that the defendant Bryan T. McGahan is entitled to test the sufficiency of the plaintiffs' evidence without the risk of penalizing himself in the event the trial court improperly sustained his motion to dismiss the plaintiffs' cause of action. In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case.

Where the trial court erroneously sustained the defendant Bryan T. McGahan's motion to dismiss the plaintiffs' cause of action at the conclusion of the plaintiffs' evidence, both parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. See Lucas v. Lucas, *supra*.

We hold the trial court erred in sustaining the defendant Bryan T. McGahan's motion to dismiss the plaintiffs' cause of action, and the cause must be, and is, remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM BOLIO, APPELLANT, V. M. R. SCHOLTING ET AL., APPELLEES.

41 N. W. 2d 913

Filed March 30, 1950. No. 32719.

1. **Trial.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
2. ———. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.
3. **Negligence.** Negligence or contributory negligence in an action for personal injuries, where the evidence in relation thereto is

such that minds may reasonably reach different conclusions as to their existence, is a question of fact.

4. **Automobiles: Negligence.** It was a question of fact whether or not it was negligence to park and leave unattended a truck in the manner and situation described in the opinion, and it was for the jury to determine whether or not it was contributory negligence for a person to go between a truck and building under the circumstances and at the time as stated therein.
5. **Trial.** The meaning of an instruction, not the phraseology, is the important consideration, and prejudice will not be found when the meaning thereof is reasonably clear.
6. ———. Instructions should be considered as a whole, and if they fairly submit the case the verdict of the jury will not be set aside.
7. **Appeal and Error.** An assignment that evidence was on the trial erroneously admitted or rejected, to be considered on appeal, must specifically point out the evidence.
8. ———. A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection and exception thereto.

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

J. J. Friedman, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

BOSLAUGH, J.

William Bolio, appellant, sued M. R. Scholting, doing business as Scholting Transfer Company, and Hugh Vargas, appellees, for damages claimed to have resulted from injuries to appellant when a truck owned by M. R. Scholting and parked by Hugh Vargas near an unloading pit of a grain elevator backed against appellant while he was passing between the rear end of the truck and the elevator building of Wertheimer & Company.

The contending parties are appellant and M. R. Scholting, owner of the truck, and his employee Hugh

Vargas, appellees. Wertheimer & Company, appellee, owner and operator of the premises where the accident occurred and employer of appellant, was made a party to protect its rights of subrogation resulting from payments under the Workmen's Compensation Act to appellant.

The trial resulted in a verdict for appellees. Motion of appellant for a new trial was denied, and he has appealed.

The negligence charged is that Hugh Vargas, while performing duties of his employment by M. R. Scholting, parked the heavily loaded truck with the reverse gear engaged on a grade descending towards the elevator building, without applying or setting the brakes on the truck and without warning appellant of the facts or the potential danger. Appellant says that the evidence of negligence of appellees was conclusive and the court should have instructed for him on this issue and submitted to the jury for its determination only the amount of his damages. Appellees denied negligence and pleaded the proximate cause of any injury or damage to appellant was the result of his negligence. They contend there is no evidence of their negligence but that there is evidence of negligence more than slight on the part of appellant. In testing the sufficiency of evidence to support the verdict, it must be considered in the light most favorable to the successful party, any controverted fact must be resolved in his favor, and he must be given the advantage of any inferences that can reasonably be deduced therefrom. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418. It is not permissible for this court in reviewing the record in an action at law to resolve conflicts or weigh evidence. Clark v. State, 151 Neb. 348, 37 N. W. 2d 601. It is presumed in an action at law that all controverted facts are resolved by the jury in favor of the successful party. The findings of a jury based on conflicting evidence in such a case will not be disturbed unless

clearly wrong. Anderson v. Lotman, 124 Neb. 795, 248 N. W. 309.

There is evidence that appellant and Hugh Vargas had knowledge of the location and situation of the place of the accident. The former had lived and worked there for many years, and the latter had made deliveries there before and knew the situation. He was performing duties of his employment in accordance with the instructions of his employer, the owner of the truck, at the time of the accident. Hugh Vargas, appellee, was making delivery of a truckload of shelled corn to the elevator of Wertheimer & Company. The elevator building extended north and south. To the north of it was an office building and scales. South of the main building was a spur railroad track, and north of it and as a part of the building was a construction referred to as an unloading pit, chute, or hopper in which grain was unloaded and conducted into the elevator building and from there elevated by power machinery and equipment into one of the five bins of the elevator. Above and to the east of the unloading pit was a door in the side of the building. It was three or four feet from the right or east side of the doorway west to the east edge of the unloading pit. There were two doors in the doorway and they were open. The covering of the unloading pit had been removed and it was in condition to receive grain. There was an incline to the south from the south rail of the railroad track. The loaded truck was driven by appellee onto the scales and weighed by appellant. It then moved around the west end of the elevator and to the east and turned south until it was about opposite the unloading pit and then backed north until the rear wheels were probably on the south rail of the track. The truck was stopped, the motor turned off, it ceased to operate, and the clutch was engaged in reverse gear, but the brakes of the truck were not put on or set to prevent it from moving. It was a ton and a half Chevrolet truck equipped with

grain box about 3 feet deep, 12 feet long, and 8 feet wide, with a movable end gate in the middle of the rear which when removed made an opening about half the width of the box. It was opened by pulling it up or taking it out. It was not a dump truck. It was necessary to shovel the part of the grain that did not spill out by gravity. The truck was in good mechanical condition. Vargas stopped the truck and got out to ascertain that it was in position, when backed farther, to have the opening in the rear end over the pit to permit the corn to drop in it when the end gate was opened or removed. The rear end of the truck was stopped about five feet from the building and about a foot south of the south edge of the pit. When appellant came around the west of the building from the office the truck was standing still and appellee was out of the truck on the east of it. Appellant traveled along the south of the elevator building to the pit and took one step up on its rim. The truck without warning started back. He grabbed the back part of the truck in an attempt to get up on it, but could not do so, was pinned between the truck and the side of the elevator building, and was injured. Vargas got in the truck, put it in operation, moved it forward, and appellant fell to the ground. What caused the truck to move backwards is unknown. Appellant was going to the doorway in the south wall of the elevator building to turn the switch so that the elevator machinery and equipment would operate and elevate the grain that was about to be unloaded from the pit into one of the bins of the elevator. That was his only object. He had nothing to do with the operation of the truck or the removal of the corn from it into the pit. The effect of leaving or putting the truck in gear after it was stopped and the motor turned off was to act as a brake and to tend to keep it motionless. Appellee had parked the truck in the same position and condition previously and under similar circumstances and the truck had not moved as it did on this occasion.

The top of the rails of the track south of the building was about an inch and a half higher than the surrounding surface. Appellant was not required to pass between the rear of the truck and the building. He could have reached the location to which he was going through the elevator building or by going around the front of the truck to the doorway.

The heavily loaded truck was parked with the front wheels on higher ground than the rear wheels. The rear wheels may have been on the top of a rail of the spur track which was above the surrounding surface. The reverse gear was engaged, the brakes were not applied, and no warning was given appellant of any hazard of the situation. The shortness of time between when the truck was stopped and when it moved backwards was significant. It is true that it is not specifically known what caused it to move backwards after it had come to rest, but the appellant was not obliged to show that a specific negligent act or omission of the operator of it was the cause of its starting and moving backwards four or five feet until it stopped against the elevator building. It is enough that there is evidence justifying the jury in inferring and finding that the negligence of appellees was the cause of the truck starting in motion and causing injury to appellant.

A motor vehicle is not an inherently dangerous machine and one may leave it standing unattended in a public or private place without being chargeable with negligence if he takes ordinary precautions of securing it by the appliances with which it is equipped for that purpose, but when he does so, it is his duty to use due care to have it secured so that it will not travel unattended except by the intervention of some external cause not required to be anticipated and guarded against. The operator in this instance knew that the truck was in some respects parked in an unusual situation and that nothing was holding it immobile but the precarious tenure of an engaged reverse gear. The jury might well have decided from the evi-

dence that an ordinarily prudent person would have anticipated that the gear might not continue it at rest and that it might move backwards and cause damage to anyone or anything in the direction of its travel. The unexplained automatic starting of a motor vehicle when at rest into motion, when according to its mechanical construction and equipment it ought to remain still, may be significant of improper attention under the circumstances then existing to use reasonable precautions at the time it was brought to rest. Circumstantial evidence is sometimes sufficient to permit an inference and finding of negligence. The evidence presented a question of fact to be determined by a jury as to whether or not the driver for the owner of the truck when he parked it in the way described used the care that an ordinarily prudent man would use under the circumstances then existing. Thomas v. Fundum, 135 Neb. 728, 283 N. W. 839; Fone v. Elloian, 297 Mass. 139, 7 N. E. 2d 737; Maher v. Concannon, 56 R. I. 395, 185 A. 907; Miller v. Universal News Delivery Corp., 122 Conn. 662, 188 A. 880; Bergman v. Williams, 173 Minn. 250, 217 N. W. 127; Bacon v. Snashall, 238 Mich. 457, 213 N. W. 705; Fuller v. Magatti, 231 Mich. 213, 203 N. W. 868; Annotation, 66 A. L. R. 439; 60 C. J. S., Motor Vehicles, § 334, p. 777; 5 Am. Jur., Automobiles, § 338, p. 683.

Appellant complains because the issue of contributory negligence was submitted to the jury. It was pleaded as a defense. There was evidence he had been for many years familiar with the situation at the place of the accident. He knew the manner in which grain was delivered and unloaded there. He was at the office north of the elevator when appellee drove from there to put the truck in position to unload the corn from it into the unloading pit south of the elevator. There are indications that trucks backing in to unload did travel back to and against the building. Appellant had no duty in the operation of the truck or the removal of the corn from it into the pit. To elevate the corn from a pit to a bin in the elevator it

was required that a switch be turned. He was on his way to do this when he was injured. He was in a place of safety until he voluntarily chose and followed a course that took him between the rear of the truck and the south side of the building. He could have reached the place he was going through the elevator building or by going around the front of the truck. A person who knowingly and of his volition exposes himself to an obvious danger cannot recover damages for an injury he might have avoided by the use of reasonable care. The evidence does not establish contributory negligence as a matter of law. The existence of contributory negligence in an action for personal injuries is generally a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to its existence, the question should be submitted to the jury. Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N. W. 355. It was sufficient to require a determination by the jury whether or not appellant observed ordinary care in taking a course that unnecessarily placed him in a hazardous position and whether or not he could have avoided injury to himself by the exercise of reasonable prudence, and, if he was chargeable with contributory negligence, was it more than slight in comparison with any negligence of appellees, and to what extent should it effect the amount of his recovery. Thomas v. Fundum, *supra;* Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372, rehearing denied 142 Neb. 367, 9 N. W. 2d 157.

It is argued that the instruction as to contributory and comparative negligence incorrectly stated the law. The last paragraph should have been omitted, but it is not ground for setting aside the finding of the jury. If the negligence of appellant was equal to or greater than that of appellees, then indubitably the negligence of appellant was more than slight when compared with the negligence of appellees. The use of the word "would" when "should"

would have been more appropriate, or the omission of the word "directly" after the word "contributing" in the expression therein "that the plaintiff was himself guilty of negligence contributing to cause the injuries" or the substitution of "on the other hand, if, in comparing the negligence of the parties" for "and if, in comparing the negligence of the parties" does not amount to material error. This is especially true when the complaining party offered or requested no instruction on the subject. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of it is reasonably clear. The instructions should be considered as a whole, and if they fairly submit the case the finding of the jury will not be disturbed. In determining whether or not there was error in a sentence or in a clause of an instruction, it will be considered with the instruction of which it is a part and other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject. Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423. The instruction given on the subject of contributory and comparative negligence in this case does not constitute reversible error. Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158; Sgroi v. Yellow Cab & Baggage Co., *supra;* Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633.

The instructions contained a statement that there was no loss of wages of appellant involved in this case, but that he was paid his regular compensation during the time that he was unable to work. This is assigned as error. It was a correct statement of fact. Appellant was paid his wages during his disability by his employer. The checks he received from the insurance carrier of Wertheimer & Company, by whom he was employed at the time of the accident, were endorsed by him to it. This complaint of appellant is without foundation.

Appellant complains in a general way of the refusal of

the court to admit evidence offered by him and that the court erroneously refused to sustain objections made by him to evidence offered by appellees, but neither in the assignments of error or in the argument is there specific reference to any particular item of evidence to which the complaints are directed. It is a rule of this court of long standing, frequently announced and recently reiterated, that an assignment of error complaining of the admission or rejection of evidence must, to be considered, point out the particular evidence to which the complaint refers. World Mutual Benefit Assn. v. Worthing, 59 Neb. 587, 81 N. W. 620; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100.

It is argued by appellant that the record shows prejudicial error because of improper conduct of and statements made by the judge during the trial in the presence of the jury. The record does not show any objection or exception to any such statements or conduct. This is a prerequisite to a review of matters of this nature in this court. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602; Pittenger v. Salisbury & Almquist, 125 Neb. 672, 251 N. W. 287.

The judgment should be, and it is, affirmed.

AFFIRMED.

HENRY J. KUHLMAN, APPELLEE, V. FARMERS UNION CO-OPERATIVE ASSOCIATION OF MEMPHIS, NEBRASKA, APPELLANT.

42 N. W. 2d 182

Filed March 30, 1950. No. 32732.

1. **Evidence: Appeal and Error.** Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured.
2. **Trial: Pleading.** Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give

evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict, to render judgment for the plaintiff for that sum, without evidence.

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

Clyde R. Worrall and *Harlan A. Bryant,* for appellant.

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

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

SIMMONS, C. J.

This is an action to recover for the sale and delivery of corn. Issues were made and trial was had resulting in a verdict and judgment for the plaintiff. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff alleged in substance the sale and delivery of 2,026 bushels of yellow corn to defendant on June 27, 1947, at the current market price which the defendant quoted to be $1.95 for yellow corn and "that $1.95 a bushel was the fair and reasonable value of said corn" on that day. Plaintiff alleged demand and refusal to pay, and prayed judgment for $3,950.70.

Defendant attacked the petition by motion but in nowise referred therein to the above-quoted allegation.

Defendant by answer made admissions not material here and denied generally. Defendant further alleged that on June 10, 1947, it purchased 2,600 bushels of yellow corn, No. 2 grade or better, at $1.85 a bushel, to be delivered in ten days, with the understanding that if the corn tested less than No. 2 grade, payment would be made in accord with accepted practices for inferior grades. Defendant then alleged that on June 27, 1947, plaintiff delivered 2,026 bushels of yellow corn, sample grade, 21.87 moisture content with 30 percent damage; that the corn was moldy, wet, rotten, and mixed with dirt; that the fair and reasonable market

value of the corn delivered was $1.30 a bushel; that defendant made repeated efforts to pay on that basis; that defendant tendered to plaintiff on September 11, 1947, $2,633.80, representing payment for 2,026 bushels of corn at $1.30 a bushel, and the offer of settlement was rejected; and that the fair and reasonable market value of the corn delivered was $2,633.80, "for which defendant elevator confesses judgment." Defendant counterclaimed for damages for failure to deliver the balance of the 2,600 bushels of corn.

For reply plaintiff denied generally except as to allegations admitting those contained in plaintiff's petition.

The issues so stood when, on March 22, 1949, the case came on for trial. Plaintiff on that day by permission of the court amended his petition so as to allege $3,712.64 to be due and owing, and so as to pray for recovery in that amount.

At the opening of the trial defendant moved that the plaintiff elect whether he sued upon an express oral contract or one in quantum meruit. Plaintiff replied that he alleged the sale of the corn on June 27, 1947, at the quoted price of $1.95 a bushel.

We take up defendant's argued assignments of error in the order in which they occurred at the trial.

During the direct examination of the plaintiff he was asked if he had overheard a conversation between his attorney and defendant's manager regarding settlement for the corn. He testified that he had, and that defendant's manager offered to pay $1.40 without suit or $1.30 if suit were filed. This question was objected to as conversation having to do with a compromise settlement. After the answer was received, the defendant moved to strike the testimony and that the jury be instructed to disregard it. The court sustained the objection and so instructed the jury. Defendant assigns this as error, contending that the instruction to disregard did not correct the harm done in the admission of the testimony.

Substantially this same situation was presented in

Stapleton v. Chicago, B. & Q. R. R. Co., 101 Neb. 201, 162 N. W. 644, where evidence of a compromise settlement offer was admitted over objection, and later stricken, and the jury instructed not to give it consideration. We there held that in view of defendant's answer admitting injuries while in defendant's employment and the court's instruction to disregard, the error was not so prejudicial as to require a reversal. Here defendant's answer pleaded an offer of settlement in part exactly as testified to by the witness. Here the trial court granted in full defendant's motion. Under these circumstances we apply the rule that "Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured." Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521. See, also, Bush v. James, *ante* p. 189, 40 N. W. 2d 667.

At the close of plaintiff's case-in-chief, defendant moved for a directed verdict in its favor, contending that there was not sufficient evidence to establish the sale price of the corn, or, based on defendant's answer, that the court direct a verdict against the defendant for $1.30 a bushel for the 2,026 bushels of corn. The trial court overruled the motion.

Plaintiff testified that there was no conversation on the morning of June 27, 1947, as to the price to be paid until the delivery of the second load of corn. At that time plaintiff asked defendant's manager about the price of corn that day and was told " '$1.95.' " Plaintiff testified that he asked what the "dock" would be and was told by the defendant's manager that the first load tested "21 and some hundredths" and the second load tested "near 22"; that defendant's manager "got out a sheet" and plaintiff was told that with that moisture the dock was 11¾ cents; and that if plaintiff could get the moisture down to about 17, the dock would not be over 4 or 5 cents. On cross-examination plaintiff testified that he understood that the buyer would fix the

grade of the corn and that the price of $1.95 a bushel was for No. 2 grade yellow corn.

The contention here of defendant is that plaintiff did not prove the grade of corn and hence there was no basis for determining the market price. Defendant concedes that the price of $1.95 for No. 2 yellow corn was quoted to the plaintiff as the market price on the day of sale. Plaintiff testified in effect that the defendant's manager calculated the dock at 11¾ cents because of moisture content. Plaintiff was not required to prove the processes by which defendant arrived at that price. The price stated under this testimony was $1.95, less 11¾ cents. The assignment is without merit.

When both parties had rested the defendant renewed in exact words the motion, heretofore discussed, that had been made at the close of plaintiff's case-in-chief to the effect that the court direct a verdict against the plaintiff, or against the defendant for $1.30 a bushel for 2,026 bushels of corn. At the same time and not as a separate motion the defendant moved that the court direct a verdict against the defendant in the amount of $2,026 and no more. The court overruled the motion. The defendant then stated that it "withdraws its offer to confess judgment * * * in any amount" on the ground that the "offer" had not been accepted. Obviously the motion was inconsistent and the court could not have sustained it properly.

Defendant presents the contention that there was a failure of the plaintiff to prove the market value of the corn; that its evidence proved it to be $1 a bushel; and that the court should have directed judgment for the plaintiff for $2,026. We have set out a summary of plaintiff's evidence. The defendant's evidence is that the corn was rotten, damp, moldy, and sprouting, and tested by weight was 30 percent rotten or spoiled; that the corn was sample grade, worse than grade No. 5; and that sample grade was corn that tested more than 22.50 moisture and 15 percent damage. This testimony

was followed by testimony that the average moisture content of the corn delivered was 21.87, and that the fair value of the corn was not to exceed $1 a bushel. This evidence as to value was received over objection. Defendant's manager testified that he told the plaintiff the dock would be "around" 11¾ cents for moisture only if the corn "would get better" and that nothing was said about spoilage or damage at that time. We see no merit in the assignment.

Defendant assigns error in the giving of certain instructions.

In instruction No. 1 the court summarized the plaintiff's petition and said that plaintiff alleged that the defendant bought the corn at the market price of $1.95 a bushel "which plaintiff claims was the fair and reasonable value on that date * * *." Defendant cites the rule stated in Acton v. Schoenauer, 121 Neb. 62, 236 N. W. 140, that "There can be no implied contract where there is an express agreement between the parties relative to the same subject-matter," and contends that by the instruction the court permitted the jury to take into consideration the fair and reasonable value of the corn on the day in question.

By instruction No. 4 the court told the jury that "Under the pleadings plaintiff is entitled to a judgment for at least $2633.80.

"In order to be entitled to a judgment for more than $2633.80 the burden of proof is upon the plaintiff to prove by the greater weight of the evidence that defendant agreed to buy the 2026 bushels of corn delivered to it by plaintiff at a price greater than $1.30 per bushel and what that price was.

"If the evidence is equally balanced or if the greater weight of the evidence is in favor of the defendant in this regard then your verdict should be that plaintiff is entitled to recover no more than $2633.80. If, on the other hand, the plaintiff has proved by the greater weight of the evidence that defendant agreed to pay more than

$1.30 a bushel and the amount per bushel it agreed to pay your verdict should be for the plaintiff for that price per bushel multiplied by 2026."

This instruction answers the contention advanced. The assignment is without merit.

Defendant assigns as error the giving of that part of instruction No. 4 which states that plaintiff is entitled to a judgment for at least $2,633.80. Defendant refers to section 25-906, R. R. S. 1943, providing that an offer to confess judgment shall not be deemed to be an admission of the cause of action or amount to which plaintiff is entitled, nor be given in evidence upon the trial. Defendant also refers to our decision in Hammang v. Chicago & N. W. Ry. Co., 107 Neb. 684, 186 N. W. 991, that "An offer to confess judgment incorporated in an answer should not be referred to in the instructions." An examination of instruction No. 2 summarizing defendant's answer reveals that the court did not advise the jury of the confession of judgment contained in defendant's answer. The trial court in instruction No. 2 did advise the jury that defendant alleged "That on June 27, 1947, plaintiff delivered to defendant 2026 bushels of yellow corn sample grade (very poor) 21.8% moisture content with 30% damage, the fair and reasonable market value of which was $1.30 per bushel or a total of $2633.80." Defendant does not assign the giving of this instruction as error.

It further is to be noted that defendant's withdrawal at the close of the trial of what it then termed its "offer to confess judgment" did not in any way purport to alter the allegation in its answer that the value of the corn which it had received and had not paid for was $2,633.80. Nevertheless it now contends that there was no evidence in the record to support its allegation; that the answer was not offered in evidence; that the allegation in defendant's answer did not conform to the proof; and that the court erred in instructing the jury that the plaintiff was entitled to a judgment for at least $2,633.80.

These contentions are answered in Bonacci v. Cerra,

134 Neb. 476, 279 N. W. 173, wherein we quoted and followed this rule: " 'Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict, to render judgment for the plaintiff for that sum, without evidence.' " It follows that the trial court did not err in giving the instruction as to the amount plaintiff was entitled to recover in any event.

Defendant further contends that under the instruction the trial court permitted the jury to consider an agreement to pay more than $1.30 a bushel and that no such agreement was proved. We have determined this contention adverse to the defendant in considering the motion for judgment made at the close of plaintiff's case-in-chief. The assignment as to instruction No. 4 is without merit.

Defendant further assigns the giving of instructions No. 5 and No. 9 as error. These assignments are not discussed in the brief and under rule 8 a 2 (4) of this court will not be considered.

The judgment of the trial court is affirmed.

AFFIRMED.

THE MASONIC TEMPLE CRAFT OF OMAHA, A CORPORATION, APPELLEE, V. A. E. STAMM, REVIVED IN THE NAME OF ERIC AMBROSE, ADMINISTRATOR OF THE ESTATE OF ANDREW E. STAMM, DECEASED, APPELLANT, THE FIRST NATIONAL BANK OF OMAHA, ET AL., APPELLEES, JOHN W. NELSON, INTERVENER AND APPELLEE.

42 N. W. 2d 178

Filed March 30, 1950. No. 32737.

1. **Bills and Notes.** The owner of a negotiable instrument payable to bearer negotiates it or transfers the title thereto to another by delivery of the instrument to him with intent to do so.

2. **Gifts.** Mere physical possession of such an instrument by one claiming ownership thereof by gift from an admitted former owner without competent evidence of delivery by him with donative intent is insufficient to make a prima facie case against such former owner.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

John D. Wear, John R. McCormack, T. F. Hamer, and *Hadley Kelsey,* for appellant.

Gaines, Shoemaker & Crawford, and *John M. Peters,* for intervener and appellee John W. Nelson.

Joseph B. Fradenburg, for appellee Masonic Temple Craft of Omaha.

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

CHAPPELL, J.

This action originated when plaintiff filed a bill of interpleader to save itself harmless in the redemption or payment of four coupon bonds, each for the principal sum of $500, payable to bearer, with interest at three percent accruing semiannually. The bonds were issued by plaintiff on December 15, 1941, and subsequently delivered to Andrew E. Stamm, hereinafter generally designated as Stamm, who was thereafter at all times, according to plaintiff's records, the owner thereof. Prior to filing the action, notice of call for redemption of two of the bonds, as provided therein, was forwarded to Stamm, who, by his agent or guardian, notified plaintiff that after diligent search the bonds could not be found and ordered it not to pay the proceeds of such bonds to any other person because Stamm was the owner thereof. Thereafter, however, the bonds came into the possession of defendant First National Bank of Omaha, having been forwarded to it by defendant Seattle First National Bank for collection or sale. During pendency of the action, the

other two bonds were called for redemption, and subsequently, by appropriate order the proceeds of all the bonds were impounded by the court, where they still remain.

Eric Ambrose, a nephew of Stamm, as guardian of his person and estate, answered plaintiff's petition, alleging substantially that the bonds were owned by and the property of Stamm, and that the guardian was entitled to the possession thereof.

John W. Nelson, a nephew of Stamm, thereafter filed a petition in intervention, alleging substantially that subsequent to issuance of the bonds by plaintiff, and at a time when Stamm was competent, they were turned over to intervener by him as a gift, since which time intervener had been the owner in possession thereof, and had forwarded same to the Omaha bank through the Seattle bank for redemption. Intervener thus claimed that, as owner, he was entitled to the proceeds.

In the meantime Stamm died, and the action was revived in the name of Eric Ambrose, executor of the estate of Andrew E. Stamm, deceased. The executor as such then answered the petition in intervention, denying generally the allegations thereof.

After a hearing whereat evidence was adduced, the trial court found and adjudged that intervener was owner of the bonds and entitled to the proceeds. The respective defendant banks were ordered discharged upon delivery and surrender of the bonds by the Omaha bank to the clerk of the district court, who was ordered to receipt for and surrender same to plaintiff, who had already paid $2,285, the full amount due thereon with interest, to such clerk. A balance of $2,140.27 remaining after payment to plaintiff and its attorney of certain cost items, was ordered paid to intervener, and the costs of the action were taxed to the executor.

The executor appealed, and the issues presented here, as in the trial court, were primarily those arising out of intervener's petition, wherein he claimed the proceeds

by reason of the alleged gift of the bonds to him by Stamm, and the answer thereto filed by the executor. As the record comes to us, the sole question for decision is whether or not the undisputed evidence was sufficient to sustain the judgment finding and adjudging that intervener was owner of the bonds and entitled to the proceeds. We conclude that it was not.

An examination of the record discloses, and it is admitted, that relevant competent evidence adduced in intervener's behalf established nothing except that he had obtained possession of the bonds at his mother's home, where deceased then lived, sometime in 1942 or 1943, and had retained possession thereof ever since. He had no written assignment of the bonds, which of themselves disclosed that none of the interest coupons due or becoming due and payable while in intervener's possession were ever presented for payment.

In that connection, intervener argued that since the bonds were payable to bearer, such possession alone raised a presumption of legal title and ownership in intervener, and was sufficient to make a prima facie case in the absence of any evidence rebutting such presumption. In that light, intervener also argued that the allegations of his petition with regard to the gift of the bonds, not being indispensable to establish such a prima facie case, should be disregarded as mere surplusage. We conclude that such contentions have no merit.

It will be observed that this action was not one by the holder of a negotiable instrument payable to bearer against the maker to recover thereon. Rather, it was one to determine the ownership of choses in action, personal property, between an alleged owner in possession thereof by gift, against the alleged donor who was in fact admittedly previously the true owner, which action ultimately survived as against the executor of his estate who had a right to possession of all the personal property of deceased. § 30-406, R. R. S. 1943.

There was no competent evidence adduced by inter-

vener, either direct or circumstantial, indicating how intervener got possession of the bonds. In other words, there was no evidence whatever of delivery by deceased to intervener, or that such was done with donative intent. In that regard, mere possession is distinguishable from actual delivery since there may be possession where there has been no delivery, although there can be no valid delivery unless possession, actual or constructive, accompanies it. It is not mere possession by the donee that is material, but rather actual or constructive delivery to him by the donor with the present intent to transfer title to him and thus make a gift. 28 C. J., Gifts, § 21, p. 633; 38 C. J. S., Gifts, § 18, p. 797.

The owner of a negotiable instrument payable to bearer negotiates it or transfers the title thereto to another by delivery of the instrument to him with intent to do so. § 62-130, R. S. 1943. See, also, 10 C. J. S., Bills and Notes, §§ 185 and 188, pp. 681 and 683, § 226, p. 717. Mere physical possession of such an instrument, by one claiming ownership thereof by gift from an admitted former owner without competent evidence of delivery by him, is insufficient to make a prima facie case against such former owner.

In Yardum v. Evans, 120 Neb. 699, 235 N. W. 85, this court held: "Possession by an alleged donee of personal property of the alleged donor, after the death of the latter, raises no presumption of ownership in the alleged donee."

In In re Yeager's Estate, 273 Pa. 359, 117 A. 67, it was said: "Primarily, the donee must show an executed gift 'not only because the original ownership (of the fund) is presumed to continue, but also because the defense is an affirmative one which necessarily carries with it this duty': McConville v. Ingham, 268 Pa. 507, 518."

In the headnote, 25 A. L. R. 643, citing many cases, it was said: "As stated above, it is a settled principle in the law of gifts that there must be a delivery of the subject thereof. That principle is uniformly applied in cases of

gifts of bills and notes; there must be a delivery to complete the gift." Also, as stated by the same authority at page 647: "The act which most clearly evidences a delivery of a note is the act of the donor in handing the note to the donee. The cases uniformly hold—except in Louisiana—that, where the donor hands a note to the donee in pursuance of his intention to make a gift of the same to the donee, there is a sufficient delivery to constitute a completed gift." See, also, 24 Am. Jur., Gifts, § 84, p. 774; 38 C. J. S., Gifts, § 45, p. 822.

As stated in 28 C. J., Gifts, § 61, p. 660: "The actual delivery of negotiable bonds, with words or acts indicating a present absolute gift, constitutes a valid gift inter vivos."

In Fouts v. Nance, 55 Okl. 266, 155 P. 610, L. R. A. 1916E 283, citing many authorities, it was said: "There must be some act or circumstance shown amounting to an actual delivery at the time of the gift. It is not the possession by the donee that is material, but the delivery to him by the donor."

In 28 C. J., Gifts, § 83, p. 679, it was said: "The mere possession of the property by the donee is not sufficient evidence of a gift, for this may be consistent with a mere custody or agency."

As said in In re Wilson's Estate, 140 Misc. 10, 250 N. Y. S. 553, citing cases: "The burden is on the claimant. The possession of the bank books must be accompanied by some proof of delivery, which is not present in the instant case. Possession alone is not enough."

In Chipman's Adm'r. v. Gerlach, 286 Ky. 157, 150 S. W. 2d 633, it was said: "The fact of manual possession of a chattel is not of itself sufficient to warrant the presumption that there had been an actual delivery of it and an irrevocable and unconditional transfer of title."

In Rothwell v. Taylor, 303 Ill. 226, 135 N. E. 419, it was said: "Let us assume that because plaintiff had possession of the notes and certificates before her aunt's death it must be presumed, unless the contrary is shown,

that her aunt delivered them to her. Would the presumption also follow, as a matter of law, that the delivery was with intent to pass title? The intent to pass title by delivery is an essential element of a valid gift."

In Keepers v. Fidelity Title and Deposit Co., 56 N. J. Law 302, 28 A. 585, 44 Am. S. R. 397, 23 L. R. A. 184, speaking of gifts, it was said: "Around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily-proven devices."

In Whalen v. Milholland, 89 Md. 199, 43 A. 45, 44 L. R. A. 208, after citing and quoting from Keepers v. Fidelity Title and Deposit Co., *supra,* it was said: "Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made while he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation, whether it be a donation inter vivos or mortis causa."

This court has held that: "When a party pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact." Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581.

The rule generally is that a party who claims personal property of whatever character by gift inter vivos or mortis causa has the burden of establishing every essential element thereof by clear, satisfactory, and convincing evidence. Yardum v. Evans, *supra;* In re Yeager's Estate, *supra;* In re Wilson's Estate, *supra;* Bosserman v. Watson, 230 Iowa 627, 298 N. W. 804; 28 C. J., Gifts, § 71, p. 669; 38 C. J. S., Gifts, § 65, p. 854.

In In re Estate of Sternecker, 136 Neb. 813, 287 N. W. 659, it was held: " 'One of the essential elements of a gift is the intention to make it. A clear and un-

mistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory.' The person asserting it (a gift) 'must prove all the essential elements by clear, direct, positive, express and unambiguous evidence.'" See, also, Hild v. Hild, 135 Neb. 896, 284 N. W. 730; Ralston v. Marget, 138 Neb. 358, 293 N. W. 124; In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799; 28 C. J., Gifts, § 82, p. 676; 38 C. J. S., Gifts, § 67, p. 869.

In First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496, it was held: "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable in trespass." See, also, Jones v. Ewart, 143 Neb. 717, 10 N. W. 2d 708.

In the light of the foregoing, it will be observed that intervener failed entirely to make a prima facie case, which disposes of both contentions made by him. Cases relied upon by him are distinguishable either upon the facts or the character of the relief sought therein. To discuss them at length would serve no purpose.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, with directions to enter a judgment against intervener and for Eric Ambrose, executor of the estate of Andrew E. Stamm, deceased, and direct that the clerk of the district court pay the proceeds of such bonds to him as representative of the estate. Costs are taxed to intervener.

REVERSED AND REMANDED WITH DIRECTIONS.

THE STATE OF NEBRASKA EX REL. WINFIELD EVANS, APPELLANT, V. HORACE E. BROWN, FORMER CITY CLERK, ET AL., APPELLEES.

41 N. W. 2d 862

Filed March 30, 1950. No. 32743.

1. **Mandamus.** A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.
2. ———. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.

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

W. H. Kirwin, for appellant.

Jack E. Lyman, for appellees.

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

CHAPPELL, J.

In conformity with the provisions of Chapter 16, article 6, R. S. 1943, and the 1949 Supplement thereto, Scottsbluff, a city of the first class, operating under a city manager plan as provided in Chapter 19, article 6, R. S. 1943, passed an ordinance entitled: "An Ordinance of the City of Scottsbluff, Nebraska, appropriating certain property for the use of said city for streets and sewers; appointing assessors, fixing the time and place for meeting of said assessors, prescribing their duties and remuneration and providing for the service of notice upon the owners of said property and persons interested; opening, establishing and designating said property as a part of Broadway Avenue; and repealing Ordinance No. 809 and all other ordinances or parts of ordinances in conflict herewith."

Thereafter a referendum petition, which evidently contained the required number of signatures but did not protest against enactment of the ordinance requiring its

suspension or reconsideration as provided by section 19-640, R. S. 1943, was filed with the city clerk, praying that the ordinance should "be referred to the voters of the City of Scottsbluff, Nebraska, for rejection or approval, at a special election to be called as provided by law."

The city clerk performed the duties required of him by section 19-639, R. S. 1943, but the city council took no affirmative action thereon to call and hold a special election, and relator filed this action in mandamus, alleging among other things that it was the legal duty of the city council to call a special election referring said ordinance to the voters of the city for their rejection or approval, which it failed, refused, and neglected to do. Relator's prayer was that respondents who are officers of the city be ordered and compelled to call and hold such a special election or appear and show cause why they had failed, neglected, and refused to do so.

An alternative writ issued in conformity with relator's prayer, and respondents answered, substantially denying generally, alleging that relator's prayer was for action by the city council, which it was not compelled to perform, that the ordinance pertained to local improvements, and referred to the taking of real estate under the power of eminent domain, an executive and administrative act not subject to referendum.

A hearing was had, whereat relator adduced evidence in his behalf and rested, whereupon respondents moved to dismiss the action for failure of relator to establish that respondents had "failed to act in accordance with the law or acted contrary to the law," and for other reasons set forth in respondents' answer which we need not repeat here.

After the motion was argued at length the trial court entered its judgment sustaining respondents' motion and dismissing the action at costs of relator. Motion for new trial was overruled and relator appealed, assigning, insofar as important here, that "The court erred in not grant-

ing the writ of mandamus as prayed for in the petition of relator."

Several propositions of law were presented by the briefs and argued to this court. However, but one of them requires discussion because it is decisive of the appeal and requires affirmance of the judgment.

Section 19-640, R. S. 1943, insofar as controlling here with regard to the submission of the ordinance by referendum to the voters, provides: "* * * the council shall submit it to popular vote at the next municipal election held not less than thirty days after filing of the petition, or the council *in its discretion* may call a special election for that purpose." (Italics supplied.)

It will be noted that the prayer not only of the referendum petition filed with the council but also relator's petition filed in the case at bar was that the council should hold or be required to call and hold a special election. The council was not petitioned to submit the matter at any general election, and never yet has refused to do so.

In that regard also, as stated at the end of the argument in relator's brief, "No municipal election was held or being held within thirty days thereafter, and a special election should have been called by the council in compliance with the plain provision of the statute" evidently referring to the statute just above quoted.

Respondents took the position throughout the trial that it was not mandatory but was within the discretion of the city council whether or not they should call and hold a special election. In other words, viewed in that light, the primary purpose of this action was to control the discretion of the city council, which cannot ordinarily be done by a mandamus proceeding.

As recently as State ex rel. Strange v. School District, 150 Neb. 109, 33 N. W. 2d 358, this court held: "The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

"A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown."

There was no evidence from which the court could have concluded that the council's discretion was so abused as to result in capricious and arbitrary action, discussed in State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178.

For the reasons heretofore stated, the judgment should be and hereby is affirmed. Costs are taxed to relator.

AFFIRMED.

CHARLENE RISTOW, APPELLEE, V. ALFRED RISTOW, APPELLANT.

41 N. W. 2d 924

Filed March 30, 1950. No. 32744.

1. **Divorce.** In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case.
2. ———. In determining provision to be made in a divorce case for support of an infant child of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with the best judgment of the court.

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

E. L. Mahlin, for appellant.

Spear, Lamme & Flory, for appellee.

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

MESSMORE, J.

This is a divorce action tried in the district court for Dodge County. The plaintiff Charlene Ristow was granted a decree of divorce from the defendant Alfred Ristow, the custody of their minor daughter Kristin Ristow, permanent alimony, and an allowance for child support. The defendant appeals from the allowance of alimony and child support on the ground that the amounts allowed were excessive and unreasonable under the evidence and constitute an abuse of judicial discretion. The plaintiff cross-appeals, contending the amount of alimony and child support allowed by the trial court was insufficient and inadequate under the evidence. No other issues are involved in this appeal.

For convenience we will refer to the parties as they were designated in the district court.

The case is here for trial de novo upon the issues presented by such appeal, as in other equity actions. See, § 25-1925, R. R. S. 1943; Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901.

It appears from the record that the parties were married February 28, 1947. At the time of their marriage the plaintiff was 20 years of age and the defendant 38 years of age. To this union one child, Kristin Ristow, was born on February 5, 1948. The defendant since 1936 has held the position of postmaster at Scribner, Nebraska, except for the period of time he was in the military service, from March 22, 1942, until May 23, 1946, when he was released from the service. The parties lived together 8 months and 8 days.

The decree, with reference to alimony and child support, provides that the plaintiff should be awarded the custody of Kristin, the minor daughter, the issue of the marriage; that the defendant should pay the plaintiff $2,000 as permanent alimony, payable in installments of

$50 a month commencing September 15, 1949, and continuing until the total sum is discharged; that the defendant should pay to the plaintiff as support money for Kristin Ristow the sum of $75 a month for 40 months commencing September 15, 1949; and that defendant should thereafter, during the minority of Kristin Ristow or until she marries or becomes self-supporting, pay the sum of $100 a month for her support and maintenance. The court further found that the defendant had the custody and possession of $520 belonging to the plaintiff which she received as a wedding gift from her parents and relatives, and that this sum should be forthwith paid to the plaintiff by the defendant. The costs of the action and attorneys' fees were taxed to the defendant.

In Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771, this court said: "Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the circumstances of the parties, and this obligation continues after their legal separation. Permanent alimony was unknown at common law, and in this state is based upon section 42-318, Comp. St. 1929 (now section 42-318, R. S. 1943), which declares that the court may award 'such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case.' It will be seen at once that, under such a liberal statute, the fixing of the amount of the alimony rests alone upon the sound discretion of the court. The first factor that should be taken into consideration is the financial circumstances of the parties, and all of the property owned by the parties should be considered and its value ascertained as of the time of the decree. Next, the income and productiveness of the property should be considered, together with the earning capacity and future prospects of the parties; the manner in which such property was acquired, whether through joint savings or by inheritance, and the contribu-

tions made by each, together with the value of the services rendered by each of the parties during their marriage. If evidence relating to the respective ages of the parties, the duration of and conduct during the marriage, their station in life, respective wants, circumstances and necessities, has been given, it should be considered, together with the health and physical condition of the parties, * * * ."

The case of Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625, holds: "In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case." See, also, Hild v. Hild, 135 Neb. 896, 284 N. W. 730; Haussener v. Haussener, 147 Neb. 489, 23 N. W. 2d 700; Holmes v. Holmes, *ante* p. 556, 41 N. W. 2d 919.

The defendant's net salary as postmaster is $254 a month. He owns the fee simple title to property left him by his mother, she having died in 1943, subject to the life estate of his stepfather who at the time of trial was 69 years of age. Prior to his marriage he lived with his stepfather in the property, and after his marriage he and his wife lived with the stepfather in the property until the plaintiff left, about November 8, 1947, to go to the home of her parents who reside on a farm near Scribner, where she was living at the time of trial.

The defendant testified to certain items that constituted the value of his property. The trial court, in consideration of all of the evidence as to the property owned by the

defendant, apparently based the defendant's net worth to be between $4,000 and $5,000.

In determining the question raised in this appeal and cross-appeal with reference to permanent alimony and child support, we have taken into consideration the earning capacity of the defendant since he became of age in 1929, his salary as assistant postmaster and postmaster, and his salary and allowances as an army officer; in addition, the inheritance from his father's estate which finally amounted to $1,300; and the investments made by him, in his name, of four real estate mortgages totaling $10,700, $9,000 of which he testified belonged to his mother. The last of these mortgages was released in May of 1946.

We have also considered the testimony with reference to an oral agreement made by the defendant's mother in his presence and in the presence of his stepfather that after her death the defendant should pay to his brother Edward, living in California, the sum of $9,000. The mother's will bequeathed five dollars to Edward who had not seen his mother since 1931. She died in 1943. Edward testified that his mother told him in 1931 that he would receive some money after her death. He was unable to attend her funeral as he was in an induction center at that time and transportation was not available. The testimony of the defendant and his brother Edward is that $5,600 was paid to Edward in July of 1943, $400 in November of 1945, and $3,000 was paid to Edward July 12, 1946. The payments were made by checks. The testimony involving this $9,000 transaction, from a close inspection, is conflicting, not clear, and is doubtful. This is derived from the manner and form in which the amounts were alleged to have been paid and the uncertainty of the reason therefor as shown by the testimony of the brother Edward.

The record shows 24 shares of bank stock in defendant's name valued at $3,120, or $130 a share. Originally 12 shares of this stock came into defendant's name when his

stepfather transferred the shares to the defendant in 1944, to enable the defendant to become a director in the bank. There appears to have been a reissue of the stock later, so the 12 shares in fact constituted 24 shares. Defendant testified to repaying 12 shares to his stepfather, and due to the reissue of the stock he should have repaid 24 shares. The ownership of this stock and the evidence as to its value have been taken into consideration in determining this appeal.

We also take cognizance of the expenses of the last illness and burial of the defendant's first wife who departed this life in 1943. He testified that at that time he borrowed $3,000 from his stepfather to take care of this expense. This loan was repaid by the purchase of an automobile, the title of which was taken in his stepfather's name, in the amount of $2,300, leaving a $700 balance due his stepfather on the $3,000 debt. This transaction occurred December 9, 1947.

In addition we have considered the evidence with reference to the defendant's interest in the real estate left by his mother, the value of which, as shown by the record, ranged from $5,000 to $7,000 at the time of trial. We have also considered the amounts deposited by the defendant, the amounts withdrawn, the purchase of government bonds and the cashing of the same; also that the plaintiff was able to and did instruct in music during her marriage, from which she earned approximately $30 a month.

The defendant's evidence also shows that he destroyed canceled checks prior to his entry into the army and thereafter until approximately the last three or four months of 1946. The accounts and canceled checks of the defendant's stepfather were destroyed in a flood.

The afore-cited items constitute the basis to determine the allowance of permanent alimony and child support.

It is impossible, from the record, to determine with exactitude the value of the defendant's property at the time of the marriage. It is apparent that the defendant

owned more property at the time of his marriage to the plaintiff than his testimony discloses. It is likewise apparent that the evidence in behalf of the plaintiff as to the amount of property the defendant had at the time of the marriage is excessive.

After an analysis of the record in the light of the rules to be adhered to in determining what alimony shall be allowed or what division of property shall be made when a decree of divorce shall be awarded, we conclude the plaintiff is entitled to $4,000 permanent alimony to be paid at the rate of $50 a month from the date of September 15, 1949, the date fixed by the decree, until the entire amount is paid.

The decree with reference to child support is disproportionate to the actual needs of the child at this time. The child resides with her mother in her grandparents' home on a farm. The child support should be fixed in the sum of $50 a month, and the part of the decree fixing the amount thereof should be reversed with directions to the trial court to order $50 a month as support for the infant daughter of the parties, commencing on September 15, 1949, the date fixed in the decree, until the minor daughter is of legal age, or until the further order of the court as provided for by law in reference thereto.

In the event of a change of circumstances, the minor child is protected by the following applicable authority: Section 42-312, R. S. 1943, provides procedure for the revision and modification of such orders based upon the situation existing and made at the time of the trial, if the circumstances of the parties change or it shall be to the best interest of the child.

The amount fixed for the care of the infant daughter of the parties is wholly and exclusively child support, as distinguished from alimony or support of the plaintiff.

In determining provision to be made in a divorce case for support of an infant child of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with

the best judgment of the court. See Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535.

We therefore direct that the judgment be reversed and the cause remanded with directions that the decree of the trial court be modified in accordance with this opinion. Costs to be taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLEY W. TUCKER, APPELLEE, V. PAXTON & GALLAGHER COMPANY, A CORPORATION, APPELLANT.

41 N. W. 2d 911

Filed March 30, 1950. No. 32754.

1. **Appeal and Error.** A party may not be heard to complain of error which he has invited.
2. ———. Error may not be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party.
3. ———. In order to confer jurisdiction upon the Supreme Court to hear a civil action on appeal, notice of appeal must be given within one month from the date of the order, judgment, or decree from which the appeal is taken.

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

Kennedy, Holland, DeLacy & Svoboda, and *Edwin Cassem,* for appellant.

Charles A. Nye, William Comstock, and *Schall, Robinson, Hruska & Garvey,* for appellee.

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

YEAGER, J.

This is an action by Kelley W. Tucker, plaintiff and appellee, against Paxton & Gallagher Company, a corporation, defendant and appellant, to recover under the Workmen's Compensation Act for alleged accidental

injuries sustained by plaintiff on May 17, 1948, while he was engaged as an employee of the defendant. A judge of the workmen's compensation court, on hearing, dismissed the action. From the dismissal an appeal was taken to the district court where a trial was had. In the district court an award was rendered in favor of plaintiff for $18 a week for 55 weeks for temporary total disability and for $201.20 for medical and hospital expense. From this award the defendant has appealed.

The only question presented by the appeal is that of whether or not the plaintiff sustained an accident which produced the disabilities of which he has complained. The propriety of the amount of the award in the event that it is found that the plaintiff sustained a compensable injury is not brought into question.

Thus it appears that the only question for consideration here is one of evidence or in other words of whether or not the evidence is sufficient to sustain an award for the plaintiff.

From an examination of the record it appears well to point out here, although the subject to be considered is not raised, that after the decree was rendered the defendant filed a motion for new trial which was overruled. The decree was entered on July 25, 1949, and the motion for new trial was overruled October 27, 1949.

One of the stated grounds for a new trial was the following: "That the Decree is not sustained by sufficient evidence."

The only assignments of error on appeal are the following:

"1. The Trial Court erred in holding that an accident occurred.

"2. The Trial Court erred in finding that plaintiff's disabilities were the proximate result of an accident in the employment."

It is apparent that these two assignments are in substance a declaration that the decree is not sustained by sufficient evidence, or a reiteration by limitation and

particularization of the quoted ground of the motion for new trial.

The order overruling the motion for new trial is the following:

"Now, on this day, this cause comes on for hearing on motion of defendant filed herein August 4, 1949, for an order of the Court setting aside the decree and granting defendant a new trial. Whereupon by consent of parties, it is ordered that said motion be and the same hereby is overruled."

By this record it is made to appear that the order overruling the motion for new trial, which motion contained as one of its grounds the same substance as the assignments of error in this court, was overruled by consent of the defendant herein.

Under such circumstances may the defendant be permitted to seek from this court the reversal of action of the district court to which it has given its consent? This it may not do.

The principles involved are well settled by the decisions of this court. It is a well-settled rule that a party may not be heard to complain of error which he has invited. Storm v. Holmes, 2 Neb. (Unoff.) 16, 96 N. W. 73; Farmers Mutual Ins. Co. v. Cole, 4 Neb. (Unoff.) 130, 93 N. W. 730; In re Estate of Mattingly, 121 Neb. 90, 236 N. W. 175; Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712.

It is also well settled that error may not be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party. Chamberlain v. Brown, 25 Neb. 434, 41 N. W. 284; Union Nat. Bank of Chicago v. Touzalin Improvement Co., 1 Neb. (Unoff.) 116, 95 N. W. 489.

An examination of the application of these principles by this court in cases too numerous to attempt to collect them here leads to the definite conclusion that the defendant by its consent to the overruling of its motion for new trial barred itself from review here of the question of

whether or not the award was sustained by sufficient evidence.

If it should be urged that the appeal is not from the order overruling the motion for new trial but from the decree this can avail the defendant nothing. If the appeal is from the decree and not from the order overruling the motion for new trial then this court has no jurisdiction to entertain it.

The decree, as pointed out, was entered on July 25, 1949, whereas the notice of appeal was not given until November 4, 1949, which was more than three months from the date of rendition of decree, rather than within one month as is required by statute in order to confer jurisdiction. § 25-1912, R. R. S. 1943.

For the reasons herein stated the decree of the district court is affirmed and an attorney's fee in favor of the attorney for plaintiff is allowed in the amount of $250.

AFFIRMED.

ELVA REMMENGA, APPELLEE, V. VIRGIL SELK, APPELLANT.
42 N. W. 2d 186

Filed April 6, 1950. No. 32693.

1. **Trial: Damages.** In an instruction to a jury that the plaintiff is entitled to recover such damages as "she may have sustained" by reason of the injuries complained of, the use of the word "may" does not introduce an element of conjecture and uncertainty, and such an instruction is not erroneous upon that ground.
2. ———: ———. An instruction that damages for future pain and suffering must be proved with reasonable certainty is not required where damages already sustained are alone submitted to the jury.
3. **Trial.** The proper method of submitting a case to a jury is by a clear and concise statement of those issues which find support in the evidence and not by substantially copying the pleadings of the parties into the instructions, and if, by doing the latter, it results in prejudice to the complaining party it ordinarily constitutes sufficient grounds for reversal.

4. **Negligence.** Where the only issue is the nature and extent of the injuries sustained and the amount of recovery therefor, the inclusion of allegations of negligence in the submission of the issues upon which no evidence has been adduced in support thereof is not prejudicial to the rights of the party charged with such acts of negligence.
5. **Trial: Damages.** While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought.
6. **Damages.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered.
7. **Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

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

Davis, Stubbs & Healey, and *V. H. Halligan,* for appellant.

George B. Dent, Jr., and *Beatty, Clarke, Murphy & Morgan,* for appellee.

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

CARTER, J.

This is an action for damages for personal injuries sustained in an automobile accident alleged to have been caused by the negligence of the defendant. The jury returned a verdict for the plaintiff for $10,000 and judgment was entered thereon. The defendant appeals.

The case was previously before this court. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. A detailed statement of the facts in the case can be found in the former opinion.

The action as originally instituted was based on two

causes of action. The first was based on the personal injuries the plaintiff suffered in the accident. The second was based on the assigned claim of her husband, James Remmenga, for medical, hospital, nursing, household, and traveling expenses incurred for plaintiff as a result of the accident. Both causes were submitted to a jury and a verdict was returned for defendant. The trial court sustained a motion for a new trial as to the first cause of action and overruled it as to the second. On appeal to this court the order granting a new trial on the first cause of action was sustained and the order denying a new trial on the second cause of action was reversed. After remand to the district court, plaintiff dismissed her second cause of action without prejudice. The case was thereupon tried upon the issues raised by the first cause of action with the result hereinbefore stated. This appeal is from the verdict and judgment rendered on the first cause of action.

The defendant asserts that the trial court erred in four respects and has assigned such alleged errors on this appeal. They are in substance as follows: (1) That the trial court erred in giving an instruction which did not limit damages for permanent injuries to damages which are reasonably certain; (2) that the trial court erred in setting forth plaintiff's petition verbatim in the instructions, including allegations of negligence not supported by evidence; (3) that the trial court erred in instructing the jury that, although defendant's attorney had informed the jury that he would prove contributory negligence on the part of the plaintiff, he was unable to prove it; and (4) that the verdict is excessive.

With reference to the first assignment the record shows that the trial court instructed the jury "that Plaintiff's measure of damages for any personal injuries she may have sustained is such a sum as will fully and fairly compensate her for the damages thus sustained, * * *. In considering the damages thus sustained, you may take into consideration the extent and character of

said injuries, Plaintiff's physical pain and suffering, whether said injuries are permanent or not, and any other evidence in the case bearing upon the question of Plaintiff's injuries."

It is the contention of defendant that the use of the words "may have sustained," used in the fore part of the instruction, have application to the whole instruction and authorize the jury to allow uncertain, speculative, or probable future damages. We do not think the quoted words are subject to any such interpretation. The words are of common usage and in the manner used mean that plaintiff is entitled to recover compensation for any personal injury already sustained which was the result of defendant's negligence. There is nothing in the instructions given which authorizes a recovery for future pain and suffering or any physical disabilities that may result in the future. The instructions authorize a recovery only for disabilities already sustained. Under such circumstances we cannot say that the instruction given contains prejudicial error.

This question has been directly passed upon by this court in Henry v. Omaha Packing Co., 81 Neb. 237, 115 N. W. 777, wherein it was said: "The defendant complains of the use of the word 'may' in the following taken from one of the instructions given by the court on its own motion: 'If the plaintiff has established these facts by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as she may have received by reason of the injuries complained of, not exceeding the sum of $2,000.' A charge which allows damages for the pain and suffering which plaintiff may endure hereafter is erroneous, as allowing the jury to go into the field of mere probability. Nixon v. Omaha & C. B. Street R. Co., 79 Neb. 550. Used concerning a past transaction, the word is not capable of such a construction. To speak of such suffering as one may endure in the future is to introduce into the estimate an element of conjecture and uncertainty which is not at all involved

in speaking of the damages one may have sustained in the past. The amount of the latter cannot, under any construction of the language used, exceed the damage which has actually been sustained. The trial judge, not being permitted to assume that the plaintiff had suffered any damage, used the word 'may' to express the possibility of the existence of such damages, which were limited by the amount that she had already experienced, and therefore no element of probability was included. We think the rule laid down in Nixon v. Omaha & C. B. Street R. Co., has no application to the case at bar, and there was no error in the use of the word 'may' in the instruction complained of."

In Ballard v. Kansas City, 110 Mo. App. 391, 86 S. W. 479, the court in dealing with this same question said: "So far as this criticism is applied to the issue of permanent injury, it is without merit. 'May have suffered' is a form of the verb 'to suffer,' descriptive of completed action, and, so far as tense is concerned, is the equivalent of the past tense, indicative mode, 'has suffered.' This latter form of the verb may be substituted for that used without change of meaning. As permanency is a fact existing in the present, the result of completed action, and independent of future happening or contingency for its continuation, it is apparent no speculative future event could be considered by the jury under the form of expression employed. A present fact was dealt with, and the jury was restricted to the consideration of present conditions." See, also, City of South Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997.

We hold that the instruction does not authorize the jury to consider future damages, and consequently the necessity for an instruction to the effect that only such future damages could be considered as were proved with reasonable certainty did not exist.

Defendant contends that the trial court erred in copying plaintiff's petition into the instructions and allegedly including allegations upon which no evidence was

adduced. While this court has frequently criticized the practice of copying pleadings into the instructions as a method of stating the issues to the jury, such practice does not constitute reversible error unless it has resulted in prejudice to the complaining party. The criticism is based primarily on the danger of including allegations of negligence upon which no evidence has been offered. It is fundamental, of course, that it is reversible error to submit issues to a jury upon which no evidence has been offered. Where pleadings, though voluminous, are copied into the instructions as a statement of the issues to be determined, no error can be predicated thereon if there is evidence to sustain all the pertinent allegations included therein and prejudice to the complaining party does not otherwise appear. Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

The court correctly instructed the jury that the only question to be determined is whether plaintiff sustained the injuries complained of at the time and place alleged, the extent of said injuries, and the amount of recovery therefor. This for the reason that it was determined by our former opinion and judgment in this case that defendant was guilty of negligence and that there was no evidence of contributory negligence on the part of the plaintiff. The evidence at the second trial being no different than at the former one, there was nothing remaining to be determined other than the amount of plaintiff's recovery. This was made clear to the jury. Consequently, it cannot be said that the inclusion of allegations of negligence in the instructions which find no support in the evidence could result in prejudice to the defendant. They were wholly immaterial to the issue which the jury was to determine. City of Omaha v. Bowman, 63 Neb. 333, 88 N. W. 521.

It is urged that it was error for the trial court to include in the statement of the issues the amount for which plaintiff brings suit. While the better practice

is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error for the trial court to state the amount for which the action is brought. Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879.

Defendant contends that the trial court disparaged the efforts of counsel by informing the jury in the instructions that he had been unable to prove certain assertions made in his opening statement. The purport of the instruction was correct and, though not couched in the most appropriate language, we fail to see where it was disparaging to or contemptous of the efforts of defense counsel. It is often necessary that remarks of counsel made in an opening statement on matters not relevant to the issues be removed from the possible consideration of the jury by a curative instruction to disregard them. While the better practice is to make such instructions as impersonal as possible, we cannot say that the use of the name of one of defense counsel therein is prejudicially erroneous.

Defendant contends that the verdict for $10,000 was excessive. In this respect the evidence shows that plaintiff was a housewife and mother of the age of 38 years. She received a terrific blow to the face which left her scarred, disfigured, and in appearance much more aged than one of 38 years. The evidence shows that she lost all of her teeth, her gums, and part of the jawbone. The fractured fragments at the hinge on the left side of the jaw healed in such a manner as to lock the left jaw. The joint was destroyed and immobilized so that there will never be any articulation of the joint. The evidence also shows that plaintiff has had five sets of false teeth in an attempt to improve her appearance and give support to her jaw. She has been unable to use any of them because of the pain they induce. When she takes them out, the lower jaw sags and causes great and continuous pain in the locked hinge joint. The result is that plaintiff is limited to the use of soft foods as she is unable to bite or chew any other type of food.

The evidence shows that plaintiff has a permanent scar on her jaw and a disfiguring depression of the lower part of the lower jaw resulting from infection and a consequent sloughing away of the bone. She is nervous and irritable. Her black hair has turned gray. She suffered injuries to the back of her neck and back, the pain from which extended into her lower limbs. Her entire personality, appearance, and health have changed completely as a result of the accident. The injuries are permanent, with little hope of much improvement. The jury saw the plaintiff on the witness stand and had the opportunity to see the outward effects of the accident. That plaintiff suffered much pain is very evident from the evidence.

The defendant offered no evidence to contradict the foregoing evidence as to the nature and extent of plaintiff's injuries. We think it is sufficient to sustain the verdict of the jury under controlling rules of law. The applicable rule is stated in Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920, as follows: "There is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injury may be applied to all cases alike. As has often been said, much is left to the good sense and reason of the man in the jury box. Fishleigh v. Detroit United Ry., 205 Mich. 145; Southern R. Co. v. Bennett, 233 U. S. 80. The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed."

In Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387, we 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." See, also, Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. The verdict of the jury under these rules is amply sustained by the evidence. The judgment is affirmed.

AFFIRMED.

EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, APPELLEE, V. W. E. (CHILI) BRAZDA, APPELLANT.
42 N. W. 2d 195

Filed April 6, 1950. No. 32750.

Contracts. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purposes and in course of the same transactions are, in the eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.

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

Mapes & Johnson, for appellant.

Joseph H. McGroarty and *Charles H. Yost*, for appellee.

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

WENKE, J.

Employers Mutual Casualty Company, a corporation, brought this action in the district court for Dodge County against W. E. (Chili) Brazda. The purpose of the action was to require an accounting by the defendant of all moneys owing by him to the plaintiff as its agent. Defendant denied owing plaintiff any money because of a settlement. The trial court found there was owing to plaintiff the sum of $1,584.72 and entered judgment for that amount against the defendant. His motion for new trial having been overruled, defendant appealed.

The evidence shows that the appellant was engaged in the insurance business at Fremont, Nebraska; that he was an agent of the appellee; that as such agent, during the months of March, April, May, June, and July of 1948, he collected substantial sums of money belonging to the appellee; and that he failed to remit a large part thereof.

The principal difficulty arises out of the following instrument:

"SALE and ASSIGNMENT

In consideration of the payment of One Dollar ($1.00) and other considerations the receipt of which is hereby acknowledged, the undersigned being indebted to the EMPLOYERS MUTUAL CASUALTY COMPANY of DES MOINES, IOWA, does as of August 1, 1948 hereby sell and assign all right, title, ownership and interest whatsoever to the EMPLOYERS MUTUAL CASUALTY COMPANY of DES MOINES, IOWA all insurance policies and renewals thereof of the said EMPLOYERS MUTUAL CASUALTY COMPANY of DES MOINES, IOWA which are now in force or to be issued.

This assignment is given by free consent of the undersigned and without coercion of any kind or character whatsoever.

Dated at Fremont, Nebraska this 26 day of August, 1948.

/S/ W. E. Chili Brazda
W. E. (Chili) Brazda

Witness:
/S/ W. R. Somerville

The undersigned hereby agrees with W. E. (Chili) Brazda that any proceeds derived by the sale or disposal of the ownership of renewals of their policies shall, less any expense incurred, be credited against the indebtedness of the said W. E. (Chili) Brazda to the undersigned.

Dated this 26th day of August, 1948.

EMPLOYERS MUTUAL CASUALTY COMPANY
By /S/ Robt S Somerville
Nebraska Branch Manager

Witness:
/S/ W. R. Somerville."

Appellant contends that only the upper part of the instrument, that is, the part above his signature, was there when he signed it and the agreement was in fact a sale and assignment by him to the appellee of all right, title, ownership, and interest which he had in all the insurance policies, and renewals thereof, of his agency in satisfaction or settlement of all amounts which he was then owing appellee as its agent.

Appellee contends that the instrument had been fully drafted and signed by Robt. S. Somerville before it was presented to and signed by appellant; that the instrument constitutes one agreement; and that by the agreement the assets of the agency were transferred to it for the purpose of liquidation and the net proceeds to be applied on the amount owing it by appellant.

While there is dispute in the evidence as to whether or not the instrument, as hereinbefore fully set forth, had been fully drafted and signed by Robt. S. Somerville before it was signed by appellant, we find the evidence satisfactorily establishes that it had.

In Farmers Union Cooperative Elevator Federation v. Carter, *ante* p. 266, 40 N. W. 2d 870, we said: "The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purposes and in course of the same transaction are, in the eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance."

We find the appellee's contention to be correct both as a matter of fact and of law.

The evidence establishes that the assets assigned to appellee, so far as they are of any value, have been completely liquidated; that the proceeds received therefrom have been applied to the amount owing appellee, without expense to the appellant; and that the amount for which judgment was rendered is the unsatisfied balance.

As to appellant's contention that he should have been permitted to show, by parol evidence, what the consideration of the agreement actually was, we find nowhere in the record any attempt or offer to do so.

We said in Dean v. State, 128 Neb. 466, 259 N. W. 175, that: " 'In a criminal trial, as well as civil, when to a question in direct examination an objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded.' Savary v. State, 62 Neb. 166."

Appellant complains of the reasons given by the trial court for coming to the conclusion that it did. Whether or not the reasons given by the trial court for reaching

the conclusion that it did are correct we do not find it necessary to decide, as its conclusion is correct. As stated in Bragonier v. Stevenson, 104 Neb. 578, 178 N. W. 186: "A wrong reason for a correct conclusion of the trial court is generally immaterial on appeal."

In view of the foregoing, we affirm the judgment entered by the trial court.

AFFIRMED.

KENNEDY & PARSONS COMPANY, A CORPORATION, APPELLANT, v. HERMAN G. SCHMIDT ET AL., APPELLEES, E. I. DU PONT DE NEMOURS & COMPANY, APPELLANT.

42 N. W. 2d 191

Filed April 6, 1950. No. 32752.

1. **Penalties: Corporations.** An action to recover the penalty provided by section 24-213, Comp. St. 1929, must be brought in equity in behalf of all creditors and against all stockholders.
2. ———: ———. In pursuing the remedy provided by section 24-213, Comp. St. 1929, creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court.
3. **Appeal and Error.** The record of the trial court in all appellate proceedings imports absolute verity.
4. **Affidavits.** An affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.

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

W. J. Moss, Melvin Moss, and *Cloid J. Wilson,* for appellants.

Baldwin & Pike, for appellees.

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

SIMMONS, C. J.

This is an action in equity brought under the provisions of section 24-213, Comp. St. 1929, to enforce stockholders' liability to pay the debts of a dissolved corporation because of the failure of the corporation to publish annual notice of the amount of all existing debts of the corporation. The action is preserved under the general saving provision of section 24-1,104, C. S. Supp., 1941 (now section 21-1,156, R. S. 1943). The trial court dismissed the action on the ground that all the stockholders of the dissolved corporation were not made defendants in the action. Plaintiff and cross-petitioner appeal. They are referred to herein as appellants. We affirm the judgment of the trial court.

No question is raised here as to the facts that the dissolved corporation was the Farmers Union Co-Operative Association of Deshler, Nebraska, a Nebraska corporation; that the notice of indebtedness was not given; that the plaintiff was a judgment creditor of the corporation; that its judgment is unsatisfied; that the corporation has no goods or assets out of which to satisfy the judgment; and likewise that the defendant and cross-petitioner, E. I. Du Pont de Nemours & Company, a corporation, is also such a judgment creditor.

An action to recover the penalty provided by section 24-213, Comp. St. 1929, must be brought in equity in behalf of all creditors and against all stockholders.

In pursuing the remedy provided by section 24-213, Comp. St. 1929, creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the

court. Dempster v. Ashton, 125 Neb. 535, 250 N. W. 917.

The questions presented here relate to whether or not good and sufficient reason has been shown for the failure of plaintiff to join stockholders as parties defendant.

We recite only that part of the record that has to do with the questions here presented.

The transcript shows the trial judge's notes of January 16, 1947, to the effect that the files of the case were misplaced and that copies of the pleadings were ordered substituted. Accordingly it would seem that all pleadings shown in the transcript prior to that date are substituted copies. The transcript shows the appearance docket record of the clerk of the court. Where it appears reasonably certain, the dates shown on the appearance docket are those used here as the filing date for pleadings prior to January 16, 1947.

The appearance docket shows that this action began with the filing of a petition on November 17, 1941. The petition does not appear in the transcript, although an amended petition bearing a date in the verification form of the "____ day of October, 1941," is shown as the first pleading in the transcript. We cannot reconcile this date with any date on the appearance docket. This amended petition shows seven individuals named as parties defendant. It contains allegations that they are officers, directors, and stockholders of the corporation.

On February 3, 1942, a demurrer was filed to whatever petition was then on file on the grounds that there was a defect of parties plaintiff and defendant, and that the petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained on all three grounds on July 21, 1942.

On June 30, 1942, plaintiff filed a demand on the defendants to produce the records and books of the corporation wherein the records of the names of stockholders and creditors were kept. This demand contained a notice that unless complied with within four

days, a court order would be sought directing their production. The judge's notes show that on July 6, 1942, he sustained the motion and directed defendants to produce such records and books for inspection within ten days. On July 17, 1942, there was filed with the clerk of the court what is denominated in the bill of exceptions as the minute book of the corporation.

Plaintiff's attorney testified that prior to the filing of the minute book he did not know the name of the secretary of the corporation and that he determined it from the minute record; that he did not then undertake to secure a list of the stockholders from the secretary either by personal request or by court order or deposition; and that he advised defendants' attorneys that the minute book was not what he wanted and that he wanted the stock book.

No showing was made to the court of noncompliance with the order of July 6, 1942.

Plaintiff without following the matter further gleaned from the minute book the names of parties who appeared from it to be stockholders. On August 8, 1942, plaintiff filed its pleading denominated "Second Amended Petition" naming in the caption the original seven defendants, 30 other parties as individuals, and the Du Pont corporation, as defendants. In this petition it alleged, so far as material here, that the named defendants were "sole or part owners" of the stock of the corporation; that the plaintiff was unable to ascertain who were the stockholders; that it had on June 30, 1942, made demand upon the known stockholders for a disclosure of the records of who were the company's stockholders and creditors; that the demand was not complied with, other than the minute book of the corporation; and that to the best of its knowledge and belief the defendants are the owners and holders of the stock of the corporation. The Du Pont corporation filed an answer and cross-petition on May 10, 1943,

wherein similar allegations are made. No showing of service of process appears.

On October 25, 1943, 30 defendants (except the Du Pont corporation) demurred to the "petition" of the plaintiff, and 32 defendants demurred to the answer and cross-petition of the defendant Du Pont corporation, for the same reasons as given in the earlier demurrer. We find no ruling on these demurrers.

On March 29, 1943, the appearance docket shows the filing of an amended petition. We find no petition in the transcript that can be reconciled with that date.

On June 4, 1948, 32 defendants filed answers to the second amended petition and to the answer and cross-petition. These were general denials. On October 15, 1948, they filed amended answers in which they specifically denied that they were all the stockholders of the corporation, and alleged that all the stockholders had not been made parties defendant.

On October 26, 1948, the plaintiff had a subpoena issued directed to two of the defendants to appear as witnesses and to bring with them the books and records of the corporation, particularly the stock register and stock transfer records.

The cause went to trial on October 27, 1948. One of the defendants, who was served with the subpoena and who was secretary of the corporation at the time of its dissolution and one of the original seven defendants, as a witness for the plaintiff produced the stock register of the corporation containing the stock transactions of the corporation, and testified that he had never had a request from anyone for a list of the stockholders. The record shows that there were a large number of stockholders who are not parties defendant.

The case was continued until February 10, 1949, to enable the plaintiff to present additional evidence. On that date the court sustained the motions to dismiss, two of the grounds being that all the stockholders were not made defendants in the action; that all the defendants

named were not served by process, and that plaintiff's petition contained no allegation or statement that the defendants not served were nonresidents of the state or could not be reached by process.

Motions for a new trial were made and heard on May 5, 1949. On October 3, 1949, the court dismissed plaintiff's petition and cross-petitioner's cross-petition.

Appellants claim that they are excused from making other stockholders parties because of fraudulent concealment of the records which would disclose such stockholders, and that that is good and sufficient reason for such nonjoinder.

The defendants first by demurrer as early as February 3, 1942, raised the question that there was a defect of parties defendant as against the original petition or amended petition. They again raised that question by demurrer on October 25, 1943, as against the pleadings making the enlarged group of defendants parties to the action. They raised it finally by answer. It follows that at all times after February 3, 1942, plaintiff had notice of the claimed defect of parties defendant.

It appears that plaintiff knew that there had been a stock record, and that that record should contain the required information from which it could secure a list of stockholders so as to comply with the requirements of the law. It also appears that plaintiff, subsequent to the hearing at which the trial court on July 6, 1942, entered on its docket an order to produce records, took no action in court to secure a compliance with the order until it had a subpoena issued on October 27, 1948, at which time there was prompt compliance with the order. There is no showing that had earlier action been taken the same result would not have been had. It affirmatively appears that plaintiff knew on or about July 17, 1942, that the minute book was not the stock record and elected to proceed on the basis of information contained in the minute book, rather than undertake to compel the production of the stock record.

We see no merit in appellants' contention. There is no basis for a contention of fraudulent concealment or estoppel. Appellants have not shown good and sufficient reason for their failure to join all stockholders as defendants or serve process on all those joined.

Appellants further contend that under the provision of section 25-1267, R. R. S. 1943, they are entitled to a holding that they have in fact named all stockholders as defendants that it was possible to join. This statute was formerly section 8901, Comp. St. 1922. Appellants rely upon our holding in Sallander v. Prairie Life Ins. Co., 110 Neb. 332, 193 N. W. 737, that "When a party to an action has secured an order of court to produce a book, paper or document in the possession or control of the adverse party, as provided by section 8901, Comp. St. 1922, and the adverse party refuses to comply with such order, the proper practice is for the party desiring to use the book, paper or document in evidence to offer an affidavit setting forth the contents of such book, paper or document. It then becomes the duty of the court to instruct the jury to presume that the contents of the book, paper or document is such as the affidavit alleges it to be."

This argument proceeds upon the theory that the second amended petition contains allegations that bring it within the requirements of the statute and that the verified petition constitutes an affidavit.

The record of the trial court in all appellate proceedings imports absolute verity. Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222.

An affidavit is a written declaration under oath, made without notice to the adverse party. § 25-1241, R. R. S. 1943. We have held that an affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. Sebesta v. Supreme Court of Honor, 77 Neb. 249, 109 N. W. 166.

We need examine the contention of the appellants no

further than to point out that there does not appear such a certificate on any of the petitions shown in the transcript.

We find no merit in appellants' contentions.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ORIVAL L. SHINEMAN ET AL., APPELLANTS, V. BOARD OF EDUCATION, SCHOOL DISTRICT NO. 33 ET AL., APPELLEES.

42 N. W. 2d 168

Filed April 6, 1950. No. 32786.

1. **Mandamus.** A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.
2. ———. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.
3. **Constitutional Law.** A constitutional provision is not self-executing if the language of the Constitution is directed to the Legislature, or if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect.
4. ———. Article VII, section 6, of the Constitution is not self-executing.
5. **Schools and School Districts.** Section 79-443, R. S. Supp., 1949, places the general power in the school board with the consent and advice of the Superintendent of Public Instruction to establish such branches and grades as the board shall deem best adapted to the school.
6. ———. The second sentence of section 79-802, R. S. Supp., 1949, relates to the subject of tuition. It does not relate to the subjects of grades, departments, or courses of study.
7. ———. Section 79-444, R. S. Supp., 1949, deals with the subject of minimum-age requirements. It does not require the maintenance of a kindergarten or beginner grade in the schools.
8. **Statutes.** The simultaneous repeal and reenactment of a statute in terms or in substance is a mere affirmance of the original act and not a repeal in the strict or constitutional sense.

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

Stiner & Boslaugh, and *Leon Samuelson,* for appellants.

Spence & Long, for appellees.

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

SIMMONS, C. J.

In this action relators sought a writ of mandamus requiring the respondents to furnish and make available in the school operated by respondents a kindergarten or beginner grade for children who attained the age of five years but not six years on or before October 15, 1949. The trial court denied the writ. Relators appeal. We affirm the judgment of the trial court.

The relators are parents of children over five years of age and, at the time this action was begun, not yet six years of age. They are residents of the city of Franklin and of School District No. 33 in Franklin County.

The respondents are the Board of Education of School District No. 33.

The district is a class III district as defined in section 79-102, R. S. Supp., 1949. The district has never maintained in its schools a kindergarten or beginner grade as distinguished from a first grade. Before the budget was adopted in June 1949, the question of establishing a kindergarten was considered but not adopted because of financial reasons and lack of available room. In August 1949, the Board of Education considered and denied a petition for the establishment of a kindergarten. At the beginning of the school term on September 12, 1949, the relators presented their children for admission as members of a kindergarten or beginner grade and were denied admission because such a grade was not maintained. It was stipulated that had the district provided a kindergarten grade the children would have been required to

attend. Relators did not request that the children be admitted to the first grade. Shortly thereafter this action was begun for the writ and with the result above stated.

Relators present the question here as to whether or not it is mandatory that a class III school district maintain and operate a kindergarten or beginner grade for the instruction of children more than five years old but not six years old.

The respondents state the question as follows: "Will mandamus issue to compel a school district to establish, maintain, and operate either a kindergarten or a beginner grade preliminary to the first grade for the instruction of children who have attained the age of five years but have not reached the age of six years?"

We have held that a court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency, and that 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, 150 Neb. 109, 33 N. W. 2d 358.

Relators contend that the mandatory duty exists and that the legal right to the writ of mandamus is clear.

Relators rely upon the provisions of Article VII, section 6, of the Constitution and upon sections 79-802 and 79-444, R. S. Supp., 1949.

The constitutional provision is: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

Section 79-802, R. S. Supp., 1949, is: "All schools organized within the limits of such cities shall be under the direction and control of the boards of education authorized by section 79-803. Such schools shall be free to all children between the ages of five and twenty-one years whose parents or guardians are legal residents of such district, and all children of school age, nonresidents of

the district, who are or may be by law allowed to attend the schools without charge."

Section 79-444, R. S. Supp., 1949, is: "(1) The district board or the board of education, in all classes of school districts, shall not admit any child to the first grade of any school of such district unless such child has reached the age of six years or will reach such age on or before October 15 of the current year; *Provided,* that in the event any child has successfully completed the kindergarten or beginner grade such child may enter the first grade of any such school regardless of age.

"(2) The board in all classes of school districts shall not admit any child into the kindergarten or beginner grade of any school of such school district unless (a) such child has reached the age of five years or will reach such age on or before October 15 of the current year or (b) such child has demonstrated through recognized testing procedures approved by the Superintendent of Public Instruction that he is capable of carrying the work of those grades."

The relators argue in this way—that under the constitutional provision and section 79-802, R. S. Supp., 1949, their children are entitled to free public instruction; that under the provisions of section 79-444, R. S. Supp., 1949, the children are prohibited from entering the first grade and securing the free public instruction there; and that accordingly the district is required to provide a kindergarten or beginner grade in order that the children may have the free instruction.

The constitutional provision is clearly directed to the Legislature. We held in State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196, that a constitutional provision is not self-executing if the language of the Constitution is directed to the Legislature, or if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. With reference to this provision we said in Affholder v. State, 51 Neb. 91,

70 N. W. 544, that the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature. Clearly legislation is necessary to carry into effect the constitutional provision. It is not a self-executing provision. It follows that relators must find statutory authority to sustain their contention.

The Legislature has provided that "The district school boards and boards of education shall have the general care and upkeep of the schools, shall provide the necessary supplies and equipment, and, *except as herein otherwise provided, shall have the power to cause pupils to be taught in such branches and classified in such grades or departments as may seem best adapted to a course of study which the school board or board of education shall establish with the consent and advice of the Superintendent of Public Instruction.*" (Emphasis supplied.) § 79-443, R. S. Supp., 1949.

The statute places the general power in the school board with the consent and advice of the Superintendent of Public Instruction to establish such branches and grades as the board shall deem best adapted to the school. We find no indication in this record and it is not contended that the classification of grades in the school here involved is not in accord with the consent and advice of the Superintendent of Public Instruction.

In State ex rel. Sheibley v. School District, 31 Neb. 552, 48 N. W. 393, we construed a comparable statute and held that the school trustees had authority to classify and grade the scholars in the district and cause them to be taught in such departments as the trustees deemed expedient. In the course of the opinion we said that a parent could not require that his children be taught branches different from those in the prescribed course of the school. We so construed that opinion in Bourne v. State ex rel. Taylor, 35 Neb. 1, 52 N. W. 710. We reexamined and adhered to that opinion in State ex rel.

Kelley v. Ferguson, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. N. S. 266.

Unless otherwise provided in the act, the determination of whether or not there shall be a kindergarten or beginner grade in the respondent school is to be determined by the board of education.

This brings us to the question of whether or not the two sections of the statutes, relied upon by relators, limit the power, for otherwise the respondents have determined the question here presented adverse to the desires of relators.

Section 79-802, R. S. Supp., 1949, is relied upon by relators. The first sentence is a statement of broad powers placed in the board of education. The second sentence, upon which relators rely, refers to the subject of tuition. McNish v. State, 74 Neb. 261, 104 N. W. 186; State ex rel. Mickey v. Selleck, 76 Neb. 747, 107 N. W. 1022. It does not relate to the subjects of grades, departments, or courses of study. It has no bearing on the question here presented.

Section 79-444, R. S. Supp., 1949, relied upon by relators, deals with the subject of minimum-age requirements. As a part of Chapter 139, section 1, Laws 1931, page 385, the Legislature provided that the board of education should not be compelled to admit to the schools a child who had not reached the age of five years on or before September 1 of the current year. This became section 79-414, R. S. 1943. The 1949 Legislature first enacted section 79-444, R. S. Supp., 1949, in its present form (without the proviso in paragraph 1) as LB 381. Laws 1949, c. 258, p. 868. It then was enacted as section 83 of LB 1. Laws 1949, c. 256, § 83, p. 720. At that time the proviso was added and LB 381 was repealed.

"The simultaneous repeal and reenactment of a statute in terms or in substance is a mere affirmance of the original act and not a repeal in the strict or constitutional sense." Sullivan v. City of Omaha, 146 Neb.

297, 19 N. W. 2d 510, on rehearing, 146 Neb. 305, 21 N. W. 2d 510.

The title to LB 381 was: "AN ACT to amend section 79-414, Revised Statutes of Nebraska, 1943, relating to schools; to increase the age at which a child can be admitted to the first grade of any school in all classes of school districts; to fix the age at which a child may be admitted to the kindergarten or beginner grade of any school of such a district except as prescribed; and to repeal the original section." Laws 1949, c. 258, p. 868.

It appears from the title as well as from the act that the Legislature intended to fix a minimum-age limit for the first grade, subject to the proviso, and a minimum-age limit for the kindergarten or beginner grade, subject to the exception of paragraph 2(b).

The 1931 act, which became section 79-414, R. S. 1943, fixed a minimum limit for all children whether entering the kindergarten or first grade in those schools which did not maintain a kindergarten. Obviously under that provision children in some schools would be entering the first grade at five years of age and some in other schools at six years of age. The act as it now stands (section 79-444, R. S. Supp., 1949) makes mandatory the age limits, subject to the exceptions, and makes for uniformity of age in the grades beginning with the first, in all the schools of the state. The Legislature did not undertake to say by this provision that all schools should provide a kindergarten or beginner grade.

The issue here presented is one for the determination of the respondents and not the relators or the court.

The relators have not shown a right to the writ.

The judgment of the district court is affirmed.

AFFIRMED.

PHELPS INCORPORATED, A CORPORATION, ET AL., APPELLEES, v. CITY OF HASTINGS, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

42 N. W. 2d 300

Filed April 13, 1950. No. 32726.

1. **Licenses.** The rights of a licensee can rise no higher than the terms of the statute by which the licensee becomes a holder of the license.
2. ———. A license is invalid, whatever may be its form, to the extent to which it purports to grant a permit in excess of the licensing authority's statutory power.
3. **Municipal Corporations: Licenses.** A city with authority delegated to it to regulate a licensed business, not inconsistent with the licensing statute, may properly impose stricter regulations than the statute without being inconsistent with such statute.
4. **Intoxicating Liquors: Municipal Corporations.** Under the provisions of section 53-147, R. S. 1943, delegating to the governing bodies of cities and villages the power to regulate the business of beer licensees not inconsistent with the provisions of the act, a city or village is not prohibited from exacting additional restrictive requirements where the statute does not limit the requirement for all cases to its own prescription.
5. ———: ———. Under the provisions of the Liquor Control Act, Chapter 53, R. S. 1943, and the 1949 Supplement thereto, the primary power to permit the sale of beer and alcoholic liquors other than beer in the same room or location rests with the city or village under its delegated authority in section 53-147, R. S. 1943, to regulate the business of beer licensees.
6. ———: ———. Where a city or village does not permit beer to be sold in the same room or location with alcoholic liquors other than beer, by virtue of a valid ordinance not inconsistent with the Liquor Control Act, the form of the license issued by the Liquor Control Commission does not have the effect of nullifying such ordinance.

APPEAL from the district court for Adams County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

Albert P. Madgett, for appellants.

Stiner & Boslaugh, for appellees.

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

CARTER, J.

This is a suit for an injunction to enjoin the enforcement of an ordinance of the city of Hastings which by its terms prohibited the sale at retail of beer and alcoholic liquors other than beer in the original packages for use off the premises in the same room or location. A demurrer to the petition was overruled, and the defendants electing to stand thereon, the trial court entered an order permanently enjoining the defendant city and its officers from enforcing the ordinance in question against the plaintiffs. The defendants appeal.

The plaintiffs are holders of "Class D" licenses issued under the provisions of subdivision (5) D, section 53-124, R. S. 1943. This provision states that the fees for annual licenses finally issued by the commission shall be as follows: "Alcoholic liquors, including beer, regardless of alcoholic content, within the corporate limits of cities and villages, for consumption off the premises (sales in the original packages only), the sum of one hundred and fifty dollars; * * *." The plaintiffs contend that the provisions of this and other sections of the Liquor Control Act sustain their contention that beer and alcoholic liquors other than beer may be sold by them in the same room.

The ordinance of the city of Hastings upon which the defendants rely provides as follows: "It shall be unlawful for any person or persons, holding a license to sell beer at retail 'off sale' and alcoholic liquors other than beer in the original package, at retail, to sell or keep the same for sale at retail in the same room or on the same premises. It shall be unlawful for any person or persons holding a license or licenses for the sale at retail of beer 'on sale' and of alcoholic liquors other than beer in the original package, to sell, or keep for sale the same at retail, except in separate and distinct rooms or premises.

Rooms or premises shall be deemed separate and distinct only when located in buildings which are not adjacent, or when so separated by walls or partitions that access can not be had directly from one to the other by means of doors or other openings."

The only question to be determined is whether or not the ordinance is valid and enforcible. It is the contention of the defendants that the power to regulate the sale of beer lies in the city, under the express delegation of authority to so do in section 53-147, R. S. 1943, one of the sections of the Liquor Control Act. This section provides: "The governing bodies of cities and villages are hereby authorized to regulate by ordinance, not inconsistent with the provisions of this act, the business of all beer licensees carried on within their corporate limits."

The case resolves itself into a question as to whether or not the ordinance is inconsistent with the provisions of the Liquor Control Act. It must be conceded at the outset that a municipal corporation derives all of its powers from the state and that it has only such powers as the Legislature has seen fit to grant to it. It follows that in case of a direct conflict between a statute and a city ordinance, the statute is the superior law. The Liquor Control Act provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the commission." § 53-116, R. S. 1943. It becomes apparent that the Liquor Control Commission has full power to regulate the liquor traffic except as such power is specifically delegated elsewhere. Such power to regulate the business of beer licensees is delegated by section 53-147 to the governing bodies of cities and villages insofar as such regulations are not in conflict with the Liquor Control Act.

By definition contained in the statute, alcoholic liquors include alcohol, spirits, wine, and beer. § 53-103, R. S.

1943. It is urged that the grant of a license herein described as class D, which purports to license the sale of alcoholic liquors including beer, is in conflict with and superior to the ordinance passed pursuant to section 53-147 which delegates the control of the sale of beer to cities and villages where not inconsistent with the Liquor Control Act. That the Liquor Control Commission may properly issue licenses for the sale of beer and alcoholic liquors other than beer in the same room or location is within the purview of the act. We so held in Hanson v. Gass, 130 Neb. 685, 267 N. W. 403, wherein we said: "Sections 82 and 83 are the specific and particular provisions, and the only provisions, of the act by which the practical procedure for applying for and procuring licenses for the retail sale of alcoholic liquors, including beer, are prescribed and governed. By the language of those sections the licensee is granted the undoubted right to sell all forms of alcoholic liquor, including beer, in the premises described in the application and the license, without any restriction or exception as to different or separate premises." This decision is grounded on the theory that all conditions necessary to the issuance of a valid license for the sale of beer and alcoholic liquors other than beer, which are within the power of the city to prescribe, have been met. The opinion in that case points out that the city of Omaha had voted for the sale of alcoholic liquors at retail. No restrictions on the part of the city appear to have been imposed. We have no hesitancy in saying, under such circumstances, that the sale of alcoholic liquors on the premises described in the license would include the sale of beer, since the latter is included within the term "alcoholic liquors" by statutory definition.

But in the present case the city of Hastings has by ordinance imposed conditions regulatory in character. This is a fact which makes the case of Hanson v. Gass, *supra,* wholly inapplicable here. It must be borne in mind that a license is only a permit. Its permissive

effect can be no greater than the statute which authorizes it. The rights of a licensee can rise no higher than the terms of the statute by which the licensee becomes holder of the license and a license is invalid to the extent to which it purports to grant a permit in excess of the licensing authority's statutory power. Burgess v. Mayor and Aldermen of Brockton, 235 Mass. 95, 126 N. E. 456; Topoozian v. Geraghty, 239 App. Div. 458, 267 N. Y. S. 598; Steves v. Robie, 139 Me. 359, 31 A. 2d 797. Where, as here, a city is delegated the power to regulate the business licensed insofar as it is not inconsistent with the statute, a license which purports on its face to deprive the city of the regulatory rights delegated to it can have no such effect. Section 53-124 deals with annual license fees, classifies the various types of licenses, and assigns to each an annual license fee. The powers of the commission and of the governing bodies of cities and villages are found in other sections of the act and are not controlled by the license fee section.

What is meant by the power to regulate has been before the courts on many occasions and does not warrant an extensive discussion here. Generally it means that the mode and manner of conducting the business may be controlled. In so doing, the regulatory body may ordinarily consider the character of those operating the business, the place and hours of operation, the type of building and the sanitary condition thereof, the number of places to be licensed, and any other reasonable regulation that is not prohibitory. Thielen v. Kostelecky, 69 N. D. 410, 287 N. W. 513, 124 A. L. R. 820; Ajax v. Gregory, 177 Wash. 465, 32 P. 2d 560. A city with authority delegated to it to regulate a licensed business, not inconsistent with the licensing statute, may properly impose stricter regulations than the statute, without being inconsistent with such statute. Fox v. City of Racine, 225 Wis. 542, 275 N. W. 513; LaCrosse Rendering Works v. City of LaCrosse, 231 Wis. 438, 285 N. W. 393, 124 A. L. R. 511. Every regulation is in fact a restraint

or restriction upon the business, and where such regulations are authorized by the licensing statute the licensee must conform thereto, irrespective of the form of the license itself.

The argument that the city of Hastings is attempting to prohibit that which the statute provides is without substance for the simple reason that the licensing statute specifically delegates the power to regulate the beer business in a manner not inconsistent with the statute. Stricter regulations by cities and villages than those imposed by the commission or the Liquor Control Act are contemplated. The local option features of the act, the distinctions made in the act as to the control of beer and alcoholic liquors other than beer, and the underlying intention to separate on-sale and off-sale handling of alcoholic liquors, confirm the interpretation of the statute we here make. Under the act the regulation of the beer business is primarily in the hands of named political subdivisions of the state. In the instant case it lies with the city of Hastings. The mere fact that the Liquor Control Commission issues a license having a broader effect than the statute authorizes under the circumstances shown does not change the situation as to the powers delegated to and exercised by the city under such statute.

An authoritative text states: "As a general rule, a state or governmental authority which has power to deny a privilege altogether may grant a license therefor upon such conditions, not requiring the relinquishment of constitutional rights, as it sees fit to impose, and the person to whom the license is granted takes it upon such conditions. When a license or privilege is granted subject to such rules and regulations as may be imposed, the acceptance of the license is an acceptance of regulations adopted thereafter; and in such a case, a violation of a license is a violation of the terms of its grant." 33 Am. Jur., Licenses, § 52, p. 371. See, also, 53 C. J. S., Licenses, § 42, p. 644. In Manchester Press Club v. State Liquor

Commission, 89 N. H. 442, 200 A. 407, 116 A. L. R. 1093, it was said: "No one may sell intoxicating liquor against the State's consent, and if consent is granted, it may be on such terms and conditions as the State attaches thereto. Acceptance of the license is an acceptance of the requirements to be observed by the licensee. The requirements impose the obligation to observe them, since the obligation is one voluntarily assumed in return for the privilege."

The rule applicable here is well stated in 37 Am. Jur., Municipal Corporations, § 165, p. 790, in the following language: "The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail."

Stated differently, the primary power to permit the sale of beer and alcoholic liquors other than beer in the same room or location rests with the city by virtue

of its delegated authority to regulate the sale of beer. Where the city permits, the license issued pursuant to subdivision (5) D, section 53-124, R. S. 1943, grants the privilege insofar as the commission is concerned, but where as here the city does not permit beer to be sold in this manner by virtue of a valid restrictive regulation not inconsistent with the provisions of the Liquor Control Act, the form of the license issued does not have the effect of nullifying the action of the city.

The plaintiffs cite The Neil House Hotel Co. v. City of Columbus, 144 Ohio St. 248, 58 N. E. 2d 665; State ex rel. Cozart v. Carran, 133 Ohio St. 50, 11 N. E. 2d 245; Walgreen Co. v. Lenane, 363 Ill. 628, 2 N. E. 2d 894, and other cases of similar import. In these cases the court held that the requirements of the statute were limited to its own prescription. Where the power to regulate is fully and exclusively reserved by the statute, any other purported regulation is in conflict therewith and within the principle announced in the cited cases. But such is not the case here. The power is expressly delegated to the governing bodies of cities and villages, and calls for the application of the rule we have announced.

The ordinance of the city of Hastings merely imposes stricter regulations than the Liquor Control Act and, being such, it is not inconsistent with the act. The ordinance is therefore within the scope of the regulatory powers granted to the city and a valid exercise of the police power delegated to it by the Liquor Control Act. The trial court erred in overruling the demurrer to plaintiffs' petition and in enjoining the defendants from enforcing the ordinance. The judgment is reversed with instructions to the district court to sustain defendants' demurrer to plaintiffs' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I cannot agree with the majority opinion in this case. There are two questions which are basic in the deter-

mination of the issues involved in this case a correct approach to either or both of which requires a decision the direct opposite of that made by the majority opinion. Only one was considered.

The question considered and determined was that of whether or not the provisions of the ordinance of the city of Hastings, Nebraska, which were brought into question are inconsistent with the provisions of the Nebraska Liquor Control Act. If they are, then the majority opinion to the extent that it deals with the issues involved is wrong and this dissent stands on a firm basis. I insist that inconsistency does exist and my purpose is to point it out.

I desire to point out that, as I believe, none of the cases cited in the majority opinion except Hanson v. Gass, 130 Neb. 685, 267 N. W. 403, has a bearing on the question involved and this one completely supports the contentions of the plaintiffs in this case.

The plaintiffs according to the petition were holders of licenses from the Nebraska Liquor Control Commission to sell, at designated premises in the city of Hastings, Nebraska, alcoholic liquors, including beer, regardless of alcoholic content, sales to be made in the original packages and for consumption off the premises. This type of license is designated in the act as class D.

The defendants demurred generally to the petition the effect of which was of course to admit the possession of the licenses and the propriety of their issuance.

These licenses were the measure of the rights of the plaintiffs to dispense alcoholic liquors. Section 53-123.04, R. S. Supp., 1949, makes this clear. The provision is: "A retailer's license shall allow the licensee to sell and offer for sale at retail either in the original package or otherwise, as therein prescribed, in the premises specified in such license, alcoholic liquors or beer regardless of alcoholic content for use or consumption but not for resale in any form."

Applied to this case that is a declaration that these

plaintiffs were *on the premises designated* in their respective licenses granted the right to sell alcoholic liquors, including beer, regardless of alcoholic content, sales to be made in the original packages and for consumption off the premises. This was a clear, unequivocal, and unmistakable right which flowed to them from the act itself through the license issued by the Liquor Control Commission.

The following which appears as section 53-147, R. S. 1943, is a provision of the Nebraska Liquor Control Act: "The governing bodies of cities and villages are hereby authorized to regulate by ordinance, not inconsistent with the provisions of this act, the business of all beer licensees carried on within their corporate limits."

Apparently pursuant to this authority the governing body of the city of Hastings enacted the following:

"It shall be unlawful for any person or persons, holding a license to sell beer at retail 'off sale' and alcoholic liquors other than beer in the original package, at retail, to sell or keep the same for sale at retail in the same room or on the same premises. It shall be unlawful for any person or persons holding a license or licenses for the sale at retail of beer 'on sale' and of alcoholic liquors other than beer in the original package, to sell, or keep for sale the same at retail, except in separate and distinct rooms or premises. Rooms or premises shall be deemed separate and distinct only when located in buildings which are not adjacent, or when so separated by walls or partitions that access can not be had directly from one to the other by means of doors or other openings."

A penalty provision was also enacted for violation which shall not be set forth here.

The plaintiffs by their petition declare that this provision of the ordinance which by its terms denies them the right to sell beer from the same premises as other alcoholic liquors is directly inconsistent with the rights

granted to them under the law through the instrumentality of the Liquor Control Commission.

It is directly contrary to the legislative grant of rights which shall attend a class D license. Being contrary to the statute I am unable to comprehend how it can be free from inconsistency therewith.

It cannot well be said that the defendants may be aided in this instance by consideration of any general regulatory right or right under police power. The specific subject with which the ordinance deals was a thing specifically dealt with by the Legislature, and the effect of the legislative declaration, which conferred the only power of the city to act at all, is to effectually bar contrary or inconsistent municipal legislation.

It is apparent to me that the majority opinion fails to comprehend the true perspective of the case of Hanson v. Gass, *supra*. In the majority opinion it is stated: "The opinion in that case points out that the city of Omaha had voted for the sale of alcoholic liquors at retail. No restrictions on the part of the city appear to have been imposed. We have no hesitancy in saying, under such circumstances, that the sale of alcoholic liquors on the premises described in the license would include the sale of beer, since the latter is included within the term 'alcoholic liquors' by statutory definition."

Analyzing and applying that statement together with the opinion in Hanson v. Gass, *supra,* let us see at what point we arrive. Like in that case these plaintiffs had proper licenses, or at least we must so assume, since by their petition they so declared and by the general demurrer the defendants so admitted.

The right of these plaintiffs to sell beer on the same premises with other alcoholic liquors is statutorily more conclusive than was true under the license involved in Hanson v. Gass, *supra.* As to licenses such as the plaintiffs have the statutory provision contains the words "including beer" whereas as to the other it does not.

It is quite true that in the case of Hanson v. Gass,

supra, no restriction on the part of the city of Omaha was involved. It is not true however that a restriction like or similar to that contained in the ordinance of the city of Hastings was not involved. The similar restriction was contained in the Liquor Control Act itself.

The opinion in that case points out quite certainly that this restrictive provision was contrary to and inconsistent with the right of the licensee under his license to sell beer from the same premises where he was engaged in selling other alcoholic liquors. If the conclusion of this court with respect to consistency was correct there, how reasonably can an opposite conclusion be correct here?

Fairness requires that I point out here that it may reasonably be said that the decision in that case did not in the last analysis turn on the question of conflicting provisions of the statute. The court determined that the conflicting provision there was not substantive law but was only a declaration of public policy in the nature of a preamble, and hence could not be considered a substantive abridgement of the rights of the licensee under his license. Obiter dicta though it may be, it stands as reasoning of this court employed in a case wherein the majority opinion fails to deny its correctness, and a case, as I believe, involving a principle exactly the same as is involved in this case.

The other reason why I conclude that the majority opinion is wrong is that the provision of section 53-147, R. S. 1943, gives cities and villages no control whatever over licenses such as these plaintiffs have. That provision extends power to cities and villages to regulate the business of holders of beer licenses. These plaintiffs do not have beer licenses. They have class D licenses which permit the sale of all kinds of alcoholic liquors including beer. Beer licenses are separately classified. Retail beer licenses are classed as A, B, and F.

I repeat, I cannot agree with the majority opinion in this case. The decree of the district court should be affirmed.

SETH BEAM, APPELLANT, V. GOODYEAR TIRE & RUBBER COMPANY, A CORPORATION, APPELLEE.
42 N. W. 2d 293

Filed April 13, 1950. No. 32767.

1. **Workmen's Compensation.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. ———. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
3. ———. 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 his employment.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

W. M. Elmen and *Joseph J. Cariotto,* for appellant.

Cline, Williams & Wright, and *Warren C. Johnson,* for appellee.

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

WENKE, J.

This is a workmen's compensation case. Seth Beam makes claim for compensation under the act against Goodyear Tire and Rubber Company, a corporation, his employer. From a decree by the district court for Lancaster County denying his claim and dismissing his action, his motion for new trial having been overruled, claimant appeals.

For the purpose of convenience in writing the opinion we shall refer to Seth Beam, the appellant, as claimant and the Goodyear Tire and Rubber Company, a corporation, as employer.

The principal question presented by this appeal is, did the claimant establish that he was injured in an accident arising out of and in the course of his employment which, although latent in character was progressive in nature and culminated in his becoming disabled, would entitle him to be compensated therefor under the provisions of the workmen's compensation statute?

The foregoing presenting a question of fact, the following principles are applicable in our consideration of the record:

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

" 'Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.' Cunningham v. Armour & Co., 133 Neb. 598, 276 N. W. 393." Ames v. Sanitary District, 140 Neb. 879, 2 N. W. 2d 530.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking." Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592.

"The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course

of his employment." Hassmann v. City of Bloomfield, *supra*. See Saxton v. Sinclair Refining Co., 125 Neb. 468, 250 N. W. 655.

"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 his employment." Hassmann v. City of Bloomfield, *supra*.

"No recognition of the doctrine that because an injury may probably be the cause of an ailment the court should so find appears in our decisions. It may be so in other states, but not in this jurisdiction. The Nebraska rule, often pronounced and adhered to, is that in proceedings under the workmen's compensation law awards for compensation are not to be based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment. Bartlett v. Eaton, 123 Neb. 599; Townsend v. Loeffelbein, 123 Neb. 791; Kuhtnick v. Carey, 124 Neb. 762." Saxton v. Sinclair Refining Co., *supra*.

"' * * * symptoms of pain, and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.' (Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492.) We approve this exposition of the meaning of the terms 'accident' and 'objective symptoms' as contained in the statute quoted, * * *." Van Vleet v. Public Service Co., 111 Neb. 51, 195 N. W. 467.

The record shows that the claimant, who was 49 years of age at the time of trial, was a pipe fitter by vocation and that he returned to work for his employer as such in February 1946. He was classified as a labor trainer at the time of the accident hereinafter referred to. While so employed, apparently in August 1946, he was at work repairing a leak in a water pipe. While so working his

left shoulder came in contact with an open electric switch carrying 440 volts of electricity. At the time of the contact he was holding the pipe with his left hand. When his left shoulder touched the switch he received an electrical shock. As a result of the shock he was knocked off balance. He was helped from the floor by a fellow employee. The shock caused him to be dazed and weak. He apparently does not have too clear a memory of exactly what happened. Within a short time after the accident he went to the pipe shop and worked there the balance of the day.

Thereafter he remained on the job and regularly performed all of the duties of his position until August 2, 1947. During this period he did not take off any time because of illness; nor did he have any medical attention, except possibly for a cold. During this period of time he put in a substantial amount of overtime. While there is some conflict in the evidence, particularly that of claimant himself, as to whether he had any symptoms after the accident in August 1946 and prior to August 2, 1947, which it can be said were the effects of the shock, we think it can be fairly stated that the only possible symptoms which occurred during this period that might relate thereto is the fact that his left arm would occasionally become tired when he used it for the purpose of heavy pulling or other heavy work. However, it does not appear to have handicapped him in any way. He testified it gave him no trouble. Except for the foregoing it appears he was in good health during this time.

Claimant did not feel very good on August 1, 1947, however, he reported for work on August 2, 1947. After he reported for work on that date he became ill. He had a severe cold. His neck was swollen on both sides; he could not get his breath; he was coughing; his head pounded; and he seemed to hurt all over. He was taken home in the employer's car and later that evening the family physician, Dr. R. C. Olney, was called to the home and he treated him for flu or a very severe acute upper

respiratory infection. Claimant has never been able to return to work.

After claimant became ill Dr. Olney treated him regularly for a long time but he did not seem to readily respond to the treatment. This condition continued through the following winter and into the next summer. Claimant seemed to have very little resistance. Whenever the condition began to clear up he would have a reoccurrence thereof. It was not until the next summer that it really cleared up. It was then that it was noticed that he had a limited use of his left arm and that the muscles of the upper arm and shoulder were smaller. The arm was weak, a numbness had developed therein, and he suffered pain therefrom. It was then that claimant informed his doctor of having received the electrical shock sometime in August 1946.

Dr. Olney, who had taken care of the claimant during all of this time, testified he did not know and was unable to say what effect the shock had upon his general health but thought it must have been a factor but was of the opinion that his arm condition was due thereto. Dr. J. W. Hervert was of the opinion that the shock had damaged the nerve cells in the spinal cord and that it was the cause of all his trouble.

Dr. J. Marshall Neely and Dr. O. V. Calhoun, testifying for the employer, were both of the opinion that the length of time that had elapsed before any symptoms showed up eliminated the possibility that claimant's condition was due to the electrical shock. Dr. Calhoun was also of the opinion that his condition was due to the infection which had caused his illness and which, in his opinion, resulted in his disability.

We have previously held that compensable disability can arise in cases where injury resulting from electrical shock was latent but progressive and culminated in disability. However, in those cases symptoms developed very shortly after the accident which indicated that something had happened, although its nature or the

extent thereof was not immediately apparent or known. See, Travelers Insurance Co. v. Ohler, 119 Neb. 121, 227 N. W. 449; Keenan v. Consumers Public Power District, *ante* p. 54, 40 N. W. 2d 261.

Here we do not have a similar situation. No symptoms of any significance developed until after August 2, 1947, when claimant became ill with flu or a severe upper respiratory infection. To say that it, and claimant's condition subsequent to August 2, 1947, was caused by this shock is to engage in speculation and conjecture upon which this court has often said such claim cannot be based. From the record as a whole we find the facts do not support the claim that claimant's disability is the result of the shock he received sometime in August 1946. We find the judgment of the district court to be correct.

Other questions are raised by the appeal but their determination becomes immaterial in view of the foregoing.

The judgment of the district court is affirmed.

AFFIRMED.

WALTER E. WELLS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

42 N. W. 2d 363

Filed April 20, 1950. No. 32759.

1. **Criminal Law: Appeal and Error.** Only judgments and sentences of the district court upon convictions for felonies and misdemeanors under the criminal code may be brought to this court by petition in error.
2. **Municipal Corporations: Appeal and Error.** A prosecution for violation of a city ordinance, which does not include an offense made criminal by a statute of this state, is a civil procedure to recover a penalty, and a judgment and sentence therein may be reviewed in this court only by appeal.
3. **Evidence: Municipal Corporations.** A municipal court will take judicial notice of the ordinances of the city because it has a like relation thereto as do courts of general jurisdiction toward the general laws of the state.

4. ———: ———. On appeal of a conviction in a municipal court of a violation of an ordinance, the district court will take notice of the facts the former could have noticed judicially before the removal of the case.
5. **Appeal and Error.** The judgment of the district court in such a case will on appeal to this court be accorded the usual presumptions of regularity, and it will be presumed, nothing appearing to the contrary, that facts before that court established that the matters stated in the complaint constituted a violation of the ordinance of the city.
6. **Witnesses.** In this state no age is fixed by statute below which a child is presumed to be incompetent to testify. This is a matter committed to the sound legal discretion of the trial judge.
7. **Evidence: Appeal and Error.** The reception of improper evidence in a case tried by the court without a jury is not ground for a reversal, if there is competent evidence sufficient to sustain the findings of the court.
8. **Witnesses.** The character of a litigant may be put in issue by evidence of his general reputation in the community where he resides in reference to the particular trait or kind of character involved in the case, but evidence of his real qualities as conceived by the witness or of particular facts concerning the litigant is not admissible.
9. **Municipal Corporations.** The greater weight of the evidence, not proof beyond a reasonable doubt, is required to sustain a conviction of violation of a city ordinance not based upon an offense made criminal by the laws of the state.
10. **Trial.** Findings of the district court in a case tried without a jury are entitled to the weight, effect, and consideration of a verdict of a jury.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed. Petition in error dismissed.*

Ralph R. Bremers, for appellant.

Clarence S. Beck, Attorney General, *William T. Gleeson,* and *Charles A. Fryzek,* for appellee.

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

BOSLAUGH, J.

Appellant was in the municipal court of the city of

Omaha charged with and convicted of violation of an ordinance prohibiting indecent conduct within the city. He appealed to the district court, waived a jury trial, was tried, convicted, and adjudged to pay a fine and the costs. His motion for a new trial was denied. He has appealed from that judgment and sentence, and has also filed a petition in error in this court.

The offense charged against appellant as stated in the complaint is that he on about the 15th day of July, 1949, in the city of Omaha, "tried to perform indecent acts with Marolys (Marolyn) Darling in violation of" an ordinance of the city. Indecent acts or attempts to perform such acts are not made an offense by any statute of this state. This is a civil proceeding to recover a penalty for the violation of an ordinance, and appeal is the proper procedure to obtain a review in this court of the conviction and sentence of appellant. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81. The petition in error was improvident and should be dismissed. § 25-1912, R. R. S. 1943.

The complaint contains all the information in the record as to the ordinance therein described. This is not important in this case because courts of municipal corporations take judicial notice of ordinances thereof. They have the same relation to municipal laws as do courts of general jurisdiction toward the general laws of the state. On appeal from a conviction in a municipal court of a violation of a city ordinance, the district court will, upon a trial de novo, take notice of whatever facts the former could have noticed judicially before the removal of the case. The judgment of the district court in such a case comes to this court attended with the usual presumptions of regularity, and in the absence of a showing to the contrary, it will be presumed that the facts before that court, including those of which it was required to take judicial notice, established that the facts charged in the complaint were a violation of the ordinance of the city described or referred to therein. Foley v. State, 42 Neb.

233, 60 N. W. 574; Steiner v. State, 78 Neb. 147, 110 N. W. 723; Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683; Orose v. Hodge Drive-It-Yourself Co., 132 Ohio St. 607, 9 N. E. 2d 671, 111 A. L. R. 954.

Appellant argues that the district court was wrong in permitting Marolyn Darling to testify as a witness for appellee. She was an infant of twelve years, in the seventh grade in school, knew what it is to tell the truth, did not know the meaning of an oath, but knew she was expected to tell the truth "because the Bible says so." She was told that by her parents and her Sunday School teacher. Appellant objected to her competency as a witness when she was asked the first question material to the issue in the case for the reason that it was not shown she knew the meaning of an oath. He did not ask to be permitted to examine her as to her knowledge or ability to testify, neither did he ask the court to do so. In this state no age is fixed by statute below which a child is presumed to be incompetent to act as a witness, and there is no rule of law that an infant twelve years of age is incompetent to testify. If the opposing party in such a case challenges a witness because of his age without requesting an examination of him as to his competency by either the court or counsel, the objection is properly denied. The competency of a person to be a witness is generally committed to the sound legal discretion of the trial court, except in those cases where incompetency is prescribed by law. Inability to define such words as "testimony," "oath," or "obligation of an oath" is not determinative of want of capacity of an infant to be a witness. It is sufficient if, without being familiar with the use and meaning of such words, he has an adequate sense of the impropriety of falsehood, sufficient intelligence, and a proper appreciation for the obligation of an oath. The principle upon which the ruling should be determined is that the child is sufficiently mature to receive correct impressions by his senses, to recollect and narrate intelligently, and to appreciate the moral

duty to tell the truth. Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. The record is convincing that Marolyn Darling clearly met these tests.

It is said the court erroneously received certain evidence over the objection of appellant. In a case tried to a court without a jury, the reception of improper evidence is not reason for a reversal of the case if there is sufficient competent evidence to sustain the findings and judgment. It is presumed that the district court considered the evidence properly admitted on the trial to the exclusion of the improper evidence received. Smith Premier Typewriter Co. v. Mayhew, 65 Neb. 65, 90 N. W. 939; Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574; Shaul v. Mann, 102 Neb. 265, 166 N. W. 619.

Appellant complains that his attempt at the trial to establish a foundation for and to produce evidence of his general reputation as a peaceable and law-abiding citizen, and for chastity and morality was prevented by the court. The record fails to show this. No appropriate foundational question for this purpose was propounded by him and no offer was made of what appellant claimed the answer to such a question would have been. There was no foundation for evidence of appellant's general reputation in any respect. The offer of proof was that appellant was a temperate man, of normal habits, of good mental and physical health, and had conducted himself in a proper manner as a man of good character. It was without doubt his right to put in issue his character in the community where he resided, but the admissible evidence was proof of his general reputation in these respects and not evidence of particular and specific facts. It was proof of the estimate attached to him by persons in the community where he resided and not his real qualities as conceived by the witness. Berneker v. State, 40 Neb. 810, 59 N. W. 372; Annotation, 67 A. L. R. 1211. The sufficiency of the evidence to sustain the judgment is challenged. The assumption of appellant that the burden of appellee was proof beyond a reasonable doubt

is incorrect. The greater weight of the evidence is sufficient to sustain a conviction of violation of a city ordinance. State v. Neimer, *supra.* It is not necessary or proper to repeat the unsavory details of the evidence. The testimony produced by appellee, if accepted as true, is adequate to sustain the conviction. The evidence on behalf of appellant positively contradicted the proof of appellee in all respects material to the issue of the case, and it would have supported a finding for him if the court had accepted it as the facts. It is not permissible for this court in this situation to evaluate evidence or judge the credibility of witnesses. This was the function and the responsibility of the district court, and its finding adverse to appellant in this case is entitled to the weight, effect, and consideration of a verdict of a jury. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768.

The petition in error filed herein is dismissed. The judgment should be and is affirmed.

AFFIRMED. PETITION IN ERROR DISMISSED.

GEORGE FLOYD, ADMINISTRATOR OF THE ESTATE OF ARTHUR FLOYD, DECEASED, APPELLANT, V. FLOYD EDWARDS, APPELLEE.

42 N. W. 2d 292

Filed April 20, 1950. No. 32774.

1. **Appeal and Error.** The decision of an appellate court becomes the law of the case, and the legal effect of evidence once determined will not be reconsidered where, without material change, it is again brought to the court on a second appeal.
2. **Trial.** Findings of the district court in an action at law, in which a jury is waived, have the effect of a verdict of a jury.

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

Hubka & Hubka, for appellant.

Jack, Vette & Elliott, for appellee.

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

BOSLAUGH, J.

This case concerns a claim for damages for the death of Arthur Floyd alleged to have resulted from the negligent operation of a motor vehicle. The automobile was owned and maintained by appellee as a family car. It was operated at the time of the accident by his infant son, Lester Edwards. Deceased was struck by the car while he was upon a street of the city of Beatrice in the nighttime and his death resulted soon thereafter from the injuries inflicted upon him. Appellant is the legal representative of the estate of the deceased.

A jury was waived and trial had to the court. The court resolved the case in favor of the appellee and entered a judgment of dismissal. A motion of appellant for new trial was timely made and denied. He has appealed.

The case is here for a second time. The evidence at each trial was identical. The transcript of the evidence at the first trial as contained in the bill of exceptions used in this court on the first appeal was, by agreement of the parties, made the evidence on the second trial.

It was determined on the former appeal that there was no evidence of contributory negligence of the deceased; that the evidence did not establish that appellee was chargeable with negligence as a matter of law; and that the evidence on the issue of negligence of the driver of the automobile was sufficient to create a question of fact. The case was reversed because of the error of the court in submitting to the jury the issue of contributory negligence. Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555. The conclusion of the court as to each of these matters became the law of the case and controls all proceedings had thereafter insofar as they were or are involved. The evidence of each trial was identical and the determination on the first appeal that

the evidence was sufficient to create a question of fact as to the negligence of the operator of the automobile in the respects charged became the law of the case binding upon the parties, the district court, and this court. The decision of an appellate court becomes the law of the case and the legal effect of evidence once determined will not be reconsidered where, without material change, it is again brought to the court on a second appeal. Kline v. Metcalfe Construction Co., 148 Neb. 357, 27 N. W. 2d 383; Callahan v. Prewitt, 143 Neb. 793, 13 N. W. 2d 660; Lawson v. Union P. R. R. Co., 113 Neb. 745, 204 N. W. 791; Tyler v. Estate of McDougal, 130 Neb. 633, 265 N. W. 887; De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540.

The question in controversy, as stated by appellant, is whether or not the findings of fact made by the district court are supported by the evidence. He contends and asks this court to determine that they are each clearly wrong. This court is precluded by the long established rule of procedure, above stated, applicable to this case and binding upon it and the parties. If the findings made on the retrial of the case had been favorable to appellant, the doctrine of the law of the case would have operated in his favor and appellee would have suffered the disadvantage of it. The conclusion arrived at on the first appeal permitted a finding from the evidence of either negligence or absence of negligence. The district court precisely regarded the decision rendered on the first appeal and there is no fault in its findings. Findings of the district court in an action at law, trial by jury having been waived, have the effect of a verdict of a jury. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768.

The judgment should be and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. LESLIE C. SMITH, RELATOR, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., RESPONDENTS.

42 N. W. 2d 297

Filed April 20, 1950. No. 32820.

1. **Statutes.** Section 25-2221, R. R. S. 1943, establishes a uniform rule applicable alike to the construction of statutes and to matters of practice.
2. ———. As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials.
3. ———. The phrase "as a matter of course" as used in section 53-132, R. S. 1943, means that in the absence of objections as outlined in the act within the three-day period, the Nebraska Liquor Control Commission shall proceed to comply with the statutory procedures. It leaves open no area for the exercise of a discretion. It requires the performance of a purely ministerial duty.
4. ———. The word "shall" as used in section 53-132, R. S. 1943, presumes ministerial action and is mandatory.
5. **Officers.** When a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.
6. **Statutes.** Special provisions in a statute in regard to a particular subject control general provisions.
7. ———. Where the language of a statute is clear and unambiguous it is given effect according to its plain terms.

Original action by the state, on the relation of Leslie C. Smith, against the Nebraska Liquor Control Commission et al. *Writ of mandamus allowed.*

Webb & Kelley, and *James F. Green,* for relator.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for respondents.

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

SIMMONS, C. J.

This is an original action for a writ of mandamus to

compel the Nebraska Liquor Control Commission to issue a class "C" liquor license to relator. We allow the writ.

The fact situation is not in dispute. On January 10, 1950, the city commission of the city of Omaha granted relator a class "C" liquor license. This license, properly executed, was forwarded to and received by the Nebraska Liquor Control Commission on January 11, 1950. On January 16, 1950, a telegram protesting the granting of the license was filed in Omaha, transmitted, and received that day by the commission. The commission that day notified the relator that a protest had been received and a hearing would be had. Thereafter the hearing was held on February 1, 1950. The hearing was held over the objections of the relator that the protest was not within the provisions of section 53-132, R. S. 1943, so as to confer jurisdiction upon the commission to consider the protest. On February 6, 1950, the commission denied the license. Thereafter the relator applied for and was granted permission to commence this action here.

Section 53-132, R. S. 1943, provides for the filing of application for a license with the municipal clerk of the local governing body, the filing of a bond together with a license fee and cost deposit, the fixing of a time and place for a hearing on the application, the publishing of a notice thereof, and the holding of a hearing. The statute further provides that if, after hearing, a majority of the governing body favors the granting of a license, it shall direct the approval of the bond and cause a resolution favoring the issuance of the license to be spread upon its records, whereupon the clerk is directed to prepare a license in triplicate original and, when signed as provided in the act, shall forward the license in triplicate form to the commission, together with the state registration fee. No question is raised here as to the proper performance of the conditions of the act above outlined.

The act then provides: "The commission *shall* cause such license to be countersigned by its chairman, attested by its secretary over the seal of the commission, *as a*

matter of course, unless within three days after the receipt of such license executed by the local governing body, as aforesaid, objections in writing by a person residing within the city or village or by any person interested shall be lodged with the secretary of the commission protesting the issuance, the countersigning and completing the issuance of such license, in which event the commission shall proceed as in the case of an appeal from any other final order of the local governing body, as provided in section 53-1,115. If no protest in writing be lodged with the secretary, as aforesaid, the commission *shall* retain the second duplicate original for the permanent records of the commission, and return by registered mail *not later than the fourth day after their receipt,* the original and the first duplicate of such license, properly executed, to the municipal clerk who forwarded them; and the municipal clerk shall forthwith deliver the original license to the applicant and retain the first duplicate original thereof for the files of the local governing body." § 53-132, R. S. 1943. (Emphasis supplied.)

Section 25-2221, R. R. S. 1943, provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded."

This act establishes a uniform rule, applicable alike to the construction of statutes and to matters of practice. McGinn v. State, 46 Neb. 427, 65 N. W. 46, 50 Am. S. R. 617, 30 L. R. A. 450; Johnston v. New Omaha Thomson-Houston Electric Light Co., 86 Neb. 165, 125 N. W. 153.

It follows that the time covered by the "unless within three days" provision of the act expired here on January 14, 1950. Nevertheless the commission on January 16, 1950, took the action above stated.

The question then is, what was the commission's duty on January 16, 1950?

Relator contends that the commission had only a

ministerial duty to perform. The respondents contend that they had authority to hear and consider the protest and deny the license if in their judgment that was the action to take.

As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials. Trobough v. State, 120 Neb. 453, 233 N. W. 452.

That the three-day period for the filing of protests is a limitation on the power of the commission is further evidenced by the provision in section 53-132, R. S. 1943, above quoted, that if no protest be lodged "as aforesaid" the commission shall return the original and first duplicate "not later than the fourth day after their receipt * * * properly executed." This provision obviously negatives any discretionary action.

The use of the phrase "as a matter of course" reinforces the conclusion that after three days have elapsed without a protest being lodged the commission has but a ministerial duty to perform. "As of course" is defined by Webster's New International Dictionary, Second Edition, Unabridged, as meaning "* * * a thing to be granted upon a mere showing of the usual grounds and as not within the discretion of the judge to withhold." "Matter of course" is defined in Black's Law Dictionary, Third Edition, as "Anything done or taken in the course of routine or usual procedure, which is permissible and valid without being specially applied for and allowed." Bouvier defines "of course" as follows: "That which may be done in the course of legal proceedings without making any application to the court; that which is granted by the court, without further inquiry, upon its being asked: as, a rule to plead is a matter of course." Bouvier's Law Dictionary, Baldwin's Revision.

It follows that the phrase "as a matter of course" in the statute here being considered means that in the absence of objections as outlined in the act within the

three-day period, the commission shall proceed to comply with the statutory procedures. It leaves open no area for the exercise of a discretion. It requires the performance of a purely ministerial duty. It follows that the word "shall" where used in the statute above quoted presumes ministerial action and is mandatory.

When a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341.

It follows that relator is entitled to the writ. See State ex rel. Krasner v. Alabama Alcoholic Beverage Control Board, 246 Ala. 198, 19 So. 2d 841.

The respondents cite to us a number of statutory provisions dealing with the general powers of the commission, the restrictions on persons to whom licenses may be issued, the restrictions on locations where liquor business may be conducted, and the powers of the commission in the issuance and revocation of licenses, and submit hypothetical cases which it is contended would result in absurd conclusions if the construction sought by relator were accepted. We do not deem it necessary to discuss these contentions.

Beginning with McCann v. McLennan, 2 Neb. 286, and down to In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, we have followed the rule that special provisions in a statute in regard to a particular subject control general provisions. We are here dealing with a special provision of the statute setting out in detail the procedures to be followed in matters such as are here involved. Where the language of a statute is clear and unambiguous it is given effect according to its plain terms. City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457.

The peremptory writ of mandamus is allowed.

WRIT OF MANDAMUS ALLOWED.

HANS A. PAHL, APPELLEE, V. JOHN SPRAGUE, APPELLANT.
No. 32709.

JOHN E. SPRAGUE, APPELLANT, V. HANS PAHL, APPELLEE.
No. 32715.

42 N. W. 2d 367

Filed April 27, 1950.

1. **Trial.** When separate cases are properly consolidated for trial they ordinarily become one case, wherein one verdict and judgment dispose of the entire controversy.
2. **Parties: New Trial.** When all of the parties to such an action file a motion for new trial or join in an application therefor which is granted by the court in general terms, the order therefor has application to all the parties and all of the issues respectively pleaded by them, and requires a new trial of the entire controversy.
3. **Trial.** In order to be entitled to the benefit of the special procedure of which section 25-1315.02, R. R. S. 1943, is a part, a party is required not only to timely make a motion for directed verdict but when that motion is refused to thereafter timely file a motion for judgment notwithstanding the verdict.
4. **Appeal and Error.** A party cannot predicate error upon a ruling which he procured to be made.
5. **New Trial: Appeal and Error.** An order granting or denying a motion for new trial cannot be assigned as error by one who procured, invited, or condoned the making and entry of such order.
6. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
7. **Negligence: Trial.** In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
8. **Trial.** In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination.

9. **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.
10. **Negligence: Trial.** If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence, except insofar as the same may appear in the plaintiff's evidence.
11. **Automobiles: Negligence.** 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.
12. **Negligence: Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant or enter a judgment notwithstanding the verdict.

APPEAL from the district court for Douglas County: FAY H. POLLOCK, JUDGE. *Affirmed in No. 32709. Reversed and remanded with directions in No. 32715.*

Pilcher & Haney, for appellant.

Gross, Welch, Vinardi & Kauffman, John F. Mackenzie, T. F. Hamer, and *Wear & Boland,* for appellee.

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

CHAPPELL, J.

Hans Pahl brought an action against John Sprague to recover for personal injuries and property damages resulting from a collision of cars driven by them at the intersection of 64th and Miami Streets in Omaha. John

Sprague filed a separate action against Hans Pahl to recover damages to the car driven by him resulting from the same accident.

Upon motion of John Sprague, the cases were consolidated for trial to a jury. In conformity therewith, the trial proceeded without objection as one case, upon Hans Pahl's petition as if he were plaintiff, and upon John Sprague's petition as if he were a cross-petitioning defendant. Thus, the parties will be generally designated herein by name, or as plaintiff and defendant.

After plaintiff had rested, defendant's motion for directed verdict was overruled, and, at the conclusion of all the evidence, the respective motions of both plaintiff and defendant for directed verdict were overruled. The cause was submitted to the jury, which, in its verdict, found for plaintiff and against defendant, and awarded plaintiff $300 damages.

Thereafter defendant in due time filed a motion for judgment notwithstanding the verdict, and separately filed a motion for new trial, not only upon plaintiff's petition but also upon defendant's petition theretofore treated as a cross-petition. Plaintiff also filed a motion for new trial, and thereafter orally joined with defendant in his motion for new trial. All such motions were argued and submitted on June 24, 1949, whereupon the trial court entered an order and judgment overruling defendant's motion for judgment notwithstanding the verdict, but vacating and setting aside the verdict and granting a new trial, "plaintiff having joined in defendant's motion for new trial." Notwithstanding, however, the trial court thereafter on August 1, 1949, entered an order and judgment in which defendant Sprague's petition was dismissed and his motion for new trial was overruled, the effect of which was not only to deny defendant a new trial theretofore granted, but also to reinstate a part of the verdict theretofore vacated and set aside, and enter a judgment notwithstanding the verdict for plaintiff and against defendant, upon his

cross-petition, without any motion for judgment notwithstanding the verdict ever having been filed by plaintiff Pahl.

Although consolidated for trial upon defendant's motion, and in conformity therewith tried as one case under one set of instructions with but one verdict returned, the two purportedly separate cases were each appealed to this court by defendant, who filed two separate transcripts but only one bill of exceptions. Thus, the cases were separately briefed and argued, but they will be disposed of as one case in one opinion.

With reference to Sprague v. Pahl, appellant Sprague assigned that the trial court erred in denying him a new trial upon his petition. We sustain that contention.

In that regard, this court has heretofore established that when the cases were properly consolidated for trial they became one case, after which the parties were in no different position than they would have been had Pahl filed a petition and defendant a cross-petition in the same action, wherein one verdict and judgment would dispose of the entire controversy. Schallenberg v. Kroeger, 77 Neb. 738, 110 N. W. 664. By analogy, from the holding in such cited case, the vacating and setting aside of the single verdict rendered therein and granting a new trial in the case at bar disposed of and granted a new trial of the entire controversy.

In the absence of any motion for judgment notwithstanding the verdict filed by plaintiff, the trial court had no authority or power to dismiss defendant's petition, the effect of which was to enter a judgment notwithstanding the verdict. In order to be entitled to the benefit of the special procedure, of which section 25-1315.02, R. R. S. 1943, is a part, plaintiff was required not only to timely make a motion for directed verdict, but when that was refused, to thereafter timely file a motion for judgment notwithstanding the verdict. In re Estate of Kinsey, *ante* p. 95, 40 N. W. 2d 526; Hamilton v. Omaha & Council Bluffs St. Ry. Co., *ante* p. 328,

41 N. W. 2d 139; Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

Plaintiff did not comply with the statute, and, as hereinafter observed, both parties having filed motions for new trial and joined in a request for like relief in the same action, the granting thereof was binding alike upon both parties, and automatically granted a new trial of the whole case both upon plaintiff's petition and defendant's cross-petition. As stated in Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S. W. 776, wherein both parties filed motions for new trial: "If the bottling company was alone loosed by the new trial, and the exposition company was left bound by the old trial, then indeed would it have a grievance. But it is not so, a new trial for one is a new trial for both in all that term implies."

We therefore reverse the order and judgment in Sprague v. Pahl, No. 32715, and remand the cause with directions to award Sprague a new trial upon his petition as if it were a cross-petition in and consolidated with Pahl v. Sprague, No. 32709, hereinafter affirmed. Whether or not the trial court should have entered a judgment notwithstanding the verdict had plaintiff filed such a motion therefor upon the ground that Sprague was not the owner of the car for which he sought damages, we need not discuss nor decide.

With reference to Pahl v. Sprague, defendant assigned that the trial court erred: (1) In overruling defendant's motion for directed verdict and his motion for judgment notwithstanding the verdict; and (2) in the granting of a new trial. We conclude that the assignments have no merit.

The second assignment is disposed of by the well-established and elementary rule that: "A party cannot predicate error upon a ruling which he procured to be made." Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747.

As stated in Omaha Fire Ins. Co. v. Maxwell, 38 Neb.

358, 56 N. W. 1028: "The ruling or decision complained of was made at the request of the plaintiff in error, and to now permit it to assign the same for error would be a violation of the plainest principles of law. A party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his consent, or upon his own application."

In Missouri P. Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, it was held: "It is a sound and salutary principle that a party can not be heard to complain of an error which he himself has been instrumental in bringing about." See, also, In re Estate of Mattingly, 121 Neb. 90, 236 N. W. 175; Tucker v. Paxton & Gallagher Co., *ante* p. 622, 41 N. W. 2d 911.

In 5 C. J. S., Appeal and Error, § 1512, p. 225, it is said: "One may not complain of errors in respect of proceedings upon motions where he committed or invited such errors. The entry of an order granting or denying a motion cannot be assigned as error by one who procured, invited or condoned the making and entry of the order, as in the case of orders on a motion to dismiss the cause or a motion for new trial."

As a matter of course, the rules heretofore stated had application to both parties, plaintiff and defendant, as well as both causes of action, since each filed motions for new trial and joined in a request for like relief in the same action. In that situation, defendant could not complain of the granting of a new trial, and just as logically, plaintiff would be estopped to deny defendant the right to a new trial. In other words, the granting of a new trial in general terms had application to the whole case on all the issues made therein by the parties. Star Bottling Co. v. Louisiana Purchase Exposition Co., *supra;* Wray v. Ferris, 184 Okl. 132, 85 P. 2d 402; Fitzroy v. People's Bank of Cardwell (Mo. App.), 195 S. W. 520; National Union Fire Ins. Co. v. Forkner, 219 Ky. 119, 292 S. W. 765; Briggs v. Shepler, 115 Kan. 614, 224 P. 61; Larson v. Hanson, 207 Wis. 485, 242 N. W. 184; 39 Am.

Jur., New Trial, § 204, p. 201; 46 C. J., New Trial, § 512, p. 436.

Defendant's first assignment requires an examination of the record in the light of certain legal principles, since defendant argued that plaintiff had failed to establish that defendant was negligent in any manner alleged, and that recovery by plaintiff was precluded because the evidence disclosed that he was guilty of negligence more than slight as a matter of law. We conclude that the contention has no merit.

In Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21, this court held: "A motion for a directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.

"In negligence cases the trial court should sustain a motion for directed verdict, or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.

"In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination." See, also, Hamilton v. Omaha & Council Bluffs St. Ry. Co., *supra,* wherein it was held: "In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him."

In Simcho v. Omaha & Council Bluffs St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501, it was held: "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."

In Costello v. Hild, *ante* p. 1, 40 N. W. 2d 228, it was held: "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence, except insofar as it may appear in the plaintiff's evidence."

In Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617, it was held: "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.

"Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant." See, also, Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561.

This court long ago held that: "A jury is not bound to blindly accept as true all testimony which is not directly contradicted or impeached. The testimony of a witness should be weighed in connection with all the facts in the case." Murphey v. Virgin, 47 Neb. 692, 66 N. W. 652.

It is elementary that: "The credibility of witnesses and the weight to be given their testimony are questions

for the jury." Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

In the light of the foregoing applicable rules, we will briefly summarize and consider the relevant competent evidence adduced by plaintiff, which is substantially as follows: The accident occurred in the intersection of 64th and Miami Streets in Omaha. Plaintiff approached the intersection from the right and defendant from the left. Miami Street runs east and west and 64th Street runs north and south. They are each paved streets, approximately 24 feet wide. From the east, Miami Street slopes west down to the intersection with 64th Street. On the other hand, 64th Street slopes north more steeply down to the intersection. The intersection itself is almost level, although the west side thereof slopes slightly to the west. On the southeast corner of the intersection is a house, with a porch facing west, standing on a terraced bank approximately four feet above the intersecting sidewalks and streets. A privet hedge approximately four and one-half feet high extends east and west along the north side of the bank and the south side of Miami Street up to the sidewalk intersection. A large maple tree stands in the southwest corner of such intersecting sidewalks, a few feet east of the east 64th Street curb line. There are two other smaller trees south of it. Thereby, concededly, the view of persons driving cars and approaching the intersection from either the east or the south was obstructed up to a point near the intersection.

On October 5, 1947, at about 4 p. m., plaintiff drove his 1934 Chrysler car from the east to the west on Miami Street. The car was in fair mechanical condition, with good brakes, having recently been approved by the Omaha testing station. He stopped at the stop sign at 63d Street, and approached 64th Street driving at 20 to 22 miles an hour, on the right side of the street. When plaintiff was about 10 or 15 feet from the intersection, he first looked north, then south, and seeing no cars ap-

proaching, entered the intersection. When the front of his car was about even with the center of 64th Street, plaintiff looked south again, and first observed the car driven by defendant, coming from the left or south almost upon him. He could not estimate defendant's speed, but a broadside collision seemed imminent, and plaintiff turned to the north to avoid an impact. However, when plaintiff's car was across the center line of 64th Street and the front end of his car was only about six feet east of the west curb line of 64th Street, the right front of defendant's car collided with the left side of plaintiff's car at about the point where plaintiff driver was sitting. Broad sidewise skid marks one and one-half to two feet long, caused by plaintiff's car, extended from the point of impact northwest toward the curb, which plaintiff's car struck and turned over on its top, against a tree, with the rear thereof near the east and west crosswalk, at the northwest corner of the intersection. Skid marks caused by defendant's car extended from about the south walk crossing 64th and Miami Streets east and west to a point at about the center of the intersection, then went sharply to the left or west a foot or two.

After the accident, defendant's car was turned around upright, headed south or slightly southwest, at about the center of the intersection. Both cars were damaged, and plaintiff received personal injuries. The amount of such damages is unimportant here. During the trial, the manner of the accident was demonstrated by both parties with toy cars.

Plaintiff admitted that during the afternoon he had two or three beers, but denied that he was intoxicated, and there was competent evidence adduced by him corroborating that contention. His testimony that "I would say I was first in the intersection" was, upon motion of defendant, properly stricken from the record, upon the ground that no sufficient foundation had been laid, since under the circumstances it was not a statement of fact observed by him, but only a conclusion of the witness.

From the foregoing evidence the jury could reasonably have concluded that defendant Sprague was driving at an unlawful and excessive rate of speed, failed to maintain a proper lookout and have his car under reasonable control, failed to yield the right-of-way, and failed to stop or turn his automobile to avoid a collision, as alleged by plaintiff and submitted in instructions given by the trial court.

The evidence adduced in defendant's behalf upon the issues of negligence and contributory negligence was generally in conflict with that adduced by plaintiff. To summarize it herein would serve no purpose. It is sufficient to say that the issues of negligence and contributory negligence as alleged by the respective parties and submitted by the trial court were for the jury.

For the reasons heretofore stated, we conclude that the order and judgment of the trial court in Sprague v. Pahl, No. 32715, should be and hereby is reversed, and that the order and judgment in Pahl v. Sprague, No. 32709, should be and hereby is affirmed. Therefore, Sprague v. Pahl is hereby reversed and remanded with directions that the trial court enter an order granting a new trial therein, consolidated with Pahl v. Sprague as one case, not only upon the issues presented by Pahl's petition in Pahl v. Sprague, but also upon the issues presented by Sprague's petition in Sprague v. Pahl, to be tried as if it were a cross-petition in the same action.

AFFIRMED IN NO. 32709. REVERSED AND REMANDED WITH DIRECTIONS IN NO. 32715.

CHARLES KIRKENDALL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

42 N. W. 2d 374

Filed April 27, 1950. No. 32770.

1. **Trial: Appeal and Error.** Where instructions, considered as a whole, state the law fully and correctly, error will not be

predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

2. ———: ———. Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete.
3. **Criminal Law: Trial.** The court should fully and correctly instruct as to matters of justification interposed by the accused only when there is some evidence tending to put such matters in issue.
4. **Criminal Law: Appeal and Error.** Where the evidence received in a criminal case contains no testimony to which an instruction relating to "self-defense" would be applicable, no error is committed by the trial court's refusal to instruct thereon.
5. **Criminal Law: Evidence.** The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
6. **Assault and Battery: Criminal Law.** Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances, inclusive of the assault.
7. **Criminal Law: Evidence.** The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected.
8. ———: ———. It is a general rule applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed.
9. ———: ———. Such a presumption, although rebuttable in cases where specific intent is an element of the crime, is sufficient to establish a prima facie case as to intent and will prevail unless from a consideration of all the evidence the jury entertains a reasonable doubt whether such intention existed.
10. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised

within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

J. L. Gagnon, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for defendant in error.

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

CHAPPELL, J.

An information charged that on or about July 24, 1949, in Richardson County, defendant made an assault with intent to inflict great bodily injury upon the person of George A. Larimore, hereinafter called complainant. Upon a plea of not guilty, defendant was tried to a jury, which found him guilty of the included lesser offense of assault and battery. His motion for new trial was overruled, and he was sentenced to serve 75 days in the county jail at hard labor, and pay the costs of prosecution.

He prosecuted error therefrom to this court, assigning substantially that: (1) The evidence adduced was insufficient to warrant submission to the jury of the offense charged, particularly relating to the issues and elements of venue and intent; (2) that the court erred in refusing defendant's requested instructions Nos. 7 and 8, thus depriving him of the benefit of the issue of self-defense; (3) erred in giving instruction No. 9, because it allegedly assumed that defendant had committed an assault upon complainant; and (4) that the sentence was excessive. We conclude that the assignments should not be sustained.

We have examined instruction No. 9 given by the trial court, in the light of defendant's contentions, all other instructions given, and section 29-2308, R. R. S.

1943. The language of the instruction simply undertook to and did correctly define the term "great bodily injury" as distinguished from an ordinary assault and battery. The court therein did not assume to relieve the jury of consideration of any element necessary to establish defendant's guilt. All of such elements and material allegations were fairly, fully, and correctly submitted in other instructions given by the trial court. We may assume for the purpose of argument that the instruction considered by itself or separately might be subject to criticism or incomplete, and yet hold, as we do, that the giving of it was not prejudicially erroneous.

The applicable rule was recently reaffirmed in Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868, wherein it was held: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

"Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete."

We conclude that defendant's third assignment has no merit.

We are required to dispose of the other assignments in the light of the evidence and applicable rules of law. Evidence adduced by the State may be substantially summarized as follows: Complainant, a mature man, was, on Saturday night, July 23, 1949, and the early morning hours of Sunday, July 24, 1949, employed by his mother in a night spot operated by her just across the viaduct south of Falls City. Defendant, a mature married man, who farmed near Barada, arrived at the night spot about 1:30 a. m. He was accompanied by a male companion and his companion's girl friend. About 2:30 a. m. they left the place and it was closed. At that time complainant and defendant were on friendly terms.

About 15 or 20 minutes later, complainant and his mother heard women screaming a short distance outside the building. Thereupon complainant ran outside, and his mother turned on the neon outside lights circling the building on the north, east, and south sides. A short distance, 30 to 35 feet southeast of the building, complainant found defendant's wife and the girl friend of defendant's companion engaged in a fight. Defendant was then standing near his pick-up truck, although he theretofore had been fighting with and had knocked down two or three other men who had accompanied his wife to the place. Complainant separated the two women, took hold of the arm of defendant's wife, and led her to one side, whereupon defendant, without any warning to or provocation by complainant, struck complainant from the rear on the back of his head or neck, thereby knocking him down and out, unconscious. Thereafter, as complainant thus lay on the ground, defendant kicked him in the face two or three times.

When complainant's mother saw her son thus struck, knocked down, and kicked by defendant, she rushed out to him, whereupon defendant also struck her, knocking her down and out, unconscious. Bystanders helped carry complainant and his mother into the building, where they became conscious. The blood was washed from complainant's face, and arrangements were made for medical attention.

When asked whether the foregoing events all happened in Richardson County, complainant answered "Absolutely," which from other answers made by him could be construed only as an affirmative answer.

As a result of the attack, complainant's glasses and false teeth were broken, and he described numerous cuts, lacerations, contusions, and abrasions received by him. His physician testified that complainant had four cuts around his swollen right eye, requiring three stitches, a deep cut or laceration through his lower lip extending to the attachment, which also required three

stitches. Two photographs appear in the record disclosing the extent of complainant's facial injuries, and his physician testified that he would have permanent scars as a result of the assault made upon him by defendant.

One of defendant's witnesses testified that he drove up while the fight was in progress, and saw defendant hit complainant two or three times, but did not see defendant kick him. Defendant in his own testimony admitted that if complainant were the man who had hold of his wife's arm, he, defendant, pushed him away and struck at him three or four times, but defendant denied that he kicked any one, and claimed that he did not know who complainant was because he had been in a fight with other men and the car lights blinded him.

There was no competent evidence whatever appearing in the State's case or in evidence adduced by defendant tending to justify or require submission of the issue of self-defense in defendant's behalf.

In that regard, as stated in 6 C. J. S., Assault and Battery, § 128, p. 1007: "The court should fully and correctly instruct as to matters of justification interposed by the accused only when there is some evidence tending to put such matters in issue."

The general rule in this jurisdiction is that: "Where the evidence received in a criminal case contains no testimony to which an instruction relating to 'self-defense' would be applicable, no error is committed by the trial court's refusal to instruct thereon." Schleif v. State, 131 Neb. 875, 270 N. W. 510. See, also, Stevens v. State, 84 Neb. 759, 122 N. W. 58; Krchnavy v. State, 43 Neb. 337, 61 N. W. 628.

The foregoing rules are controlling in the case at bar. We conclude that the trial court did not err in refusing defendant's requested instructions Nos. 7 and 8. Therefore, defendant's second assignment has no merit.

Defendant argued in his brief that the State failed to establish the venue of the offense. In that connection, this court held in Clarke v. State, 125 Neb. 445, 250 N.

W. 551, following Weinecke v. State, 34 Neb. 14, 51 N. W. 307, that: "The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient." See, also, Clark v. State, 151 Neb. 348, 37 N. W. 2d 601. That rule is controlling here, and we conclude that defendant's contention has no merit.

That defendant committed an unlawful assault upon complainant as charged was established by ample direct or objective evidence. The jury could have reasonably concluded that the injuries received therefrom by complainant were of a grave and serious character. Whether or not defendant made such an assault with intent to inflict great bodily injury was a question for the jury, under all the facts and circumstances.

In State v. McDaniels, 145 Neb. 261, 16 N. W. 2d 164, this court held: "Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances, inclusive of the assault.

"The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected.

"It is a general rule applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed.

"Such a presumption, although rebuttable in cases

where specific intent is an element of the crime, is sufficient to establish a prima facie case as to intent and will prevail unless from a consideration of all the evidence the jury entertain a reasonable doubt whether such intention existed."

The foregoing rules are controlling herein upon the question of intent. We conclude that defendant's first assignment has no merit, since the record discloses ample evidence to have supported a verdict finding defendant guilty as charged. By analogy, of course, it was sufficient to sustain the verdict finding defendant guilty of assault and battery, the lesser offense included in the greater.

Finally, defendant argued that the sentence imposed was excessive and should be reduced by this court, as authorized by section 29-2308, R. R. S. 1943. In that connection, the penalty provided by section 28-411, R. R. S. 1943, upon conviction for assault and battery, is a fine not exceeding $100, or imprisonment in the county jail not exceeding three months.

In Bright v. State, 125 Neb. 817, 252 N. W. 386, this court held: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion."

Under the facts and circumstances presented here, we find no abuse of discretion by the trial court, and conclude that the sentence imposed was not excessive.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

RAYMOND P. ASH ET AL., APPELLEES, V. CITY OF OMAHA EX REL. LOUIS I. PENTZIEN, APPELLANT, METCALFE CONSTRUCTION COMPANY ET AL., INTERVENERS AND APPELLEES, ISEL I. SOLZMAN, INTERVENER AND APPELLANT.

42 N. W. 2d 648

Filed May 12, 1950. Nos. 32667, 32672.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. On oral argument on motion for rehearing. See *ante* p. 393, 41 N. W. 2d 386, for original opinion. *Opinion modified. Motion for rehearing overruled.*

Frank C. Heinisch, for appellant Isel I. Solzman.

Kennedy, Holland, DeLacy & Svoboda, Edwin Cassem, and *J. A. C. Kennedy, Jr.,* for appellant Louis I. Pentzien.

Fraser, Connolly, Crofoot & Wenstrand, for appellees Metcalfe Construction Co. and Theodore W. Metcalfe.

G. H. Seig, for appellees Raymond Ash et al.

Edward Sklenicka, Edward F. Fogarty, Einar Viren, James M. Paxson, and *Herbert M. Fitle,* for appellee City of Omaha.

SUPPLEMENTAL OPINION

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

MESSMORE, J.

On motion for rehearing this court's attention is directed to certain language appearing in syllabus No. 1 of the opinion, and to certain language in the opinion.

The first syllabus of the opinion is corrected to read as follows: "The period of time provided for by section 25-1912, R. R. S. 1943, within which to perfect an appeal from a judgment or decree rendered in the district court, commences to run from the date of the rendition thereof,

if there is no motion for a new trial filed in the case," and as corrected, is substituted for the first syllabus as it originally appears in the opinion.

The language appearing to like effect in the original opinion at the bottom of page 398 and concluding with the citation of the case of Union Central Life Ins. Co. v. Saathoff, 115 Neb. 395, 213 N. W. 342, is deleted from the opinion, together with any reference made in the opinion as to the time of filing motions for a new trial.

It is clear from the record that the final decree may be considered as having been signed by the trial judge on April 1, 1949. This would constitute the date of rendition of the decree. On April 30, 1949, the intervener Isel I. Solzman gave notice of appeal in the district court for Douglas County and as provided for in section 25-1912, R. R. S. 1943, "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, * * * ."

The intervener Solzman, having given notice of appeal in conformance with the above language in the cited section of the statutes, perfected the appeal in proper time to the Supreme Court, and this court was vested with jurisdiction of the cause. The compliance by the intervener Isel I. Solzman, a party to the case, within the requirements of the statutes, gives this court jurisdiction of the entire case and all parties thereto in the district court. See, Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260; Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

There being no effective motion for a new trial this court could not consider or pass upon errors of law such

as the improper admission or rejection of evidence. Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Sutherland v. Sutherland, 132 Neb. 558, 272 N. W. 549.

With the foregoing corrections made in the original opinion, the motion for rehearing is overruled.

MOTION FOR REHEARING OVERRULED.

D. J. RHOADES ET AL., APPELLEES, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.
42 N. W. 2d 610

Filed May 12, 1950. No. 32731.

1. **Appeal and Error: Licenses.** The appeal of a holder of a real estate broker's license from an order of the State Real Estate Commission, provided for by section 81-884, R. S. 1943, requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court.
2. ———: ———. In such a trial in the district court the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the commission were contrary to the weight of the evidence.
3. ———: ———. Such an action is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made.
4. ———: ———. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that the adverse finding and order were wrongfully entered raises a justiciable issue, even if the license has expired or the disciplinary order satisfied.
5. **Licenses.** Section 81-881, R. S. 1943, provides that the State Real Estate Commission has authority upon sworn complaint in writing to investigate the actions of a real estate broker, and has the power to revoke or suspend a license issued under this act when such broker has been found guilty of unfair trade practices as provided for in said section.
6. ———. Section 81-882, R. S. 1943, provides that before the State Real Estate Commission may revoke or suspend a real

estate broker's license the commission shall give the holder of the license a notice in writing containing the exact statement of the charges against him and the date and place of hearing. In the absence of giving such notice, the State Real Estate Commission has no power to conduct a hearing against a holder of a real estate broker's license for the purpose of revoking or suspending such license.

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

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellees.

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

MESSMORE, J.

This is an appeal from a decree of the district court for Douglas County reversing an order of the State Real Estate Commission which order suspended the real estate brokers' licenses held by D. Jay Rhoades, referred to as D. J. Rhoades, and the American Mortgage Corporation, appellees herein, for a period of six months, and directed the commission to reinstate the appellees in good standing from the date such order was rendered.

It appears from the record that on February 21, 1947, G. E. Mundt, known as George E. Mundt, and Alma M. Mundt, his wife, filed a complaint with the State Real Estate Commission against D. J. Rhoades, a real estate broker. This proceeding was therefore commenced prior to the effective date of Laws 1947, Chapter 316. The complaint is long and involved. The substance of it is as follows: G. E. Mundt, the owner of a farm, listed it for sale with the American Mortgage Corporation which was represented in this transaction by D. J. Rhoades. When the farm was listed for sale the listing agreement specifically designated that the owner would give possession

of the farm March 1, 1948. D. J. Rhoades, in negotiating the sale of the farm, falsely and fraudulently represented to the complainants that the purchasers were acquainted with the complainants' tenants and had made proper arrangements with the tenants to surrender possession of the farm on March 1, 1947. Complainants relied on the false and fraudulent representations so made by D. J. Rhoades and believed the same to be true when in fact such representations were false. By virtue of such false representations, the complainants were required to employ counsel to assist them in the matter.

Section 81-881, R. S. 1943, provides that upon the sworn complaint in writing being filed with the State Real Estate Commission, the commission is authorized to investigate the actions of any real estate broker or any real estate salesman, and has the power to revoke or suspend any license, issued under this act, when the broker or salesman has been found guilty of unfair trade practices. The section then enumerates what constitutes unfair trade practices. Without detailing this section of the statutes in such respect, an examination of the section warrants the conclusion that the complaint filed against D. J. Rhoades before the State Real Estate Commission was sufficient to charge him with unfair trade practices.

The real estate broker D. J. Rhoades was given notice as a holder of a real estate license by the State Real Estate Commission in conformity with section 81-882, R. S. 1943, and hearing was had before the commission as provided for in the above-cited section of the statutes. On March 27, 1947, after hearing was had, the State Real Estate Commission rendered an order suspending the real estate brokers' licenses of D. J. Rhoades and the American Mortgage Corporation as of that date, for a period of six months. D. J. Rhoades and the American Mortgage Corporation, in compliance with section 81-884, R. S. 1943, filed an appeal bond in the amount of fifty dollars with the commission, and filed an original action in the district court as provided in said section.

The petition filed in the district court for Douglas County by the American Mortgage Corporation and D. J. Rhoades alleges the following: That the complaint upon which the order of the commission is based does not charge D. J. Rhoades with any violations of the provisions of section 81-881, R. S. 1943, as required by sections 81-862 to 81-887, R. S. 1943, and does not contain any finding or determination that the plaintiffs, or either of them, have been guilty of any violation of the provisions of section 81-884, R. S. 1943, and such order of the commission is null and void. The petition also alleges that no notice was served upon the American Mortgage Corporation as required by section 81-882, R. S. 1943, and no evidence was offered against such corporation, and it was not charged with the violation of the Real Estate Commission Act or any sections thereof. The petition further alleges that the acts of the commission in all respects, with reference to revoking the real estate licenses of D. J. Rhoades and the American Mortgage Corporation, were arbitrary, unreasonable, and capricious, and prays for an order canceling the order suspending the real estate licenses on the record of the commission and ordering the commission to reinstate the appellees in good standing as real estate brokers within this state, for such other relief as may be just and equitable, and for costs expended.

The answer of the State Real Estate Commission constitutes a general denial of the plaintiffs' petition that the proceedings had before the commission were illegal, unreasonable, or arbitrary, and prayed the court to determine that the order rendered by the commission be sustained.

By stipulation of the parties the transcript of the proceedings before the State Real Estate Commission, the exhibits introduced in the hearing before the commission, and the evidence taken before the commission, together with the order rendered by the commission, were received in evidence in the instant case. No further

evidence was taken before the district court.

Hearing was had in the district court for Douglas County. The district court entered a decree July 6, 1949, setting aside and vacating the order of the commission, and directing the commission to cancel or remove the order of suspension from its records, and to reinstate the plaintiffs as real estate brokers in good standing within the State of Nebraska as of and from March 27, 1947. The commission filed a motion for new trial. Upon the overruling of the motion for new trial, the commission appeals.

There was no notice served on the American Mortgage Corporation or D. J. Rhoades as its president, or any proper officer of the corporation legally required to accept notice, as contemplated by section 81-882, R. S. 1943. The complaint filed against D. J. Rhoades individually did not so indicate. At the hearing before the real estate commission no defense was presented by the American Mortgage Corporation. It is clear from the afore-cited section of the statutes that notice shall be given the holder of a real estate broker's license. The statute in this respect is mandatory. No notice having been served upon the American Mortgage Corporation as required by law, it was not a party to the litigation before the State Real Estate Commission nor the district court, and the State Real Estate Commission was in error in suspending its real estate broker's license. Under the circumstances, we deem no citation of authority necessary insofar as this phase of the case is concerned.

For convenience in summarizing the evidence we will refer to George Emil Mundt as Mundt; to his wife as Alma Mundt; to D. Jay Rhoades as Rhoades; to the State Real Estate Commission of Nebraska as the commission; to Edward E. Fritz, a tenant, as Fritz; to Mathilda Fritz as Mrs. Fritz; to the tenant Henry Frederick Thun as Thun; to William Henry Rutledge as Rutledge; and to Jay B. Smiley as Smiley.

The record discloses that Mundt held title in his own name to 234 and a fraction acres of farm land in Sarpy County. He retired from farming in 1940, and moved to Papillion, Nebraska. By oral agreement he rented to the Fritzs 154 acres, and 80 acres to Thun, the leases to run from March 1, 1946, to March 1, 1947. Mundt had been acquainted with Rhoades since 1945. Rhoades was engaged in the real estate, loan, and mortgage business and was desirous of listing Mundt's farm land for sale. On October 31, 1946, Mundt entered into a listing agreement with the American Mortgage Corporation through Rhoades who represented it. This agreement provided the sale price of the farm to be $45,000; provided further that in the event the farm sold for less than $45,000, the Mundts were to have $42,000 net, and possession was to be given March 1, 1948. In August 1946, Mundt contacted the Fritzs and Thun, his tenants, and they accepted an oral lease to remain on the farm from March 1, 1947, to March 1, 1948.

In the fore part of December an ad appeared in a newspaper describing the Mundt land and stating that the land was for sale and possession could be given March 1, 1947. Shortly thereafter Rhoades appeared at Mundt's home with an offer to purchase made by Smiley, in behalf of his wife, and by Rutledge, in the amount of $44,000. Mundt refused this offer, stating the price was $45,000, and no less. He called Rhoades' attention to the advertisement in the paper and told him that he could not give possession until March 1, 1948, as he had rented the farm for that period of time. Rhoades, in substance, told him to pay no attention to this item as all arrangements would be made by the proposed purchasers who were acquainted with the tenants and they would obtain possession March 1, 1947. On December 17, 1946, Rhoades returned with an offer to purchase from Smiley and Rutledge in the amount of $44,500. The Mundts accepted the offer and signed a written acceptance of it, agreeing to give warranty deed which was

signed and delivered to Rhoades, the land to be free and clear of all encumbrances except the 1947 taxes. This offer to purchase specified that possession was to be given March 1, 1947. The commission was designated as $2,225. Mundt testified that nothing was said at that time about possession being given on March 1, 1947.

Thereafter Mundt contacted Fritz and told him the farm had been sold and inquired of him if the purchasers of the farm had been to see him with reference to surrendering possession March 1, 1947. Fritz told him that he had not been contacted by the purchasers with reference to the matter. Mundt further testified that the next morning he went to see Rhoades and in the conversation Rhoades indicated that it was strange the matter of possession would come up, and volunteered to see Mundt the following morning and bring Smiley and Rutledge with him, and the four together would contact the tenants to ascertain about the trouble in giving possession. Rhoades did not come, as Mundt claimed he agreed to. Shortly thereafter written notice was served on Rutledge and Smiley's wife, the purchasers, to the effect that the Mundts would not perform the terms of the purported offer of purchase, and that the purchasers relied on this agreement to their peril. A notice of like character was sent to the American Mortgage Corporation and D. J. Rhoades, notifying such parties not to transmit, deliver, or surrender to the alleged purchasers or to any other person or concern whatsoever any paper writing upon which the signatures of the Mundts appear, purporting to convey, or granting an interest in the land in question, and demanding the return of the offer of purchase made by Mrs. Smiley and Rutledge. Thereafter the purchasers filed an action in the district court for Sarpy County for specific performance of the agreement made by the Mundts to accept their offer of purchase and to give possession March 1, 1947, as provided therein, making Mundts' tenants parties to the action.

Mundt's complaint and evidence is to the effect that

Rhoades misrepresented to him that the purchasers had made the proper arrangements with his tenants regarding the possession of the land on March 1, 1947.

It appears from the testimony of Rhoades that prior to the advertisement in the newspaper with reference to obtaining possession of the land March 1, 1947, one of his employees inserted an ad in the newspaper stating possession could be given of the Mundt farm on March 1, 1948.

Alma Mundt's testimony corroborated that of her husband with reference to the matter of possession, that is, that her husband could not give possession of the farm until March 1, 1948, and endeavored to impress Rhoades with that fact; and that at the time the offer of $44,500 was accepted Rhoades' attention was called to the newspaper ad by her husband and he stated that all arrangements had been made by the purchasers with reference to giving possession March 1, 1947. She further testified that she signed the necessary papers to consummate the deal. She was with her husband at Rhoades' office when her husband asked to see the acceptance of the offer to sell which they had signed, and told Rhoades that he had talked to his tenants and that no arrangements had been made by the purchasers with the tenants to surrender possession of the land March 1, 1947. At that time she heard Rhoades offer to come out with Rutledge and Smiley the next morning and straighten out the trouble with reference to the possession matter, but Rhoades did not come.

The testimony of the Fritzs is to the effect that they informed the prospective purchasers and Rhoades that they had the land leased until March 1, 1948; that these tenants had planted crops for the coming year, decorated a part of the house, and done other things which gave every reasonable intendment that they proposed to remain on the farm until March 1, 1948. Thun's testimony was very similar, except that Rutledge contacted him on December 22, 1946, when he informed Rutledge that he

had the land leased until March 1, 1948, and if he had to move, someone would have to pay him for it.

The evidence for the defendant given by witnesses Rutledge and Smiley was to the effect that they had visited the farm prior to the time of making the offer to purchase, had contacted the tenants Fritz and Thun, and that in conversations the Fritzs had told them that they hated to move because they would like to have the place more than one year, however, if the land was sold they would move. Thun told them that he understood that if the land was sold prior to January 1, 1947, possession would be given on March 1, 1947. Smiley was purchasing in behalf of his wife, and Rutledge was purchasing in his own behalf so that he would have land to farm from March 1, 1947, and that constituted the reason for the offer and purchase.

There is also evidence by the Mundts' tenants that he had informed them that the land had been listed for sale, and after December 17, 1946, had contacted them to ascertain whether or not the proposed purchasers had made any arrangements with them to surrender possession of the land on March 1, 1947. The tenants replied in the negative, and Mundt had said that the land had been sold.

Without stating the evidence further with reference to the conversations had between Smiley, Rutledge, and the Mundts' tenants, suffice it to say that it is in direct conflict with reference to the time when possession would be given, and we deem it unnecessary to review this part of the evidence in detail.

Rhoades testified with reference to the transactions had with Mundt, the listing of the property, the listing agreement, the contents of it, and that he had had a conversation with Mundt to the effect that if the farm was sold by January 1, 1947, possession would be given March 1, 1947, but if the farm was not sold before that date then the lease to the tenants would be in effect until March 1, 1948. Mundt stated that he had an understand-

ing with the tenants in possesison to that effect. Rhoades further testified that he was told by Mundt not to talk with the tenants, that he, Mundt, would take care of the matter of possession. He further testified with reference to the visits made to the farm, contacting the tenants Fritzs, and that nothing was said by them about a lease or any claim of possession; that after he acquired the $44,000 offer which Mundt refused, Mundt told him not to let the offer get away. There was no discussion about possession at that time. The offer of $44,500 provided for possession March 1, 1947, which Mundt was aware of. The Mundts signed a warranty deed at the same time they accepted the offer. Rhoades further testified that he was to investigate the loan on the property with the insurance company which Mundt seemed to be more interested in than any other part of the transaction, and Mundt so instructed this witness. He told about the down payment made, stating that he had $10,000, or was to have that much, which he would turn over to Mundt at his request and which Mundt declined to take at that time saying if he needed money he would call him.

Bernice Hardenbrook, an employee of Rhoades, testified that on December 17, 1946, when she was present with Rhoades at the Mundt home when the acceptance of the offer of Smiley and Rutledge was made, Mundt on three separate occasions stated that he would give possession of the farm March 1, 1947, for Rhoades to take care of the papers with reference to the insurance and he would take care of the tenants, and the purchasers would obtain possession March 1, 1947.

On rebuttal Mundt testified that he never told Rhoades to take care of the mortgage, that it was never mentioned, nor did he tell him not to see his tenants. He denied that he had ever agreed with Rhoades to give possession of the farm on March 1, 1947.

It also appears that an endeavor was made to ascertain why the tenants would not surrender possession of the farm and how best to obtain possession. This was done

at the instigation of counsel for the purchasers and by agreement with counsel for Mundt without success.

While some contention is made that Rhoades violated section 81-881, R. S. 1943, with reference to the commission to be received for the sale of the farm, we conclude that the listing agreement specifically provided that in the event the farm sold for less than $45,000, the Mundts would receive $42,000 net. The sale at $44,500 would give the Mundts $42,000 net, as provided for in the contract. We conclude there is no unfair practice on the part of Rhoades in such respect as contemplated in the afore-cited section of the statutes.

The appellant assigns as error the following: That the trial court erred in finding that as to the plaintiff D. J. Rhoades, the evidence failed to establish any violation of the provisions of sections 81-881 to 81-887, R. S. 1943, or offer any basis for the suspension of his license; further erred in finding that as to both plaintiffs the order of the commission suspending their respective licenses should be set aside and vacated; and further, that the decision of the trial court was contrary to the evidence and the law.

The principal issue of this appeal is whether or not the evidence establishes that D. J. Rhoades, while negotiating the sale of the G. E. Mundt farm, made any misrepresentations as to the terms or conditions of that sale.

From a review of the record it is apparent that the listing agreement for the sale of the farm signed by Mundt and executed on October 31, 1946, specifically stated that possession would be given on March 1, 1948. While there is evidence that in the event the farm was sold prior to January 1, 1947, possession would be given March 1, 1947, it would seem that if this evidence were true, this matter could have been taken care of by placing the same in the listing agreement. While it is true that the Mundts accepted an offer to purchase for $44,500, that in the purchase agreement possession was to be given March 1, 1947, and that they gave a warranty

deed in conformity with the agreement, the evidence as a whole indicates that the reason for such acts on their part was that they had been informed by Rhoades that all arrangements had been made with the tenants to surrender possession of the farm March 1, 1947. This is further indicated by the anxiety of Mundt in contacting his tenants to ascertain the truth of the matter, and in sending notices shortly thereafter, as heretofore mentioned, to the purchasers, the American Mortgage Corporation, and Rhoades not to proceed further with reference to the agreement signed by them wherein they had accepted the offer of purchase.

In Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823, we said: "We are here concerned with the type of hearing to be held in the district court where the appellate proceedings are required to be commenced and carried on as an original action. The proceeding in the district court, under such a statute, is in the nature of an original action, equitable in nature, commenced by an aggrieved party who sets forth his complaint or complaints against the * * * commission making the order which he claims is not in accordance with law. The complaints may be that the charge was insufficient; that he was not given proper notice of the hearing; that opportunity to be heard was not afforded; that the evidence did not warrant the ruling made; or any other objection to the procedure which if sustained would affect the validity of the order. The State Real Estate Commission is then entitled to answer and deny the allegations, or affirmatively set forth its justification of the order complained of. The court is required to determine only the issues thus raised. It appears therefore that it was the intent of the Legislature to provide more than a review to determine whether the order complained of was arbitrary or capricious. The act confers upon the district court the power to inquire into * * * the pleadings filed in the district court including, if alleged, that the findings of the commission are contrary to the weight

of the evidence. See Withers v. Golding, 100 Utah 179, 111 P. 2d 550."

It will be observed that the foregoing cited authority determines that a trial in a case in the nature of the one in the instant case is the same as an original equitable action in the district court and therefore considered de novo in the Supreme Court.

From a review of the pleadings, evidence, and exhibits in evidence, we conclude the trial court erred in reversing the order of the commission insofar as such order affected D. J. Rhoades. As heretofore pointed out, the American Mortgage Corporation, with reference to the real estate license issued to it, is not involved in this cause.

We reverse the judgment and remand the cause to the district court to enter judgment in conformity with the State Real Estate Commission's order rendered March 27, 1947, to the extent of sustaining the order as it relates to suspending the real estate broker's license of D. J. Rhoades and in accordance with this opinion.

Other assignments of error need not be discussed.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLENE RISTOW, APPELLEE, V. ALFRED RISTOW, APPELLANT.

41 N. W. 2d 928

Filed May 12, 1950. No. 32744.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. On motion for clarification of opinion. See *ante* p. 615, 41 N. W. 2d 924, for original opinion. *Former opinion clarified.*

E. L. Mahlin, for appellant.

Spear, Lamme & Flory, for appellee.

SUPPLEMENTAL OPINION

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

MESSMORE, J.

The appellee by motion requests clarification of our original opinion as to whether the $520 wedding gift to the appellee, which the trial court found should be paid to her by the appellant, was taken into consideration by this court in awarding alimony and was included therein.

The original opinion is clarified to the extent that the $520 item above mentioned constitutes no part of the alimony awarded by this court, and the trial court's decree in such respect is not changed or modified.

The appellee's attorneys are allowed the sum of $500 for services rendered in this court.

FORMER OPINION CLARIFIED.

GUY JOHNSON, APPELLEE, V. SARAH G. NORTON ET AL., APPELLANTS.

42 N. W. 2d 622

Filed May 12, 1950. No. 32749.

1. **Specific Performance.** The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform.
2. **Vendor and Purchaser: Specific Performance.** Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract.
3. **Specific Performance.** Where time is of the essence of such a contract, a court of equity will refuse to enforce specific per-

formance in favor of a party who is in default, unless strict performance has been waived or excused.

4. **Vendor and Purchaser: Specific Performance.** Specific performmance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties.
5. **Vendor and Purchaser.** Where a vendee is in default under a contract of sale of real estate, making time the essence and providing for a forfeiture in case of default, and there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made.

APPEAL from the district court for Brown County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Lanigan & Ondracek, Frederick M. Deutsch, and *Beynon, Greenamyre & Hecht,* for appellants.

William C. Smith and *Julius D. Cronin,* for appellee.

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

SIMMONS, C. J.

This is an action brought by the plaintiff to quiet the title of land in him as against the defendant Sarah G. Norton, arising as a result of the recording of certain contracts between the plaintiff and the defendant. After the action was initiated the defendant had joined as parties defendant certain heirs of a deceased sister on a showing that an undivided one-third interest in the land had been conveyed to the sister by Sarah G. Norton. The defendants sought specific performance of the contracts and an accounting of rents and profits. At the beginning of the trial it was stipulated that the matter of an accounting be reserved until the determination of the specific-performance issue. The matter was so tried, the defendants assuming the burden of the specific-performance issue. The trial court found generally for the plaintiff and against the defendants, and entered a decree quieting title in the plaintiff. Defendants appeal.

We affirm the judgment of the trial court.

From a long record we have undertaken to pick out the evidentiary matters necessary to a decision here. We state facts concluded from the record.

For convenience in writing this opinion we refer to plaintiff as Johnson and to the defendants as Norton, for the rights of all defendants are dependent upon the rights of Sarah G. Norton.

Johnson is a rancher. Norton is a real estate broker. Sometime in 1940 or 1941, Johnson and Norton entered into a verbal agreement, general in terms, by which they undertook a joint venture of buying options and titles to land and selling them. Johnson was to furnish the money and hold title to the land. Norton was to arrange the purchases and sales, and handle the transactions. After the purchase price advanced by Johnson, with interest in some cases at least, had been repaid to him, and expenses repaid to both parties, profits were to be divided equally. Norton's interest in the joint venture was one of furnishing services and in return she was to receive one-half the profits.

During the progress of these operations the parties dealt with three tracts of land situated in Brown County that we will refer to herein as the Wesleyan tract (about 1,450 acres), the Woodring tract (197 acres), and the Railroad tract (40 acres). The lands were so situated that the Wesleyan and Woodring tracts were connected with each other by the Railroad tract.

The evidence does not indicate just when the Wesleyan tract was purchased. It appears that title to it first was vested in Norton and was by her conveyed to Johnson by deeds on May 20, 1942, Norton reserving, at least as to a part of the land, "one-fourth of oil and mineral rights."

It likewise is not clear when the Woodring land was purchased. Title to that land was conveyed direct to Johnson.

As to both the Wesleyan and Woodring tracts, Norton

had abstracts of title examined and purchased with approved title reports.

As to the Railroad tract it appears that Norton and Johnson together opened negotiations for its purchase. A contract of purchase was not executed. Johnson paid $100 to the owner sometime early in 1942, and was to pay an additional $900 for that land, the deal to be completed in 60 days. It was not so completed and at the end of 1942 the owner tendered back the $100 payment with notice it would not convey. The return payment was not accepted. Thereafter Norton undertook to secure the purchase of that land. The owner desired a reservation of a part of the tract. Norton was agreeable but considered that a reduced price should be had. It was not until 1947 that the owner again agreed to convey with the reservation. The payment of the balance of the purchase price never was made by anyone and the conveyance was not made.

By May 1942, the joint venture was not operating smoothly. After negotiations the parties at O'Neill, Nebraska, on May 19, 1942, entered into written agreement, not verified or acknowledged. In that agreement they arrived at a balance showing the amounts due to and from each in the joint venture to that date. They further agreed so far as material here that the three tracts of land herein referred to reflected a joint venture; they agreed upon means of financing the purchase of the lands; Norton agreed to convey the Wesleyan tract to Johnson to be held in trust and as reflecting a joint venture, although the terms of the trust were not recited; Johnson agreed to advance additional funds to be added to the balance agreed to as earlier stated in the contract; no refunds were to be made on advancements until the lands were fully paid for; all the proceeds from sales were to be divided equally after advancements had been paid; Johnson was to receive interest on certain items listed; and covenants as to other properties in the joint venture were made.

On June 15, 1942, Norton attached an affidavit to this contract setting out the legal descriptions of the Brown County land which she said was involved in the above contract, and caused it to be filed for record and recorded on June 15, 1942. This contract is one of those against which Johnson seeks to quiet title.

The parties thereafter did not undertake new ventures.

The above contract provided that all properties were to be sold or divided by July 20, 1942, that is, to have contracts of sale signed by that date. That was not accomplished.

Thereafter the parties met again in conference and undertook a further settlement of the joint venture matters. They agreed upon the division of certain funds; that Johnson would thereafter have in excess of $10,000 invested in the venture; and that the Woodring and Wesleyan tracts were to be Johnson's. Norton wanted those lands. A written memorandum agreement, dated May 18, 1943, was executed. It recited that in working out a complete settlement of their joint venture, Norton offered to pay Johnson the sum of $10,000 for the Long Pine Ranch, including two houses in Atkinson, Nebraska; that Norton was to have 30 days to secure a loan on the ranch to pay the purchase price; that Johnson agreed to place the deeds of the above-named property in escrow "which includes" the Woodring, Wesleyan, and Railroad tracts; that Norton agreed to pay $900 for the Railroad tract; and that if the ranch was rented, Johnson agreed to assign the leases to Norton upon the completion of the agreement. Other provisions as to other property need not be recited here. Norton attached an affidavit to this contract setting out what she said was the legal description of the land designated as "Long Pine Ranch" and caused the contract to be filed for record and it was recorded on October 23, 1943. Johnson's action to quiet title is also directed to this contract.

On May 19, 1943, the parties met at Columbus, Ne-

braska, and entered into another agreement dealing with the joint venture. In it, it was provided that Johnson was to pay for the Railroad tract "if the transaction can be closed," and that he would then convey it to Norton for $900, payable on or before July 1, 1943, and if the acquisition took longer than July 1, 1943, then Johnson was to notify Norton when he did acquire it and Norton agreed to pay within 30 days thereafter. Time was made of the essence and, if Norton did not pay, she was to forfeit all right to the Railroad tract.

Thereafter on the same day an escrow agreement was entered into and signed by the parties wherein it was agreed that "deeds" attached, signed by Johnson, covering "1,660 acres in Brown County" and other real and personal properties not involved here, should be deposited in a named bank; that Norton agreed to pay $10,000, on or before July 1, 1943, to the bank for Johnson; and that if payment was not made on or before that date, the deeds were to be returned to Johnson, and Norton "forfeits all right, title and interest to the real estate therein described." Time was made of the essence.

The total acreage of the Woodring and Wesleyan tracts is approximately the 1,660 acres mentioned in the escrow agreement. It is not contended that the Railroad tract was in anywise involved in the escrow agreement; it was separate and apart from that transaction.

Correspondence with the bank refers to two deeds. One deed obviously related to the Atkinson property.

The net of these agreements is that Norton was to pay Johnson $10,000 for the Wesleyan and Woodring tracts on or before July 1, 1943, and receive in addition other items mentioned in the escrow agreement, and that if Johnson acquired the Railroad tract, Norton was to pay him $900 for that land. At the time the escrow agreement was being prepared Norton assured Johnson and the attorney drafting the papers that she could get the $10,000 to make the payment.

It appears that in March or April 1943, Norton had

made application for a loan on the property and had received from a Lincoln company commitments for a $7,000 and a $3,000 loan to be secured by a first and second mortgage on the three tracts. On June 30, or July 1, 1943, Norton was in Lincoln attempting to close the loan and make the payment required by the escrow agreement. Nothing is said in the escrow or other agreement about abstracts or merchantable title. Norton did not have the Woodring abstract. It was being held in Ainsworth for the payment of a fee. Norton asked Johnson to get it. He did, had it extended, and brought it to Lincoln. The time for performance was extended to July 2, and then to July 3. On July 2, the lender presented objections to the Wesleyan and Woodring titles and required corrections before the loan could be closed. The lender also required that the Railroad tract be included in the Norton title and mortgage. Norton testified that Johnson agreed to go to Omaha and get a deed to that property. Johnson denied such an agreement. In any event, Norton did not have title to the Railroad tract and could not then meet the title requirements as to the other properties, and the loan was not closed or the $10,000 payment to or for Johnson made.

It is quite apparent that both Johnson and Norton recognized that time was of the essence in making the $10,000 payment on July 1.

Thereafter on July 10 or 12, Norton called upon Johnson at his ranch and demanded an extension of time for performance. Johnson refused to extend the time but indicated a willingness to accept payment and deliver the deeds then. Nothing was done.

In August, Norton employed counsel who undertook to settle the matter. Norton said she could pay $7,000, raised the offer to $7,500, and then to $8,000. Johnson offered to take $9,800. Nothing came of that effort. There is evidence of subsequent discussions but no evidence as to details of the conversations. There was no agreement extending the time of performance.

Norton proceeded to secure documents to meet the objections of the lender to the Wesleyan and Woodring titles and it appears that by February 1944, Norton had met all objections insisted upon by the lender, save as to the securing of title to the Railroad tract. It likewise appears that the commitment of the lender to make the loan was kept in force thereafter and not withdrawn until sometime in 1946.

In December 1944, Johnson caused a written instrument to be served on Norton, wherein Johnson, asserting ownership of the "Long Pine Ranch," requested Norton to release the "contract" from the records within 20 days, and notifying Norton that upon failure so to do action would be brought to quiet title. Thereafter this action was filed on February 18, 1946. On June 6, 1946, Norton for herself and other defendants answered and cross-petitioned, praying for a dismissal of Johnson's petition, and for a decree that she and the other defendants have been the owners of the three tracts mentioned herein since May 18, 1943. She prayed that the court determine that there was due Johnson $10,000 with six percent interest from May 18, 1943, and that there was due Norton from Johnson the rental value of the lands since that time. Norton prayed for other relief not involved in this appeal. She renewed the prayer in subsequent pleadings.

The action went to trial on September 6, 1949, and to decree on October 3, 1949.

It is patent that Norton sought in the district court and seeks here a decree that she is and has been the owner of the land since May 18, 1943, subject only to the payment of $10,000, plus interest from that time, less rental value. It likewise is clear that Norton did not on July 1, 1943, or at any time later tender the payment of $10,000 to Johnson for the deeds to the land, nor has she had the funds with which to make such a payment. She had a commitment of a loan of $10,000, subject to the title objections and to securing title to the

Railroad tract. It also appears that after the original commitment was closed out, a new application for a loan was necessary, and that such an application had not been made.

It should be noted that Norton, as a purchaser from Johnson, never at any time objected to the deeds or to Johnson's title to the Wesleyan and Woodring tracts. She had accepted those titles as sufficient when they were purchased. Norton was trying to compel Johnson to meet the requirements of her lender so as to enable her to borrow the money with which to make the payments. We find nothing in the contracts that obligated Johnson to do that. The securing of the money was Norton's task, not Johnson's. She had met the lender's requirements as to the title to the Woodring and Wesleyan tracts in February 1944. Before and after that date, she was negotiating for the title to the Railroad tract, evidently trying to secure a better bargain in return for the reservation the owner demanded.

It is clear from this record that Johnson and Norton knew that Johnson did not have a binding contract for the purchase of the Railroad tract. The contract of May 19, 1943, so recognizes the situation. It is clear from this record that prior thereto they had been notified by the owner of that tract that the proposed sale would not be consummated. It likewise is clear that the purchase by Johnson "if the transaction can be closed" and the sale by Johnson to Norton of the Railroad tract were considered as a separate part of the settling of the joint venture. It is in the contract separately. The consideration was separate. The $900 was to be paid by Norton to Johnson not as a part of the payment for the Woodring and Wesleyan tracts but as a separate payment. It likewise is clear from the record that Norton never tendered the $900 to Johnson at any time. She does not show that she had the money to make the payment. The nearest we can come to that in the record is Norton's testimony that in

July 1943, a sister had told her she would let her have the money for that purpose.

Under this set of facts, should an equity court grant the specific performance which Norton seeks?

In O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403, we held: "The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform."

In Rossbach v. Micks, 89 Neb. 821, 132 N. W. 526, 42 L. R. A. N. S. 444, we held: "Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract."

In Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539, we held: "Where time is of the essence of such a contract, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused."

In Bradley & Co. v. Union Pacific R. R. Co., 76 Neb. 172, 107 N. W. 238, we held: "Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties." In McNea v. Moran, 101 Neb. 476, 163 N. W. 766, we held that this rule applied to stale claims of parties, not in possession, seeking specific performance.

In Abbas v. Demont, *ante* p. 77, 40 N. W. 2d 265, we held: "Where a vendee is in default under a contract of sale of real estate, making time the essence

and providing for a forfeiture in case of default, and there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made."

We have tried this cause de novo on the record. Applying these rules to the facts as found, we hold that Norton is not entitled to the relief which she seeks and that Johnson is entitled to the relief he seeks.

The judgment of the district court is affirmed.

AFFIRMED.

A. E. BRADWAY ET AL., APPELLANTS, V. DAN HIGGINS, APPELLEE.

42 N. W. 2d 627

Filed May 12, 1950. No. 32765.

1. **Pleading.** Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, the pleading will be liberally construed in the light of the entire record, and, if possible, sustained.
2. ———. In such case, if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed, they will be regarded as sufficiently alleged.
3. **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.
4. **Contracts.** Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
5. **Evidence: Contracts.** While parol evidence may not be offered for the purpose of varying the terms of a written instrument, such evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.

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

Dryden, Jensen & Dier, for appellants.

Blackledge & Sidner, for appellee.

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

MESSMORE, J.

This is an action at law to recover a down payment on a written contract entered into between the plaintiffs and defendant wherein the plaintiffs agreed to purchase the garage equipment, parts, tools, and supplies including a service car, from the defendant. The parties admit the execution of the contract and the payment of $500 as a down payment when the contract was entered into.

The plaintiffs' petition does not have attached to it a copy of the contract as an exhibit, but pleads certain terms of the contract which will hereinafter be discussed.

The plaintiffs' petition alleged that the defendant breached and violated the contract by selling and depleting the stock and equipment so that it was impossible to make performance thereof on his part; by refusing to inventory the merchandise in the garage at dealer's cost or to allow the plaintiffs to make such inventory; by insisting upon valuing certain items of merchandise and equipment at more than cost; by refusing to tender good and sufficient title by furnishing an affidavit under the Bulk Sales Act; and prayed for recovery of $400 and costs.

The defendant's answer denied that he sold and depleted the stock, equipment, or supplies other than ordinary and in the usual course of business, and which was contemplated by the contract. Defendant alleged that replacements and new purchases were made at all times, and there was on hand a complete stock of

equipment and supplies of the general nature and equal in value and usefulness of that on hand at the time the contract was made; alleged further that the plaintiffs repudiated the contract, did not tender the amount due thereon or offer to perform according to the terms of the contract; denied generally all other allegations of the plaintiffs' petition; and prayed for dismissal of the plaintiffs' petition.

At the conclusion of all of the testimony the trial court sustained the defendant's motion for a directed verdict on the grounds that the allegations of the petition were insufficient to state a cause of action, and the evidence was insufficient to sustain a verdict in favor of the plaintiffs.

Upon the overruling of the plaintiffs' motion for a new trial, the plaintiffs appeal.

For convenience we will refer to the parties as they were originally designated in the district court.

The plaintiffs predicate error upon the trial court's judgment holding that plaintiffs' petition did not state a cause of action and that the evidence was insufficient to support a judgment in favor of the plaintiffs.

With reference to the question as to whether or not the plaintiffs' petition states a cause of action, it is noted that the defendant first interposed objection to the petition on the ground it did not state a cause of action after the jury was impaneled and a witness sworn. It appears also from the record that the contract between the parties is in evidence.

In the state of the record, the following authority is applicable: "Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, * * * the pleading will be liberally construed in the light of the entire record, and, if possible, sustained. In such case, if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed, they will be regarded as sufficient-

ly alleged." Dickinson v. Lawson, 125 Neb. 646, 251 N. W. 656. See, also, Elvidge v. Brant, 131 Neb. 1, 267 N. W. 169.

From an examination of the petition, and applying the rule as above stated, we conclude the petition is sufficient to state a cause of action.

This brings us to the assignment of error as to whether or not the evidence is sufficient to support a verdict in favor of the plaintiffs.

The court having sustained the defendant's motion for a directed verdict, we review the evidence with the following rule in mind: "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." Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

We deem it advisable before setting forth the facts adduced by the record to refer to the contract between the plaintiffs and defendant. The contract was entered into on March 7, 1948. It provided that the plaintiffs agreed to purchase the garage equipment, parts, tools, and supplies including a service car the property of the defendant located at Elm Creek, Nebraska, the defendant to furnish good and sufficient title. The plaintiffs agreed to pay "A maximum of not more than $3750.00 A minimum of not less than $3500.00 Payments to be made as follows:—$500.00 (Check and Cash) payment with contract Balance due and payable After April 1st., 1948 with option to make final settlement up to May 15th., 1948. Possession is to be given as soon as final payment is made and purchasers are to give Owner at least five days notice before possession can be given." The penalty clause provided that in the event of defective title the $500 down payment was to be refunded to the plaintiffs, otherwise the defendant was entitled to the $500 down payment as liquidated damages for failure of performance on

the plaintiffs' part to carry out the terms of the contract.

The record discloses that the plaintiffs A. E. Bradway and Clarence Lammers were desirous of forming a partnership and entering the garage business. We will hereafter refer to the plaintiff A. E. Bradway as Bradway, and the plaintiff Clarence Lammers as Lammers, or as plaintiffs. On March 1, 1948, the plaintiffs contacted the defendant Dan Higgins, who will hereafter be referred to as Higgins, who owned garage equipment, tools, supplies, and a service car at Elm Creek, Nebraska. At that time the plaintiffs looked over the defendant's stock and discussed the terms of a contract with him. They next contacted Higgins March 7, 1948, and entered into the contract heretofore described and made a $500 down payment as provided for in the contract. On March 24, 1948, plaintiffs endeavored again to contact Higgins, but failed. They looked over the stock and equipment, and testified that it had been depleted to the extent that it was insufficient to amount to the minimum as provided for in the contract. On May 2, 1948, the plaintiffs and Higgins took an inventory. Bradway took down the figures as Lammers and Higgins called off the prices of the different items. There was disagreement with reference to some 1928, 1929, 1930, and 1931 Chevrolet radiators and some old car seats and bearings which Higgins wanted to include in the inventory in the amount of $350. The plaintiffs contended that this merchandise was junk, and they offered $100 for it. After the inventory had been completed, the plaintiffs took it with them. Bradway, by comparison with the cost figures of items in a parts book and other sources, determined the items as inventoried would be in excess of the cost price or what Higgins paid for them, and made this showing on the inventory. The inventory was not admitted in evidence for the reason that it did not reflect a true inventory of the stock.

On May 5, 1948, the plaintiffs contacted Higgins again

and requested that he furnish an affidavit under the Bulk Sales Act, which he declined to give.

Bradway testified that he was able and willing to perform the contract but due to disagreement between the parties as to the prices of items he told the defendant the deal was off.

Lammers corroborated the testimony of Bradway, and it appears from the plaintiffs' figures with reference to the inventory of May 2, 1948, that taking the defendant's figures, the total amount of the merchandise was $3,319.61, or approximately $200 below the minimum price they were to pay as provided for by the contract. This excluded the $350 item which the plaintiffs classified as junk. The inclusion of this item at $350 would show the inventory from the defendant's viewpoint to be approximately $3,650. The plaintiffs' figures were $2,763.42. Lammers testified further that on May 5, 1948, when the deal was called off, Higgins followed him home and offered to sell the garage business to him for $3,000, and returned $100 of the down payment to him.

Higgins testified with reference to the contract that the amount would be $3,500, or to the extent of $3,750, depending upon the inventory at the time possession was taken, but in no event would the amount be less than $3,500. He further testified that prior to the date the contract was entered into he had an inventory made and the items contained therein were checked by the plaintiffs. This inventory was either lost or destroyed. With reference to the inventory of May 2, 1948, the values he placed on the items were from his memory or from what invoices he could find. He further testified that the plaintiffs became dissatisfied and called the deal off. They demanded of him an affidavit under the Bulk Sales Act. He denied that he refused to furnish good and sufficient title or an affidavit under the Bulk Sales Act after he had ascertained the full purport and meaning of such affidavit.

He testified further that he kept the deal open until the final date of performance, May 15, 1948, and would have performed his part of the contract. On May 17, 1948, he sold the equipment and merchandise to one DeSelms for a total of $3,500. He admitted returning $100 to Lammers because Lammers had contacted him and told him he had borrowed the money, and he returned this amount out of sympathy.

DeSelms' testimony is to the effect that he purchased the garage and consummated the deal on May 17, 1948; that the $350 item heretofore referred to upon which there was a controversy was included in the deal, not separately inventoried; and that the inventory of the defendant at that time showed approximately $3,600 worth of merchandise.

It will be noted that the contract is ambiguous and difficult to construe. In such a situation the following authorities are applicable: "'"Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it."'" Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99. See, also, Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295.

"Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Such evidence is not offered for the purpose of varying the terms of a written instrument between the parties." Brock v. Lueth, 141 Neb. 545, 4 N. W. 2d 285. See, also, Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; Spangenberg v. Losey, 116 Neb. 112, 216 N. W. 191.

With the foregoing authorities in mind, it is apparent from the evidence that the parties to the contract intended that an inventory of the stock would be taken and the amount as shown by such inventory would not

be less than $3,500, the inventory to be based upon the cost price of the items to the defendant. It is also apparent that the defendant was not to deplete the stock, equipment, or supplies other than ordinary in the usual course of business, and would be required to make replacements and new purchases from the date the contract was entered into until the date of performance thereof so that at all times there would be on hand a complete stock of equipment and supplies of the general nature and equal to the value and usefulness of that on hand at the time the contract was made.

It is apparent that the plaintiffs' contention is that Higgins refused to inventory the merchandise at the proper price paid by him; that he depleted the stock of merchandise below the minimum as required by the contract and thereby breached the contract so that he could not perform it; that he declined to furnish good and sufficient title or to give an affidavit under the Bulk Sales Act; and that he refused to adjust his prices to the real cost that the dealer would pay for such merchandise. It is also apparent that the defendant's contention is that he did not deplete the stock of merchandise as contended for by the plaintiffs, but replenished the stock by purchasing separate items between the date of execution of the contract and the date of performance, which items went back into the stock. These items total a trifle in excess of $1,200.

There is no sufficient or competent evidence appearing in the record to disclose that the defendant depleted the stock of merchandise from the date the contract was entered into until the date of performance thereof below the minimum of $3,500 as provided in the contract. As heretofore pointed out, there is evidence on a subsequent sale that the stock of merchandise inventoried at more than $3,500, and was sold for $3,500.

While the trial court was in error in holding that the plaintiffs' petition did not state a cause of action, the

judgment of the trial court in directing the verdict in favor of the defendant upon the insufficiency of the plaintiffs' evidence to submit the cause to the jury was correct and requires affirmance of the trial court's judgment in such respect.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

C. H. BRESSLER AND C. H. BRESSLER, AS LEGISLATIVE REPRESENTATIVE OF THE NEBRASKA LEGISLATIVE BOARD, BROTHERHOOD OF RAILWAY TRAINMEN, APPELLEE, V. CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLANT.

42 N. W. 2d 617

Filed May 12, 1950. No. 32773.

1. **Railroads.** One of the purposes of the Legislature in enacting the Full Crew Act was to provide for safety in the operation of passenger trains. Safety not only for the passengers riding thereon but also for the employees traveling therewith.
2. ———. To carry out this purpose the act provides that passenger trains, depending on their size, must always be manned and operated by a certain number of employees classified according to the duties they perform.
3. ———. The act does not actually specify what these duties are but, in the absence thereof, it can only mean such duties as are generally associated with such positions by custom and practice.
4. ———. Compliance with this act does not mean that such employees cannot perform duties other than those of the position to which assigned. If they are qualified to perform the duties of the position to which they are assigned and, during the trip, are at all times available to perform them when need therefor arises and actually do perform them, then the statutory requirements have been met even though they may be assigned to and perform other duties.

APPEAL from the Nebraska State Railway Commission: *Affirmed.*

Neely & Otis, for appellant.

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

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

WENKE, J.

C. H. Bressler as an individual and as legislative representative of the Nebraska Legislative Board, Brotherhood of Railway Trainmen, filed a complaint with the Nebraska State Railway Commission against the Chicago and North Western Railway Company, a corporation. He complains that since November 6, 1947, the carrier has been operating its passenger trains No. 21 and No. 22, which run between Omaha, Nebraska, and Winner, South Dakota, through Norfolk, Nebraska, in Nebraska contrary to the provisions of the Nebraska full crew law, section 74-532, R. S. 1943, and in an unsafe manner. He asked the commission to find that the carrier's method of operating these passenger trains is unsafe and that it require the carrier to operate these trains in compliance with the statute.

After a hearing the commission held: That the full crew law did not apply to motor cars or trains and dismissed the complaint insofar as it had application to trains No. 21 and No. 22 when operated as motor trains; that carrier has not complied with the statute by providing a baggageman-brakeman in the manner that it did and directed it to have a brakeman or flagman on these trains, when they are operated as a steam train, who is not a baggageman; and that no showing had been made which either required or justified it to take any independent action affecting the minimum personnel to be included on these trains and the application for it to do so was denied.

Both complainant and carrier filed motions for rehearing. From the overruling thereof carrier appealed and Bressler cross-appealed.

For convenience the parties will be referred to herein as complainant and carrier.

It should be stated there is nothing in the record to

prove or even indicate that carrier's method of operating these trains, in view of all the facts and circumstances relating thereto, is in any manner unsafe. This relates particularly to its manner of operating them on and after June 16, 1941, when they are operated as motor trains, and on and after November 7, 1947, when they are operated as steam trains. When operated as motor trains the crews, since June 16, 1941, have consisted of an engineer, a conductor, and a baggageman-brakeman. The latter is always qualified to perform the duties of a brakeman or flagman. When operated as steam trains the crews, since November 6, 1947, have consisted of an engineer, a fireman, a conductor, and a baggageman-brakeman. The latter is always qualified to perform the duties of a brakeman or flagman.

The primary question presented by carrier is, does a numerically full crew comply with the provisions of section 74-532, R. S. 1943, when one of the crew, the brakeman, has baggage work assigned to him?

The Full Crew Act was first enacted by the 1909 session of the Legislature and appears as Chapter 98 on page 405 of the 1909 Session Laws. The title thereof is as follows: "AN ACT to protect the lives and property of the traveling public and the employees of the railroads of the State of Nebraska, of and concerning railroads in said state, and defining the crews which shall man passenger and freight trains and providing penalties for the violation thereof and repealing laws in conflict herewith."

From the language used in the title it is evident that one purpose of the statute is to provide for safety in the operation of passenger trains. Safety not only for the passengers riding thereon but also for the employees traveling therewith.

This statute, insofar as it relates to passenger trains, now provides: "It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road, or any part thereof, or suffer

or permit to be run over its road, or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman. Passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman." § 74-532, R. S. 1943.

To carry out this purpose the act provides that passenger trains, depending on their size, must always be manned and operated by a certain number of employees classified according to the duties they perform. By so doing the Legislature recognized that in order to secure the maximum of safety in the operation thereof certain duties must always be performed by someone qualified to perform them. The act does not actually specify what these duties are but, in the absence thereof, it can only mean such duties as are generally associated with such positions by custom and practice. Compliance with this statute does not mean that such employees cannot perform other duties than those of the position to which assigned. If they are qualified to perform the duties of the position to which they are assigned and, during the trip, are at all times available to perform them when need therefor arises and actually do perform them, then the statutory requirements have been met even though they may be assigned to and perform other duties.

The consist of trains No. 21 and No. 22 is as follows: When operated as a motor train it has a combination motor and express car, a combination baggage and railway mail car, and a coach; when operated as a steam train it has a locomotive, an express car, a combination baggage and mail car, and a coach. It will be observed that it operates at all times as a train with less than five cars.

Prior to November 7, 1947, when passenger trains No.

21 and No. 22 were operated as steam passenger trains and carried a crew of an engineer, a fireman, a conductor, a brakeman, and a baggageman, the evidence shows the brakeman usually performed the following services: Upon reporting placed the identification marker or lights on the rear of the train; checked the fire, when needed, in the heating system of the coach and also checked to see if the coach was properly ventilated; set the air on the brakes and walked the length of the train to the engine to see they were in good working condition; after arriving at the engine had the engineer release the brakes and then walked back and checked to see if they were all properly released; helped load passengers, assisting with their baggage; received the train order from the conductor and read it; checked the mail, baggage, and express cars to see if they were loaded; returned to the coach and closed the trap doors just before leaving and remained on the rear of train to see that no one got off or on while it was departing; between stations stayed in the rear of the coach to get off to flag in case train was stopped at any place but the stations; before the train stopped at any station he informed passengers getting off there that their station was next; when the train stopped helped them off and assisted passengers getting on; helped unload and load the mail, baggage, and express; and watched for signals from other trains and at stations.

After November 6, 1947, when trains No. 21 and No. 22 were operated as steam passenger trains and the crew consisted of an engineer, fireman, conductor, and a baggageman-brakeman, the evidence shows: That the baggageman-brakeman was qualified to perform the duties of a brakeman or flagman and carried full flagging equipment with him in the baggage compartment; that he was subject to call by the conductor to perform flagging but did so of his own accord only when the train stopped between stations; that he at all times worked in the baggage compartment of the combination baggage-rail-

way mail car; that this car was divided by a partition so no practical way was available for him to get to the rear of the train except to get out of the car he was in and walk back, a distance of about 120 feet; and that this would be impossible if the train stopped on a bridge.

The baggageman-brakeman's work as a baggageman, which occupied his full time and which kept him busy in the baggage compartment, consisted of handling cream cans, both empty and full, sacks of mail, large parcel post packages, baggage, and bundles of newspapers. At the stations he loaded and unloaded these items and, when necessary, helped the expressman with heavy express shipments. If the stations were closed, as most of them were on Sundays, he put what he unloaded either in the freight house, depot, or mail box. Usually he was the last one through and often the train had to wait for him to finish before it could depart. Enroute he made out his reports. These covered the various items handled and required separate reports for cream cans, mail, and baggage. He also handled company mail, sorting it enroute, and delivering it at the various stations. If cream was shipped without billing he made out and attached way bills thereto.

It should here be stated that flagging is not performed or necessary at station stops, unless the train is delayed for some reason, but is immediately necessary should the train at any time be stopped enroute.

Complainant introduced numerous operating rules of the carrier showing that the duties brakemen performed prior to November 7, 1947, were therein classified as duties which they must perform. It is true that these operating rules so provide. But these operating rules of the carrier are no part of the statute and not controlling thereof. There is nothing in the statute which prevents the carrier from changing them and assigning other duties to brakemen as long as the change does not take from them the duties of the position which the statute contemplates they shall perform and leaves them at all

times available to perform them when the need therefor arises.

The evidence fully establishes that the baggageman-brakeman is a baggageman in fact and in no sense a brakeman, although he is qualified as such. It probably is, as one of carrier's officials stated, a good economical operational change. However, what was said in New York, C. & St. L. R. R. Co. v. Public Utilities Commission, 123 Ohio St. 524, 176 N. E. 71, under a like statute and an almost identical situation, is particularly applicable here. Therein the court said:

"The railroad company is only complying with the statute upon the theory that the baggageman, employed as such, is discharging a sufficient number of the detailed duties of a brakeman to constitute a compliance with the statute. The train does not carry more than two cars, and that portion of the statute forbidding a brakeman to perform the duties of baggageman or express agent does not apply. There is therefore nothing to forbid a brakeman from performing some of the duties of baggageman or express agent. On the other hand, the statute does not provide that a train consisting of only two cars may be served without a brakeman, neither does it provide that a baggageman or express agent may take the place of a brakeman and perform only a part of the duties of a brakeman. The statute very clearly requires a brakeman as a part of the crew of every train carrying passengers. Manifestly it can make no difference by what name the servant is called, provided some particular servant in the employ of the railroad company performs all the duties usually assigned to a brakeman. * * * It is evidently the purpose of the statute to make the transportation of passengers safe. Whether or not that transportation is rendered more safe by literal compliance with the statute we need not inquire. The question before us is not the political question of the wisdom of the statute, but the justiciable question of its proper interpretation.

"The Public Utilities Commission has declared a rule of strict compliance, while the railroad company contends that the service need be such only as is reasonably necessary for the safety of passengers and employees on trains. * * * The Legislature has the undoubted power to regulate. The meaning of the language employed in the statute is clear. Its apparent purpose and intent is that the duties of the conductor and the brakeman be entirely separate and distinct, and that each shall discharge the duties of his separate position. If, as is apparently contended by the railroad company, the regulations are unnecessarily strict for the operation of a train of two cars, the remedy lies with the Legislature, which deals with the policy, and not with the court, which deals only with a determination of the legislative intent. It is conceded by the Attorney General that a regularly constituted brakeman on a two-car train, who discharges all the duties pertaining to the position of brakeman, and who has time, in addition to the performance of that service, to also perform the duties of baggageman or expressman, is not forbidden to do so. With this interpretation we concur. This view, however, does not in the least obviate the plain requirement of having one person, whether he carry title of brakeman, or other designation, perform all the duties which customarily devolve upon a brakeman, and having another person perform all the duties which customarily devolve upon a conductor."

And as stated in Public Service Commission v. Baltimore & Ohio R. R. Co., 260 Pa. 323, 103 A. 724: "The statute required that the train should have, as one of its operating crew, a brakeman on it all the time it was being operated, his duty being to assist in the safe operation of it, and not to supervise and manage a dining room on it. The statute is clear and controlling, and there is not to be substituted for its requirement the judgment of the conductor of a train, or of any one else, as to when, in its operation, there ought to be a brakeman on it; and

yet this, in effect, is the contention of the appellee, for admittedly the dining car conductor was to be a brakeman only when called upon by the train conductor to act as such. It may be again noted that the dining car conductor never at any time acted in that capacity, and the train all the time he was on it was, therefore, without a brakeman. How, then, can it be said that the appellee has complied with the Act of 1911? The wisdom of its clear provision as to the size of a crew is not for the courts. Their duty is confined to enforcing it as a piece of legislation not prohibited by the Constitution * * * ."

To like effect is the logic and reasoning of the cited case of Beal v. Missouri Pacific R. R. Corp., 108 F. 2d 897, which was, for other reasons, reversed by the United States Supreme Court. See 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577.

From the evidence adduced we have come to the conclusion that since November 6, 1947, the carrier has not complied with that part of section 74-532, R. S. 1943, which requires it to have a brakeman or flagman on all its passenger trains of five cars or less while operating its trains No. 21 and No. 22 as steam passenger trains.

It should be understood that this opinion should in no manner be considered to have determined or decided any questions affecting the relations or rights between this carrier and its employees arising out of any agreement they may have entered into under the provisions of the National Railway Labor Act.

By his cross-appeal complainant questions the correctness of our holding in Moredick v. Chicago & North Western Ry. Co., 125 Neb. 864, 252 N. W. 459, that the act was not intended to apply and did not apply to motor trains. He asks us to hold that it does. For the reasons therein stated we think our holding in that opinion is correct. For a very full and complete discussion of this same question, wherein the same conclusion is reached, see Railroad Commission of Texas

v. Texas & New Orleans R. R. Co., (Tex. Civ. App.) 42 S. W. 2d 1091. As therein stated: "* * * the statute under construction is not only remedial in its nature, but penal as well, and must be construed with at least a reasonable degree of strictness with respect to including anything beyond the immediate scope and object of the statute, even though within the spirit, and nothing can be added to the act by inference or intendment. * * * If the Legislature had in mind a gasoline motor car or train, it could have easily said so, and we believe it would have done so by appropriate language, and in absence of which we will not extend the scope of the act to include motor cars of the character involved in this suit."

There is also a further reason why it can be said our opinion correctly interpreted the legislative intent by holding it did not apply to motor trains. The opinion was released on January 26, 1934. If it did not correctly interpret the legislative intent there have been numerous sessions of the Legislature when it could have been specifically so provided. The fact that it has not done so can but lead to the conclusion that our construction thereof correctly reflects what it intended.

We have come to the conclusion that the holding of the Nebraska State Railway Commission is correct. It should be and is affirmed.

AFFIRMED.

NELLIE L. NELSON, APPELLANT, V. BONNIE NELSON ET AL., APPELLEES.

42 N. W. 2d 654

Filed May 18, 1950. No. 32755.

1. **Fraud: Pleading.** Fraud is generally a question of fact and to be effective as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded.

2. ———: ———. The mere charge of fraud is a conclusion and presents no issue.
3. **Pleading.** A general demurrer to a pleading admits the truth of all material facts properly pleaded for the purpose of testing their sufficiency as a cause of action or defense, but does not admit conclusions of law or fact.
4. **Courts.** The jurisdiction of a court over the subject matter is measured by the extent of the powers of the court in respect to the cause of action before it.
5. **Judgments.** In a suit for recovery of money, the amount of indebtedness of defendant is an issue and a judgment against him is necessarily an adjudication thereof.
6. **Courts.** In an action for the recovery of money, jurisdiction is not affected by an error of the court in determining the amount of the recovery as shown by judgment rendered therein.
7. **Judgments.** The payment of a judgment by a litigant cannot result in a cause of action in his favor against the judgment creditor because it was for an amount in excess of the indebtedness owing at the time the judgment was rendered.
8. ———. The doctrine of res judicata is that an issue determined by a valid adjudication is finally concluded as to the litigants and those in privity with them.
9. ———. The final judgment fixing the rights of the parties terminates the controversy, while it is in force, and is in any subsequent litigation conclusive evidence of those rights.

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

Torgeson, Halcomb & O'Brien, for appellant.

W. H. Kirwin, Kenneth C. Fritzler, and *Ivan Van Steenberg,* for appellees.

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

BOSLAUGH, J.

This suit was brought by appellant for an accounting and a determination of the amount she claimed to have paid to the legal guardian of Peter M. Nelson, an incompetent, in excess of her indebtedness to him and for a recovery thereof from appellees or one or more of them.

The appeal tests the correctness of the action of the

district court sustaining general demurrers to the petition and entering judgment dismissing the case.

The claims of appellant as stated in the petition are that: Ivan Van Steenberg, as guardian of Peter M. Nelson, recovered a judgment against appellant and her husband, Joseph W. Nelson, in the district court for Banner County for $6,657.35, adjudged to be the unpaid balance of an indebtedness represented by their promissory note payable to Peter M. Nelson. A subsequent suit based upon the judgment was brought in that court by the guardian to subject property in the name of appellant, her husband, and her son to the lien of the judgment and to appropriate it for the satisfaction thereof. That case resulted in a judgment against appellant in the sum of $6,637.35, and it was affirmed by this court. Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414. Appellant was compelled to pay the judgment or suffer the sale of her property on execution. Payment thereof was made by her to the clerk of the district court. She claims the prinicipal amount of the judgment rendered in the original case was, because of inadvertence, mistake, and fraud, more than $1,000 greater than the amount of the indebtedness due and unpaid at the time of its entry. The error resulted from the failure of the court to credit the payments made on the indebtedness and endorsed on the note when the computation was made of the amount due at the time of the rendition of the judgment. Appellant discovered the facts in reference thereto on April 1, 1948, more than four years after the judgment was rendered. The amount of the unpaid indebtedness evidenced by the note or the amount of the judgment first rendered was not raised or litigated in either case. Appellant contested her liability in each of the cases. The clerk of the district court paid the amount received from appellant to the guardian of Peter M. Nelson and, after the death of the ward, the guardian paid it to Kenneth C. Fritzler, trustee by the will of Peter M. Nelson, deceased, for his widow, Bonnie Nelson.

There is no claim of jurisdictional infirmity in either of the judgments. The existence of complete jurisdiction affirmatively appears from allegations in the petition. The statement that the judgment in the first case was rendered because of fraud is a conclusion insufficient to tender an issue and is not admitted by the demurrers. Fraud is generally a question of fact, and to be effective as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded. A mere charge of fraud is a conclusion and presents no issue. U. S. Theatre Supply Co. v. Creal, 122 Neb. 743, 241 N. W. 529. A general demurrer to a pleading admits the truth of all material facts properly pleaded for the purpose of testing their sufficiency as a cause of action or defense, but does not admit conclusions of law or fact. State ex rel. Johnson v. Consumers Public Power District, 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480.

The allegation that the amount of the indebtedness was not raised or litigated in either of the cases is not only a conclusion of the pleader, but is also contradicted by the inherent and necessary effect of other statements in the petition. The case in which the first judgment was rendered was solely for the recovery of money and implicit therein, as in the second case, was the issue of the liability of appellant and the amount thereof. A judgment is an adjudication of all matters essential to support it. Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Morrell v. Towle, 141 Neb. 370, 3 N. W. 2d 655; Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342.

Appellant assails the validity of the judgment in the action at law on the basis, as she claims, it was for a greater amount than was asked in the petition in the case. Conceding but not deciding this, the result claimed is not true. The contents of a petition are not a measure of the jurisdiction of the court. The jurisdiction of the subject matter is tested by the extent of the powers of

the court in respect to the cause of action before it. In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488. The jurisdiction or power of the court was not affected by any error in determining the amount of the unpaid indebtedness represented by the note sued on. Kramer v. Bankers Surety Co., 90 Neb. 301, 133 N. W. 427; Kazebeer v. Nunemaker, 82 Neb. 732, 118 N. W. 646; Weddle v. Specht, 97 Neb. 693, 151 N. W. 160.

The fraud, mistake, and inadvertence alleged by appellant are related by the petition to the judgment in the original case. There is no defect or irregularity claimed in the proceedings or the judgment in the second case. Appellant does not seek to have either of the judgments set aside. She seeks to disregard their effect in a collateral proceeding. Any insufficiency of the first judgment could not affect the validity of the judgment in the second case. They each adjudicated the amount of the indebtedness owing by her, and no direct attack has been made upon either of them. She paid the amount finally determined by contested litigation to be her liability, and the satisfaction of an adjudicated obligation by appellant could not result in a cause of action in her favor.

This is a collateral attack on a former adjudication made by a court of unquestioned jurisdiction of the parties to and the subject matter of the litigation. Van Steenberg v. Nelson, *supra*. The doctrine of res judicata is that an issue determined by a valid judgment on the merits is finally concluded as to the litigants and those in privity with them. The final judgment fixing the rights of the parties terminates the controversy, while the decision is in force, and is in any subsequent litigation conclusive evidence of those rights. Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602; In re Estate of Vetter, 142 Neb. 167, 5 N. W. 2d 215.

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

AFFIRMED.

COLLIN R. MILLER ET AL., APPELLANTS, V. CLARENCE W. MERSCH ET AL., APPELLEES.
42 N. W. 2d 652

Filed May 18, 1950. No. 32764.

1. **Elections.** Where the venue of an absent voter's affidavit and certificate required on an absent and disabled voter's identification envelope is in a county in this state, and the jurat shows that the oath was administered in a province in Canada, such affidavit and certificate are not in compliance with law and the ballot contained therein is illegal.
2. ———. Under section 79-616, R. S. 1943, requiring a proposal for the issuance of school bonds to be adopted by three-fifths of the ballots cast at the election on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast.

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

Baldwin & Pike, for appellants.

Keenan & Corbitt, for appellees.

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

CARTER, J.

This is an action involving the contest of a special school district election, the object of the election being to pledge the property and credit of the school district in the principal amount of $30,000 for the purpose of constructing a new school building. Contestants are qualified electors of the school district who purported to vote at said election by mail. Their ballots were not counted by the election board because of the alleged invalidity of the two votes. It is admitted that if the two votes of contestants had been counted it would have changed the declared result of the election. The trial court held that the two votes purported to have been cast by the contestants were invalid and that the proposition submitted was carried by the required majority. Contestants appeal.

The record shows that School District No. 47 of Thayer County, Nebraska, held an election on September 7, 1948, on the proposition of whether or not bonds in the amount of $30,000 should be issued by said district for the purpose of building a schoolhouse and furnishing the same. It is not questioned that the election was regularly held pursuant to section 79-616, R. S. 1943, which required among other things that the bonds could be issued if three-fifths of the ballots cast at such election were for the issuance of such bonds. The declared result of the election was 140 votes for and 92 votes against the proposition, and a declaration that the proposal had carried by the required majority.

The two contestants were qualified electors of the district. They were absent from the district on election day and cast their ballots as absent voters. They assert, and it is not disputed, that they cast their votes against the proposal for the bond issue, that such votes were legally cast and should have been counted, and if such ballots were counted it would change the declared result of the election. The issue submitted is limited to the validity of the two absentee ballots.

The venue on each of the "Absent and Disabled Voter's Identification" envelopes in which the votes were enclosed is as follows: "State of Neb. County of Thayer. ss." The jurat on each is as follows: "Subscribed and sworn to before me this 4 day of Sept, 1948. * * * E. C. Mortin, Commissionor. Prov. of Sask. Comm. expires Dec. 31/48."

It is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state. The privilege of voting, though the voter is absent from the voting precinct at the time of the election, requires a departure from the general rule governing the method of exercising the right to vote. Voting by mail constitutes a special privilege and requires a stricter adher-

ence to the legislative conditions imposed upon its exercise. Compliance with the conditions imposed by the statutory grant is essential to the exercise of the right. The act itself prescribes the manner of its exercise when it states that an absentee elector may vote at such election only in the manner prescribed in the act. Wheelock v. Haney, 138 Neb. 547, 293 N. W. 418. See, also, Griffith v. Bonawitz, 73 Neb. 622, 103 N. W. 327; Rasp v. McHugh, 121 Neb. 380, 237 N. W. 394.

In McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667, we held that identification envelopes containing a variance as to counties between the venue and the seal affixed by the notary public were not a compliance with the law governing absentee voting. In the case before us the venue was fixed as Thayer County, Nebraska, and the jurat indicated that the oath was administered in the province of Saskatchewan, Canada. No seal was affixed. Sufficient compliance with the statute, Chapter 32, article 8, R. S. 1943, and the 1949 Supplement thereto, was not had and the trial court correctly held the two mail ballots of the contestants to have been illegally cast and not proper to be counted at said election.

It is urged that, even if the ballots of contestants cannot be counted against the proposal, they are "ballots cast at such election" within the meaning of section 79-616, R. S. 1943, and that the proposal must therefore fail in that three-fifths of the ballots cast at said election are not for the proposal.

While the cases are not in accord as to whether illegal, rejected, and blank ballots shall be counted in determining the total vote cast, we think the correct rule is, in the absence of statutory provision to the contrary, that ballots which have been cast which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast. This simply means that ballots improperly cast, or rejected for illegality, or left wholly blank,

are no part of the "ballots cast at such election" within the meaning of section 79-616, R. S. 1943. This court appears to have adopted this rule in previous cases. State v. Roper, 47 Neb. 417, 66 N. W. 539; State v. Clark, 59 Neb. 702, 82 N. W. 8. See, also, State ex rel. Short v. Clausen, 72 Wash. 409, 130 P. 479, 45 L. R. A. N. S. 714; Wightman v. Village of Tecumseh, 157 Mich. 326, 122 N. W. 122.

The trial court was correct in holding that the two mail votes cast by contestants were invalid and not to be counted, and that the proposal for the issuance of bonds was carried by the required statutory majority.

AFFIRMED.

CHARLES A. WILDS, APPELLANT, v. WILLIAM N. MOREHOUSE ET AL., APPELLEES.

42 N. W. 2d 649

Filed May 18, 1950. No. 32782.

1. **Workmen's Compensation: Master and Servant.** The status of employee or independent contractor cannot be determined by any single test or rule, but must be established from a consideration of all the facts and circumstances of the case.
2. ———: ———. An independent contractor is one who renders service in the course of an independent occupation and who regards the will of the one for whom the work is done only as to the result of the work and not as to the means or mode by which it is accomplished.
3. **Workmen's Compensation.** Under the facts established in this case, as stated in the opinion, appellant was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act.

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

Dryden, Jensen & Dier, and *Bolus J. Bolus,* for appellant.

Neely & Otis, Arthur J. Nevins, and *Hamer, Tye & Worlock,* for appellees.

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

BOSLAUGH, J.

Appellant seeks to recover from appellees benefits provided by the Nebraska Workmen's Compensation Act. The compensation court rejected his claim on the ground that he was an independent contractor. He waived rehearing and appealed to the district court for Buffalo County. A transfer of the case was, by virtue of a stipulation of the parties, made to the district court for Douglas County. § 48-181, R. S. Supp., 1949. A trial therein resulted in a finding that appellant was not an employee of William N. Morehouse, appellee, and a judgment of dismissal. Motion of appellant for a new trial was denied and he has appealed. Royal Indemnity Company was the compensation insurance carrier of appellee and further reference to it herein is not required.

The question to be decided is whether appellant was at the time of the accident engaged as an employee or an independent contractor. This cannot be determined by any single test or rule. The relationship must be established from a consideration of all the facts and circumstances of the case. Peterson v. Christenson, 141 Neb. 151, 3 N. W. 2d 204; Prescher v. Baker Ice Machine Co., 132 Neb. 648, 273 N. W. 48.

Appellee owned and for many years operated a trucking business. He was authorized by both the Interstate Commerce Commission and the Nebraska State Railway Commission. He sometimes secured a truck operator to haul for him when the volume of his business exceeded the capacity of his equipment. Appellant purchased a tractor, rented a trailer, and engaged in and carried on a trucking business for several months prior to the accident involved in this case. He had no "over-the-road" highway permit for either intrastate or

interstate operation, but operated on the permits of other truckers. He was known as a "wild catter." He solicited regular licensed truckers to engage him to haul for them. He approached appellee on this basis in November of 1948. He had not done any work for appellee, but had solicited him for an engagement. Appellee made an investigation and later told appellant he had a load at Swift & Company for Saturday morning and he could go down and load it and then come to the home of appellee. That was on a Friday. The next morning appellant took his truck to the Swift plant and told the man in charge that he was there for a truckload for Denver, Colorado. The truck was loaded with 24,000 pounds of shortening and two barrels of glue. Appellant was given an invoice to take to appellee. He then went, as he had been requested to do, to the home of appellee and was told by him that the tariff was 55 cents a hundredweight, and the difference between that and 15 percent of it, plus the wheel tax, would be paid him for taking and delivering the cargo to the Swift plant in Denver; that appellee would pay the expense of public liability and property damage insurance; and he gave appellant a letter to the port of entry so that he could enter and travel on the highways in Colorado. Appellee advanced or loaned him $90 which he requested for expenses. Appellee told him that delivery should be made at the Swift plant in Denver sometime Monday morning, but did not specify any exact hour of arrival. Neither of the parties knew the location of the plant in Denver. Appellee thought it was in the east part of the city and appellant said he would locate it. The entire subject matter of the engagement was one truckload of merchandise to be transported from Omaha, Nebraska, to Denver, Colorado, by a time certain. Appellant consulted the Nebraska Safety Patrol to ascertain which highway was best suited for travel at that time. Appellee said nothing as to the route to be traveled, and it was not a condition of the arrangement that appellant was

personally obligated to accompany or operate the truck in transporting the merchandise to and delivering it in Denver. Nothing was said by either of the parties in reference to any deduction for social security or income tax. Appellant left Omaha about 2 p. m. on Sunday, reached Grand Island at 8 p. m., ate dinner there, and left at 8:30 p. m. on U. S. Highway No. 30. He traveled slowly because of recent repairs to the motor of his tractor. When he was about seven miles west of Kearney, he was involved in an accident and sustained injuries complained of in this case.

Appellant was in the business of transporting commodities by truck, was an independent operator, and used the equipment he owned and leased for that purpose. The engagement he made with the appellee concerned one definite thing—the transportation by him, for a fixed consideration, of one truckload of merchandise from Omaha, Nebraska, to Denver, Colorado, by means of his truck and equipment. The destination and time of arrival were determined by appellee. All details of the manner and means of executing the work were solely the responsibility of appellant. He was subject to the will of appellee only as to the result of the work, that is getting the merchandise to its destination on the forenoon of the day designated. The manner of loading the truck, the time of the commencement of the trip, the selection of the route to be traveled, the hours of work, the rate of speed, the interruptions and delays, the person selected to operate the truck and to accompany and deliver the goods, and all other matters involved in completing the work were left to the judgment and decision of appellant. Appellee, under the arrangement between the parties, had no right to direct appellant how or when the details of the transportation should be performed. He had no right to discharge the appellant or to interfere with him in the manner or mode of the performance of the work. A person who contracts to transport by the use of his truck and equipment merchandise

to a named destination by a specific time for a fixed compensation, who has the right to select and use any assistant desired, determine the hours of labor, the route of travel, the time of the commencement of the trip, and the incidents thereof, who is not subject to discharge by the person for whom the work is done, and who has the right to direct and control how and when the details of the transportation shall be done, is an independent contractor and is not an employee within the meaning of the Workmen's Compensation Act. In Lowe v. Chicago Lumber Co., 135 Neb. 735, 283 N. W. 841, it was decided that: "'An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.'" See, also, Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N. W. 2d 554; Williams v. City of Wymore, 138 Neb. 256, 292 N. W. 726.

The appellant was, under the facts and circumstances of this case, an independent contractor, and not an employee, within the meaning of the Workmen's Compensation Act.

The judgment should be, and it is, affirmed.

AFFIRMED.

GEORGE H. TIEHEN ET AL., APPELLANTS, V. FRANK A. HEBENSTREIT, EXECUTOR OF THE ESTATE OF MARY E. TIEHEN, DECEASED, ET AL., APPELLEES.

42 N. W. 2d 802

Filed May 25, 1950. No. 32780.

1. **Wills.** 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.
2. **Perpetuities.** In determining whether a given case is within or without the rule against perpetuities, the court is guided by

what is possible to occur under the will, rather than what did occur.

3. **Wills: Estates.** The general rule in this state is that, in construing a will, where the will in one clause makes an apparently absolute bequest of property, but a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the two clauses are to be construed together to ascertain the true character of the estate in fact granted by the first clause; and in such case, contrary to the ancient rule at common law, the second clause is effective and operates to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended, or undisposed property granted for life by the first.
4. **Wills.** A will speaks as of the date of the death of the testator.
5. **Wills: Estates.** The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent is apparent from the will.
6. **Wills.** Since a will speaks from the date of the testator's death, the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator.
7. **Perpetuities.** The rule against perpetuities provides that the longest possible period for vesting of an executory estate is the life or lives in being and 21 years thereafter, to which may be added the ordinary period of gestation.
8. ———. The fact that a limitation is in favor of a class causes no invalidity under the rule against perpetuities, when, under the language and circumstances of such limitation, the ability of the class to increase in membership is absent and the ability of the class to decrease in membership is certain to end within the maximum period.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, STANLEY BARTOS, and EDMUND P. NUSS, JUDGES. *Affirmed.*

John C. Mullen, for appellants.

Kennedy, Holland, DeLacy & Svoboda, Frank A. Hebenstreit, James R. McGreevy, Archibald J. Weaver, John H. Wiltse, and *Paul P. Chaney,* for appellees.

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

SIMMONS, C. J.

This is an action to quiet the title to property based on the proposition that provisions of a will violate the rule against perpetuities. Beneficiaries of the will are made parties. Issues were made and trial was had resulting in a decree denying the relief sought. Plaintiffs appeal. We affirm the judgment of the trial court.

Mary E. Tiehen died testate on May 18, 1948. Mrs. Tiehen, hereinafter referred to as the testatrix, was the mother of three children, George, John, and Catherine. They will be referred to hereinafter by their given names. Catherine predeceased her mother, leaving one child, Howard Milton Sears, Jr., who was living at the date of the death of testatrix. John is the father of five children, all of whom were living at the date of the death of testatrix, and two of whom are minors. George is the father of two children, both of whom were living at the time of the death of testatrix and are minors.

The will of testatrix was admitted to probate on June 19, 1948. No appeal was taken and the decree has become final.

By the terms of her will, including a codicil, testatrix made two specific bequests which are not involved in this litigation.

By paragraph Tenth of her will she nominated F. A. Hebenstreit as executor and trustee of her will.

By paragraph Third she devised all her property to her executor to be held in trust for the purposes named in the will, with general powers of handling and sale, the time and manner being left to his discretion.

By paragraph Fourth she directed the executor and trustee to manage the estate, keep the funds invested in certain classes of securities, "* * * and from the proceeds of said sale or the net earnings from said land or the net interest income from said investments the said trustee shall pay and distribute the corpus of the estate and the income therefrom as follows:

"A. To my beloved grandson, Howard Milton Sears, of Monrovia, California, the sum of $1200.00 per year until a full 33⅓ per cent of the net estate has been distributed to the said Howard Milton Sears.

"B. To my beloved son, George H. Tiehen, the sum of $1200.00 per year until a full 33⅓ per cent of the net estate has been distributed to the said George H. Tiehen.

"C. To my beloved son, John Thomas Tiehen, the sum of $1200.00 per year until a full 33⅓ per cent of the net estate has been distributed to the said John Thomas Tiehen."

By paragraph Fifth she provided: "I do further will and direct that if and in the event that the said Howard Milton Sears dies before the full one-third of my said estate is paid to him, then in that event the balance of his distributive share shall go to Howard M. Sears, Sr., the father of the said Howard Milton Sears, and such distribution shall be made in the same manner and in the same amount as is herein directed for the payment of monies to the said Howard Milton Sears. That in the event of the death of the said Howard M. Sears, Sr., father of the said Howard Milton Sears, before the full amount of said distributive share is paid, then in that event the remainder of his share of said estate shall be paid to St. Peters and Pauls Catholic Church of Falls City, Nebraska; that if and in the event of the death of my son, George H. Tiehen before the full one-third of my estate is paid to him, then in that event the residue thereof shall be paid to the children of the said George H. Tiehen or the survivor of them, and such distribution shall be made in the same manner and in the same amount as is herein directed for the payment of monies to the said George H. Tiehen; that if and in the event of the death of my son, John Thomas Tiehen, before the full one-third of my estate is paid to him, then in that event the residue thereof shall be paid to the children of the said Thomas

Tiehen or the survivor of them, and such distribution shall be made in the same manner and in the same amount as is herein directed for the payment of monies to the said John Thomas Tiehen."

By paragraph Seventh she provided: "It is further provided that if all of the children of the said George H. Tiehen shall die before the full amount of said trust fund is distributed to them then in that event the balance, if any, on hand shall be paid to St. Peters and Pauls Catholic Church of Falls City, Nebraska; and in the event all of the children of the said John Thomas Tiehen shall die before the full amount of said trust fund is distributed to them, then in that event the balance, if any, on hand shall be paid to St. Peters and Pauls Catholic Church of Falls City, Nebraska."

Sts. Peter and Paul Church of Falls City, Nebraska, will be referred to herein as the church.

By paragraph Sixth she provided that neither the principal nor the income of the trust estate should be liable for the debts of any beneficiary, or subject to seizure or attachment or garnishment, and that no beneficiary should have the power to dispose of his or her interest in the trust estate.

By paragraph Eighth she gave directions as to the payment of the annual amounts, and in the event of the death of either of her sons during the period of the trust, she directed the payment of funeral expenses and expenses of the last sickness out of the residue of their respective shares.

By paragraph Ninth she gave her executor broad powers in the management of the property during the life of the trust.

George and John bring this action seeking to quiet title to the property in them on the theory that under the provisions of the will hereinabove quoted they were each devised a one-third interest in this estate; that the provisions of the will above quoted limiting the estate as to them are violative of the rule against perpetu-

ities and hence void; and that the property either passed to them under the will in fee or as intestate property. They do not contend that the provisions of the will insofar as it relates to the share of Howard Milton Sears is void as against the rule. The adult children of John answered and joined in the prayer of plaintiffs' petition.

The minor children of the plaintiffs, by guardian ad litem, answered, taking the position that the provisions of paragraph Seventh of the will are void as in violation of the rule against perpetuities. They contend that it does not follow that the entire will falls, but rather that the status of plaintiffs remains unchanged, and that the trust continues as to each one-third until the death of each of the plaintiffs, when the corpus of each share of the estate vests in the children of the plaintiff then deceased, free of the devise to the church.

Hebenstreit, as executor and trustee, answered and prayed for dismissal.

The church answered, setting up that it is a religious corporation under the law of this state and setting out its corporate name, plaintiffs having pleaded that it was a corporation. The church prayed for dismissal of the action.

Howard Milton Sears, by guardian ad litem, answered, asking for strict proof.

At the outset it is necessary that we construe this will. Plaintiffs submit arguments based upon particular provisions and contentions that may or may not arise in the administration of its provisions.

The rule is that 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, 150 Neb. 222, 34 N. W. 2d 159, and decisions there cited.

What then is that intent as gathered from the whole

instrument? We undertake to determine that intent only insofar as is necessary to determine the basic question here presented, namely, do the provisions violate the rule against perpetuities and, if so, what is that effect.

The testatrix placed her estate in trust and used that instrumentality to accomplish her intent and purpose. After specific bequests she provided that her estate, so held in trust, be in effect divided into three parts. The benefits of each one-third part are to go initially to her two living sons and to the child of a deceased daughter. She provided a substantial income for each of them during their lives, so far as her estate permitted. Recognizing that death might come to any of the three before they had received the full one-third of the body of the estate, she provided for the disposition of the residue, if any. In the case of the grandson Sears, the residue was to be distributed to his father in the same manner and in the same amount as it had been paid to the grandson. In like manner she provided that if, upon the death of George, the full one-third of the estate had not been paid to him under the terms of the will, the residue should be paid to his children or the survivor of them in the same manner and in the same amount as it had been paid to George. As to the other third she made a like provision as to the children of John.

Recognizing that death might come to each of the initial beneficiaries and the successor beneficiaries before the one-third part so set aside had been fully paid out, the testatrix provided that the residue, if any, be paid to the defendant church. Such we think is patently the over-all intent of the testatrix as found in the will.

The question then comes, do the provisions relating to the children of John and George violate the rule against perpetuities?

The plaintiffs and the guardian ad litem of the minor

children rely first upon the rule that "In determining whether a given case is within or without the rule against perpetuities, the court is guided by what is possible to occur under the will, rather than what did occur." Bunting v. Hromas, 104 Neb. 383, 177 N. W. 190. They also rely upon the law as stated in the same opinion that the longest possible period for vesting an executory estate is the life or lives in being and 21 years thereafter, to which may be added the ordinary period of gestation.

Plaintiffs and the guardian argue that it is possible that either John or George, or both of them, may beget an additional child or children, and that such afterborn children would come within the terms of the will, and hence the above rule as to vesting would be violated. The guardian further argues that the identity of the members of the class would be determined as of the date of the death of each of the sons.

We have stated the rules applicable to and which solve the questions here presented.

There is a contention here that testatrix by the provisions of paragraph Fourth gave her entire estate to her two sons and grandson in fee simple, and that subsequent provisions of the will are ineffective. This contention is answered in Tucker v. Heirs of Myers, 151 Neb. 359, 37 N. W. 2d 585, wherein we held: "The general rule in this state is that, in construing a will, where the will in one clause makes an apparently absolute bequest of property, but a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the two clauses are to be construed together to ascertain the true character of the estate in fact granted by the first clause; and in such case, contrary to the ancient rule at common law, the second clause is effective and operates to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remain-

der in the unused, unexpended, or undisposed property granted for life by the first." We have followed this rule so far as applicable in construing the will as hereinbefore stated.

"A will speaks as of the date of the death of the testator." Brandeis v. Brandeis, *supra.*

The rule also is: "The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent is apparent from the will." Brandeis v. Brandeis, *supra.*

We find nothing in the will to indicate an intent contrary to a vested remainder. Hence we hold that the remainders set up in this will are vested remainders.

This brings us then to the provisions of paragraph Fifth and the remainders given to "the children * * * or the survivor of them" of George and John. The word "children" as used here is a bequest or devise to a class. " 'Since a will speaks from the date of the testator's death, the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator.' " Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713.

As we said in Lacy v. Murdock, *supra,* we find nothing in the will which in any way defines, explains, interprets, or qualifies the word "children." Unexplained and given its ordinary meaning, it refers to the children of George and John living at the date of the death of the testatrix.

We are mindful of such cases as Nitz v. Widman, 106 Neb. 736, 184 N. W. 172; DeWitt v. Searles, 123 Neb. 129, 242 N. W. 370; Gillan v. Wilson, 124 Neb. 893, 248 N. W. 646; and Drury v. Hickinbotham, 129 Neb. 499, 262 N. W. 37, where the language of the will showed an intent to permit the opening of the class so as to let in afterborn children. We find no such language in this will.

The rule against perpetuities provides that the longest possible period for vesting of an executory estate

is the life or lives in being and 21 years thereafter, to which may be added the ordinary period of gestation. Bunting v. Hromas, *supra;* Gillan v. Wilson, *supra;* Restatement, Property, § 374, p. 2176; 41 Am. Jur., Perpetuities and Restraints on Alienation, § 3, p. 50; 48 C. J., Perpetuities, § 4, p. 937.

We are mindful of the clauses in the will referring to the children "or the survivor of them." We do not here construe the effect of that language, save to point out that "The fact that a limitation is in favor of a class causes no invalidity under the rule against perpetuities, when, under the language and circumstances of such limitation, the ability of the class to increase in membership is absent and the ability of the class to decrease in membership is certain to end within the maximum period * * *." Restatement, Property, § 388, p. 2282.

It accordingly follows that the provisions of the will insofar as they relate to a remainder over to the children or the survivor of them of George and John do not in any way violate the rule against perpetuities.

There remains the question insofar as it relates to the residuary remainder to the church. Applying the above rules to those provisions it necessarily follows that those remainders became vested at the time of the death of the testatrix. The time of the possession and enjoyment only is postponed.

We have examined the other contentions of the appellants. Most of them fail because they are bottomed on the contention that the will violates the rule against perpetuities. Those not in that classification have been examined. It is not found necessary to determine them as within the issues presented here.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. W. O. BALDWIN, RELATOR, V. J. C. STRAIN, COUNTY CLERK OF THAYER COUNTY, NEBRASKA, RESPONDENT.

42 N. W. 2d 796

Filed May 25, 1950. No. 32821.

1. **Elections.** The proclamation of the Governor convening an extraordinary session of the Legislature to amend, revise, and supplement the election laws so as to facilitate absentee voting is sufficient to sustain changes as to time in the procedures set forth in the election laws in order to accomplish the stated purpose of the proclamation.
2. **Statutes.** An act which purports to amend an unconstitutional statute may be held to be amendatory of the valid statute, if such there be, which the unconstitutional act purported to amend and repeal.
3. **Officers: Elections.** The Legislature under its police power may properly declare occupants of positions and employees of the state and federal governments ineligible as candidates for delegates to party conventions and caucuses.
4. ———: ———. An act of the Legislature, section 32-1172.02, R. S. Supp., 1949, making a person ineligible to be a delegate to a county, state, or congressional pre-primary convention, who holds a position or employment under the state or federal government, is not violative of Article I, sections 1, 3, and 22, of the Nebraska Constitution.
5. **Statutes.** All things necessary or proper to carry out the general object stated in the title of a legislative act are deemed to be within the scope of such title.
6. ———. Legislative Bill No. 167, Laws 1949, contains but one subject and the same is clearly expressed in the title, within the meaning of Article III, section 14, of the Nebraska Constitution.
7. ———. The absence of a definition of the words "position or employment" contained in Legislative Bill No. 167, Laws 1949, does not invalidate the act. If doubt arises as to their meaning it can be determined upon judicial inquiry.

Original action by the state, on the relation of W. O. Baldwin, against J. C. Strain, county clerk of Thayer County, Nebraska. *Writ of mandamus denied.*

Waring & Waring, and *Fraser, Connolly, Crofoot & Wenstrand,* for relator.

Clarence S. Beck, Attorney General, *Walter E. Nolte*, and *Robert A. Nelson*, for respondent.

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

CARTER, J.

This is an action in mandamus brought originally in this court by relator to compel the respondent, the county clerk of Thayer County, to accept the filing of relator as a candidate for delegate to the Democratic county pre-primary and post-primary conventions for the years 1950 and 1952.

The action involves the constitutionality of section 32-1172.02, R. S. Supp., 1949, which provides: "No person shall be eligible to be a delegate to either a county, state, or congressional pre-primary convention who holds a position or employment under (1) the government of the United States, or (2) this state." The relator was, at all times here involved, the county attorney of Thayer County, Nebraska, and a member of the Game, Forestation and Parks Commission of the State of Nebraska. It is not disputed that relator is qualified to become a candidate for delegate to the Democratic county pre-primary and post-primary conventions unless he is prohibited from so doing by the quoted provision of the statute.

The provision in question was enacted in 1949 as an amendatory act purporting to amend portions of an act passed at the extraordinary session of the Legislature in 1944. It is contended that the act passed at the extraordinary session was broader than the proclamation of the Governor convening such session of the Legislature and that it therefore contravened Article IV, section 8, of the Constitution of Nebraska, which provides: "The Governor may, on extraordinary occasions, convene the legislature by proclamation, stating therein the purpose for which they are convened, and the legislature shall enter upon no business except that for which they were called together." The proclamation of the Governor convening

the extraordinary session, bearing date of March 21, 1944, insofar as it is pertinent to the issue before us, stated: "To amend, revise and supplement the laws of the state relating to elections so as to facilitate and afford greater opportunity for the exercise of the elective franchise by absent voters." Nebraska Legislative Journal, 57th Extraordinary Session, 1944, p. 2.

It is contended that the proclamation of the Governor, insofar as it is pertinent here, limited the call of the extraordinary session of 1944 to the express purpose of facilitating absentee voting, but that Chapter I, Laws 1944, enacted by such extraordinary session of the Legislature, amended and revised the election statutes beyond the scope of the Governor's call. It is pointed out that Chapter 1, section 29, Laws 1944, purports to amend section 32-1135, C. S. Supp., 1941, which deals with the formation of new political parties. We point out that the only amendment made which in any way changes the meaning of the former section designated the period prior to a primary or general election at which a convention to form a new political party could be held as 70 days instead of 50. This was clearly done as part of the plan to advance the date of such conventions in order to facilitate absentee voting by those serving in the armed forces in foreign lands. Such an amendment was clearly within the scope of the Governor's call.

It is urged also that Chapter 1, section 30, Laws 1944, purports to amend Chapter 77, section 2, Laws 1943, having to do with rotation of names on the ballot and the time when the county clerk shall prepare the primary ballot and have it ready for distribution to absentee voters. The amendment merely changes such time from 14 to 40 days before the primary election. Such amendment is clearly for the purpose of facilitating absentee voting and is within the scope of the Governor's call.

Chapter 1, sections 31, 32, 33, and 34, Laws 1944, likewise amend statutes by changing the time to canvass returns and notify candidates and county clerks. Such

amendments clearly facilitate absentee voting.

It is likewise contended that Chapter 1, section 35, Laws 1944, amends Chapter 77, section 4, Laws 1943, providing for post-primary and pre-primary conventions. Chapter 1, section 36, Laws 1944, amends section 32-1201, C. S. Supp., 1941, having to do with nominations on the nonpolitical ballot. The amendments change the time for filing for nonpolitical offices in order to provide more time for absentee voters to obtain and return their ballots. The amendments made are within the scope of the Governor's call.

We conclude that the amendments enacted by the extraordinary legislative session held in 1944, which have been here advanced, are within the scope of the Governor's proclamation and that Chapter 1, Laws 1944, does not contravene Article IV, section 8, Constitution of Nebraska. Consequently, section 32-1172.02, is neither an amendment of an invalid law nor in contravention of either Article IV, section 8, Constitution of Nebraska, or the proclamation of the Governor made pursuant thereto.

But even if the statute in question did in fact purport to amend an unconstitutional statute, as the relator here contends, it would be valid for another reason. If Chapter 1, Laws 1944, were unconstitutional for any reason, the previous acts on the subject would remain in full force and effect. Section 32-1172.02, R. S. Supp., 1949, would then become a valid amendment to Chapter 77, section 4, Laws 1943. In Sullivan v. City of Omaha, 146 Neb. 297, 19 N. W. 2d 510, we said in our opinion on motion for a rehearing at page 307, 21 N. W. 2d 511, as follows: "When L. B. 327 was enacted for the purpose of amending sections 35-201 to 35-203, inclusive, Comp. St. 1929, followed by the repeal of the old sections amended, the amending statute simply designated the place where the existing and constitutionally effective language might be found which it specifically attempted to amend. Consequently, L. B. 327 did not simultaneously repeal and reenact an unconstitutional statute,

although it had the apparent appearance of having done so." See, Cass County v. Sarpy County, 63 Neb. 813, 89 N. W. 291; State ex rel. City Water Co. v. City of Kearney, 49 Neb. 325, 68 N. W. 533. We conclude that the contention of relator that section 32-1172.02, R. S. Supp., 1949, is void as an attempt to amend an unconstitutional act, Chapter 1, Laws 1944, is without merit.

The relator contends that the Legislature is prohibited by the state and federal Constitutions from making a person who holds a position or employment under the federal or state governments ineligible to be a delegate to a county, state, or congressional pre-primary convention. It is urged that such an enactment by the Legislature is violative of the provisions of the Constitution of Nebraska guaranteeing equal rights (Art. I, § 1), due process (Art. I, § 3), and the rights of qualified voters to exercise the elective franchise (Art. I, § 22).

The exercise of the elective franchise is a right which the law protects and enforces as jealously as property rights. It is afforded constitutional protection against legislative impairment. Inherently in it is the right of persons to combine according to their political beliefs and to possess and freely use all the machinery for increasing the power of numbers by acting as a unit to effect a desired political end. The right to vote in a primary election and to participate in party activities is amply protected by constitutional provision. But even so, the right to use the elective franchise is subject to regulation the same as all other rights. It is elementary that the extent to which the Legislature may go in the exercise of the police power is primarily a matter of legislative judgment. It cannot properly go beyond reasonable regulation. What constitutes reasonable regulation is primarily for the Legislature to determine, subject to judicial review. If the purpose of the regulatory measure is legitimate and the means employed to effect it are reasonable, the regulation is entitled to judicial approval; otherwise not. State ex rel. McGrael v. Phelps,

144 Wis. 1, 128 N. W. 1041, 35 L. R. A. N. S. 353.

The evident purposes of the legislation are to promote efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service. The Legislature may have desired to limit party activity so as to avoid a tendency toward a one-party system. It may have thought that government employees too readily became subordinates for leaders to use in building a political machine. The purpose may have been to protect them from demands upon their time and a consequent neglect of public duties.

The relator readily concedes that the Legislature may reasonably regulate the political activities of state employees. He argues that the Legislature by appropriate legislation may make political activity a bar to continuing state employment, but that it cannot make state employment a bar to the eligibility of such employee to a political office. We fail to see any distinction in principle in the two situations. If the Legislature may constitutionally make political activity a bar to continuing state employment, it certainly has the power to declare one in the employ of the state ineligible to participate in political activity. It appears to us to be a distinction without a difference.

We desire to point out that in the present case the right to exercise the elective franchise is not infringed. The class declared to be ineligible as delegates may still vote, express their political views, and engage in political activity. The prohibition of the statute prevents them only from becoming delegates to party conventions while holding employment or positions with the state or federal governments. There is no impairment of their rights to exercise the elective francise.

In Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232, 1 S. Ct. 381, the court, in passing on the constitutionality of an act prohibiting certain officers from requesting, giving to, or receiving from any other officer money or property for political purposes, said: "The evident purpose of

Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end."

In United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556, the court, in upholding the constitutionality of the Hatch Act forbidding certain employees of the federal government from taking any active part in political management or in political campaigns, said: "As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by officeholders has been upheld. * * * The conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections."

In Brownell v. Russell, 76 Vt. 326, 57 A. 103, the court had before it a rule for the government of a police force which in part provided that " 'no member will be permitted to be a delegate or representative to, or member of, any political or partisan convention or caucus, or take any part in any political canvass.' " Relator contested it as being violative of the state Constitution which declared that all free men "have a right to elect officers, and be elected into office * * *." In holding the restriction to be valid, the court said: "It is doubtless true that the restrictions imposed must be a reasonable exercise of the power granted, and have some just relation to the

end in view. It seems to us that the provision in question satisfies these requirements. We think the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose." See, People ex rel. Clifford v. Scannell, 74 App. Div. 406, 77 N. Y. S. 704; Stowe v. Ryan, 135 Or. 371, 296 P. 857.

In Ricks v. Department of State Civil Service, 200 La. 341, 8 So. 2d 49, it was said: "It would appear that the provisions in the act prohibiting political activity on the part of State employees is a legitimate exercise of legislative discretion and not violative of the Constitutional provisions."

In State ex inf. McKittrick v. Kirby, 349 Mo. 988, 163 S. W. 2d 990, the court aptly said: "Sec. 19 prohibits any person in the classified service from using official authority or influence to coerce political action, or to interfere with an election, or from taking an active part in its political campaign, or from serving as an officer of a political club or organization, or from circulating political petitions, working at the polls, distributing badges, favoring or opposing political candidates. This section, however, carefully safeguards the rights of city employees to belong to political organizations, to cast their votes as they please and to express privately their opinions upon political questions. City employees may become candidates for public office but only after resigning their employment."

The cases cited by relator are not in point. Generally speaking they deal with limitations upon the right to vote or to freely assemble and organize themselves into a political party. The statute before us does not limit such rights. They remain as before.

We are of the opinion that the provision in question is not violative of Article I, sections 1, 3, and 22, of the Constitution. Consequently, a person holding employ-

ment or a position under the state or federal governments is not eligible to become a candidate for delegate to any county, state, or congressional pre-primary convention.

Relator contends that L. B. 167, enacted by the 1949 Legislature and which constitutes the origin of section 32-1172.02, R. S. Supp., 1949, is invalid for the reason that it violates Article III, section 14, of the Constitution, providing that no bill shall contain more than one subject, and the same shall clearly be expressed in the title. The title to L. B. 167 contains the following provision: " * * * to provide for selection at county conventions of political parties of delegates to the pre-primary state and congressional district conventions * * *." It is urged that this portion of the title is not of sufficient scope to include the regulation of the political activity of state and federal government employees by making them ineligible as delegates to the pre-primary state and congressional district conventions. The contention is without merit. The eligibility of candidates for delegates to state and congressional district conventions is germane to and a part of the subject matter quoted from the title. All things necessary or proper to carry out the general object stated in the title are deemed to be within the scope of such title. The eligibility of candidates for delegates is within its purview. We hold that L. B. 167 contains but one subject and that it is clearly expressed in the title, within the meaning of Article III, section 14, of the Constitution. See, Van Horn v. State ex rel. Abbott, 46 Neb. 62, 64 N. W. 365; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451, on rehearing, 137 Neb. 597, 291 N. W. 100.

It is also contended that section 32-1172.02 is void for uncertainty. This is grounded on the contention that the use of the words "position or employment" have no well-defined meaning and, consequently, it is not clear as to the persons whom the Legislature intended to include within the act. The words used have a common and ordinary meaning. It is not required that such words be

defined in the statute. If doubt arises as to its meaning it can be determined upon judicial inquiry. Wakeley v. Douglas County, 109 Neb. 396, 191 N. W. 337. Giving to the words used their ordinary and usual meaning, we think the words used include officers and employees, whether elected or appointed, whether full-time or part-time employees, whether their duties involve policy making or otherwise, and whether their duties are strictly governmental, industrial, or professional in their nature. All persons who occupy offices or positions, or who are otherwise employed, under the state or federal governments are within the purview of the act. It may be urged that such a declaration of ineligibility in the statute is unreasonable and is more far-reaching than is necessary to correct the evils within the contemplation of the act. The regulations imposed not being inhibited by the Constitution, the extent to which the Legislature may go is primarily a matter of legislative judgment. The courts cannot concern themselves with the expediency or wisdom of legislation. If the act is deemed unnecessarily burdensome in accomplishing the legislative intent, the remedy lies with the Legislature and not the courts.

For the reasons stated, the application for a writ of mandamus will be denied.

WRIT OF MANDAMUS DENIED.

STATE OF NEBRASKA EX REL. CITY OF GRAND ISLAND, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

42 N. W. 2d 867

Filed June 8, 1950. No. 32729.

1. **Railroads: Municipal Corporations.** The statutory duty of a railroad company or companies to construct or repair a subway viaduct or viaducts within a city is enforceable by mandamus.
2. **Mandamus.** A mandamus proceeding is an action at law, and findings of fact therein based upon conflicting evidence will not be disturbed unless clearly wrong.

3. ———. The pleadings in a mandamus proceeding may be amended in the same manner as pleadings in a civil action, and the issues thereby joined must be tried and further proceedings therein had in the same manner as in any other civil action.
4. **Statutes.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.
5. ———. Courts will, when necessary to effectuate the obvious intention of the Legislature, construe conjunctive words as disjunctive.
6. ———. A legislative act will operate only prospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
7. ———. The general saving clause, section 49-301, R. S. 1943, applies as though it were expressly incorporated in a repealing act, unless abrogated therein.
8. ———. Such general saving clause is all-inclusive, and has the force and effect of saving all pending actions founded upon a statute repealed and all causes of action that accrued thereon prior to any such repeal, except where the repealing statute itself clearly discloses that it was not the intention of the Legislature that such rights and remedies should be saved.

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

T. W. Bockes, C. B. Matthai, George C. Holdrege, R. B. Hamer, and *Suhr, Pierce & Cronin,* for appellant.

Harold A. Prince, E. Merle McDermott, and *Walter P. Lauritsen,* for appellee.

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

CHAPPELL, J.

On February 1, 1949, relator authoritatively filed this action in mandamus to compel respondent railroad company, owning and operating its tracks across the city's streets, to construct an underpass or subway viaduct under such tracks, across Sycamore Street, as required by the provisions of section 16-656 et seq., R. S. 1943.

An order was entered on February 1, 1949, allowing an alternative writ of mandamus, which writ was issued and duly served on respondent, commanding it to commence construction in accordance with plans of the city then on file, showing the width, length, strength, and materials of such underpass and approaches thereto, or show cause on or before March 8, 1949, why it refused to do so.

On March 7, 1949, respondent filed its answer and return to the writ. On May 12, 1949, such return was amended, alleging substantially that Chapter 28, Laws 1949, effective April 30, 1949, repealed the provisions under which relator was proceeding, thus barring the action, and alleging further that the city's plans were not only insufficient but also that the action of the city council in passing an ordinance purporting to require and approve such plans was null and void because they were not "as required by the board of public works" as provided by section 16-657, R. S. 1943. Likewise, on May 12, 1949, relator amended its pleadings to traverse such amendments.

The cause was tried on the merits, and the trial court entered its decree on July 29, 1949, finding and adjudging the issues generally in favor of relator and against respondent and ordering issuance of a peremptory writ of mandamus, commanding respondent to commence on or before September 1, 1949, construction of the underpass proper and the approaches proper thereto, not to exceed 800 feet in length, in accordance with the city's plans, exhibit 28, received in evidence. As a matter of course, the word "proper" appearing after the words "underpass" and "approaches" modified each as an adjective, and was used only to distinguish the one from the other.

Respondent's motion for new trial was overruled, and in conformity with its own motion, issuance of a peremptory writ of mandamus was stayed, and the judgment was superseded. Thereafter respondent appealed to this

court, assigning substantially that the judgment was not sustained by the evidence and was contrary to law and the evidence. We conclude that the assignments have no merit.

The facts are primarily without dispute, except upon the respectively alleged sufficiency or insufficiency of the plans prepared by the city engineer respecting the width, height, strength, and materials of the proposed project, of which plans respondent concededly had notice at all times. A stipulation filed by the parties on May 16, 1949, and received in evidence at the trial admitted the procedure allegedly followed by the city, and acts done by it thereunder, as well as the history and topography of the city, and respondent's operative relation thereto. Primarily, the questions presented for decision involve the ultimate validity of the city's procedure, together with its actions thereunder, and the legal effect of Chapter 28, Laws 1949, effective after relator's right to compel construction had allegedly accrued, and it had incurred and paid obligations resulting therefrom, and after the filing of this mandamus action by relator, the issuance of an alternative writ, and the filing of respondent's return and answer thereto.

Section 16-656, R. S. 1943, provided: "Upon a majority vote of the citizens at a regular or special election of any city of the first class, the mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete, and keep in repair any subway viaduct or viaducts, upon or along such street or streets, and over or under such track or tracks, including the approaches to such subway viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public; *Provided,* the approaches to any such subway viaduct, which any railroad company or companies may be required to construct, reconstruct, and keep in repair,

shall not exceed for each viaduct a total distance of eight hundred feet."

Section 16-657, R. S. 1943, provided: "Whenever any such subway viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing, and determining the damage, if any, which may be caused to any property by reason of the construction of any such subway viaduct and its approaches. The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the change of grade of a street, and such damage shall be paid by the city, and may be assessed by the city council against property benefited, and the cost of approaches beyond the distance of eight hundred feet may also be assessed by the council against property benefited by reason of the construction of any such subway viaduct and its approaches. The width, height, and strength of any such viaduct and the approaches thereto, and the material thereof, shall be as required by the board of public works, and as may be approved by the mayor and council."

Respondent conceded that relator complied with every provision of such statutes except the last sentence of section 16-657, R. S. 1943. The city conceded that it had no board of public works, but contended that the appointment of such a board was optional, not mandatory, as demonstrated by other related statutory provisions, in which event the mayor and council had authority to and did require and approve the width, length, strength, and materials of the proposed underpass.

In that connection we call attention to the fact that in the original act, Chapter 18, Laws 1901, § 118, p. 302, such last sentence read: "The width, height, and strength of any such viaducts and the approaches thereto, the material therefor, *and the manner of the construction thereof,* shall be as required by the board of public works, as may be approved by the mayor and council."

(Italics supplied.) It will be noted that the portion thereof italicized was eliminated from section 16-657, R. S. 1943, by Chapter 42, Laws 1919, § 1, p. 125, which act also, by amendment, included the duty of railroads to build subway viaducts or underpasses. As the statute now appears, it is evident that "the manner of the construction" of such an underpass was for determination by respondent and not relator.

Chapter 28, Laws 1949, effective April 30, 1949, did not abrogate the duty but generally changed the mode and manner of procedure for requiring the duty of railroads to construct viaducts over or subways under their tracks, in metropolitan and primary as well as cities of the first class, and provided for apportionment of the cost thereof between the railroad company or companies and the city. Section 17 of the act provided that nothing therein should modify, change, or abrogate any obligation of the railroad company or companies "to maintain, reconstruct, or keep in repair any viaduct or subway heretofore built or any replacement thereof under any agreement, statute, or ordinance previously in effect." Also, in the light of the fact that the act repealed parts of Chapter 14, article 3, Chapter 15, article 7, and Chapter 16, article 6, R. S. 1943, it provided in section 18: "Nothing in this act shall be construed to repeal or amend any statute except those statutes hereinafter specifically repealed, but shall be construed as independent, supplemental, and additional thereto, and as an independent act to provide the entire powers, facilities, and expenditures necessary to accomplish the elimination of grade crossings in the manner herein specified. No other statute shall be effectual as a limitation upon the powers or proceedings herein contained. Other statutes may be relied upon, if need be, to supplement and effectuate the purposes herein contained."

Neither in the title nor in the body of the repealing act was there any provision that the general saving clause, section 49-301, R. S. 1943, should not apply. That

section provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

Respondent's contentions will be disposed of in the light of the foregoing preliminary statement, and the evidence adduced.

In that connection, an examination of the record discloses competent evidence sufficient to sustain the following:

Agents of respondent and its predecessors founded or laid out the original town of Grand Island on both sides of its right-of-way. Several streets in the original town were opened across respondent's tracks, and others were left closed. Grand Island is now a city of the first class, with a population of approximately 25,000, and is located on both sides of respondent's right-of-way. The major part of the business district is on the south side, but approximately two-thirds of the population live on the north side. Respondent's railroad tracks run generally east and west practically a block north of Third Street, the city's main business street. The main portion of the business district is located between Sycamore on the east and Elm on the west, both of which are open streets. The next street west of Sycamore is Pine, open across the tracks; then Wheeler and Locust, both closed; then Walnut, open; then Cedar, closed; and finally Elm, an open street. Because Wheeler and Locust Streets are closed, traffic from the north generally funnels into either the east or west end of the business district. Such traffic over Nebraska Highway No. 2, United States Highway No. 281, and city streets from the west generally funnels into the west end of the business district. Such traffic from the east and northeast generally funnels into the east end of the business district.

Respondent's passenger station is located approximately midway between Pine and Walnut Streets, and

its freight station is just east of Sycamore Street. In recent years almost every passenger train, when stopped at the station, has blocked either Pine or Walnut Streets, to say nothing of freight trains which are sometimes 100 cars in length, which even when moving take five minutes and more to clear the crossings, which are also consistently blocked by standing trains sometimes as long as 25 to 30 minutes at a time. Because thereof, teachers and children have been tardy at school, and traffic has been held up and deviated, while pedestrians at times crawled through between the freight cars.

Fourteen of respondent's tracks, counting both main line and switch facilities, cross Sycamore Street, over which admittedly an average of 24 passenger and 25 freight trains pass each day, exclusive of switch engines, as many as 15 to 31 of which crossed it every eight hours during a traffic survey made by relator. Such survey also disclosed that the number of motor vehicles and other such traffic passing over such tracks in eight hours was from 1,025 to 1,585, and the number of pedestrians from 282 to 380 during the same period. Two people have been killed and there have been several less serious accidents at the Sycamore Street crossing in recent years.

Contrary to respondent's contention, the necessity for an underpass for the safety and protection of the public, as deemed and declared by the mayor and council and alleged by relator, was amply supported by the evidence. An underpass at Eddy Street, 2,672 feet west of Sycamore Street, then under construction, could not logically be said to have alleviated that situation.

Early in the summer of 1947, the city authoritatively employed an engineer to prepare plans for the underpass. He obtained from respondent's engineers, who had theretofore constructed many, from 20 to 50, underpasses for respondent, the information which he required to design such an underpass. He then prepared plans which were filed with the city clerk on September 3, 1947, a copy of which was sent to respondent. Those plans disclosed

the required and approved length, width, height, strength, and materials for the underpass, and approaches thereto, by the use of drawings, words, figures, and recognized standard engineering symbols.

As early as September 26, 1947, the mayor entered into authoritative negotiations with respondent concerning construction of the underpass. By stipulation, respondent had full notice and knowledge of the city's plans at all times. As a matter of fact, it ultimately received five copies thereof, and a copy of the plans received in its office on October 3, 1947, is exhibit 28 received in evidence, from which, by the use of recognized engineering practices, respondent admittedly made detailed plans, blueprints, and work sheets, exhibit 34, received in evidence, sufficient to make a comprehensive estimate of the cost of construction. From the day respondent received the city's plans until this action was brought, it made no objection whatever to them. In the meantime, it did request information with regard to the water table, substrata, and relevant matters, which the city furnished without delay. Upon other occasions, relator offered to furnish any other information which respondent might deem necessary, but such information was never requested by respondent.

On February 26, 1948, the mayor and council passed an ordinance deeming and declaring the necessity for the underpass, calling for an election, and appointing a board of appraisers as provided by sections 16-656 and 16-657, R. S. 1943. On the same date they passed a resolution approving the plans and directing that a copy be filed with the city clerk for inspection by the public pending the election.

The appraisers took the oath, ascertained the damages to private property by reason of the proposed construction of the underpass, and made a report thereof to the council before election. The total damages so allowed were $59,500, of which amount $2,500 was paid on November 10, 1948, and $5,000 on December 16, 1948, or a

total of $7,500. No appeals were taken from damages allowed in three cases for the sum of $20,500, but appeals were taken in eight cases from allowances of a total of $31,500, which appeals are still pending.

The election was held on April 6, 1948, in the manner provided by law, without any objection by respondent, which election resulted in a vote of 4,640 for and 401 against requiring construction of the underpass. The votes were duly canvassed and the proposition declared carried by the mayor and council. Respondent was then notified of the result, whereupon it requested delay of construction until a later date.

On June 2, 1948, an ordinance was passed approving awards of the appraisers and appropriating money to pay such damages allowed by them.

On July 7, 1948, an ordinance was read the first time approving the city's plan for the width, height, strength, and materials of the underpass then on file with the city clerk, and requiring respondent to accordingly commence construction thereof not later than October 1, 1948. However, after first reading, such ordinance was laid over, with instructions for the city clerk to notify respondent's legal department that if they had any objections to the plans or any suggestions with regard to construction, they should present the same at the next meeting of the council on July 21, 1948.

On July 21, 1948, counsel for respondent appeared before the mayor and city council and requested postponement of construction until a later date. He then made no criticism or objections to the city's plans, and made no request for additional information. At that meeting the ordinance was read a second time, but the request made by respondent for postponement was referred to the street and alley committee for its consideration, and the council meeting was continued to August 4, 1948.

On August 4, 1948, the street and alley committee presented a report to the mayor and council recommending that respondent be given two months additional time to

commence construction. Thereupon, the ordinance was amended and passed by the mayor and council, giving respondent until December 1, 1948, and requiring it to commence construction on that date in conformity with such plans. At the same meeting, it appropriated the sum of $199,792.34 for payment of the city's estimated share of the cost of such construction.

On December 2, 1948, the city, at respondent's request, sent it detailed information with regard to the water table and substrata. Reply thereto was received on December 10, 1948, requesting further time to ascertain costs. However, three days preceding such reply, counsel for respondent wrote its chief engineer that it was respondent's intention to write the city "in further attempt to postpone a final showdown," and informed the engineer, "we must immediately prepare to defend litigation which may be commenced at any time." Therein, such engineer was directed to prepare "preliminary plans and estimate of costs * * * both as to an underpass and an overpass at this point" which "must be in enough detail to withstand cross-examination" since "The defense to such a suit must be founded in the contention that the city is acting in an arbitrary and unreasonable manner, and of course such an argument finds part of its foundation in the tremendous cost of the structures." Such a defense, however, was not presented in the case at bar.

Plans theretofore made by the city and forwarded to respondent were enclosed in that letter, from which engineers of respondent made detailed "preliminary plans and estimate of costs" as requested by its attorney. Thereafter, respondent made no attempt to commence construction, and this action was filed.

As early as Chicago, B. & Q. R. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. S. R. 557, affirmed 170 U. S. 57, 18 S. Ct. 513, 42 L. Ed. 948, involving a similar statute, it was concluded that the statutory duty of a railroad company or companies to construct or repair viaducts within a city was enforceable by mandamus.

This court has also consistently adhered to the general rule that a mandamus proceeding is an action at law. State ex rel. Miller v. Lancaster County, 13 Neb. 223, 13 N. W. 212; State v. Affholder, 44 Neb. 497, 62 N. W. 871; State v. Farrington, 86 Neb. 653, 126 N. W. 91. In the light thereof, it was held in State ex rel. Lackey v. Gering & Ft. Laramie Irrigation District, 129 Neb. 48, 260 N. W. 568, followed in State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26 that: "Finding of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless it is clearly wrong." As stated in another way, it was held in State ex rel. McMillin v. Boyd County, 130 Neb. 898, 266 N. W. 764, also a mandamus proceeding, that: "The findings of the trial judge on a question of fact in a law action will not be disturbed by this court when supported by competent evidence."

In that connection, the effect of the trial court's decree was to find, as a matter of fact, that the plans, exhibit 28, prepared by relator's engineer, sufficiently disclosed the width, height, strength, and materials of the underpass and approaches thereto, as approved and required by the mayor and city council. Contrary to respondent's contention, an examination of the record discloses that the trial court's finding in that regard was not only amply sustained by competent evidence adduced by relator, but was also supported by admissions made by respondent's witnesses with relation to its plans, exhibit 34, made from exhibit 28, both of which were offered in evidence by relator.

Respondent argued that the proceedings were fatally defective because relator had no board of public works, therefore no such board required the width, height, strength, and materials of the underpass as set forth in section 16-657, R. S. 1943. We conclude that the contention has no merit.

In the first place, the express power and authority to require respondent to erect, construct, reconstruct, com-

plete, and keep in repair such underpass was vested in the mayor and council and the electorate of the city by section 16-656, R. S. 1943, which prescribed the conditions precedent necessary to exercise such power and authority. On the other hand, the manner of its construction was left with respondent, although the city, for the benefit of the public, was authorized by section 16-657, R. S. 1943, to require and approve not only the material of which it was to be constructed, such as wood, steel, or concrete, but also its width, height, and strength. The statute involved did not require the city to furnish the railroad company any plans as a condition precedent to the exercise of the power. In any event, the city did authoritatively furnish respondent sufficient plans. The trial court in effect so found, and we sustain that conclusion.

In In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85, this court said: "It has been aptly stated that 'In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.' 59 C. J., Statutes, § 594, p. 993. It has also been stated with authority that 'Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.' 59 C. J., Statutes, § 595, p. 995. See, also, Drainage District No. 1 of Lincoln County v. Kirk-

patrick-Pettis Co., 140 Neb. 530, 300 N. W. 582."

The history of the statutes involved may be readily traced, and it will not be repeated here. It is sufficient to say that obviously, as provided by section 16-325, R. S. 1943, now section 16-325, R. S. Supp., 1949, section 16-253, R. S. 1943, section 16-320, R. S. 1943, and other related sections, the appointment of a board of public works by a city of the first class is entirely optional, and when such board is so established it is completely subordinate to the mayor and council, and required to perform only such duties in the manner and form as may be required and approved by the mayor and council, who in any event possess all legislatively delegated powers. In the absence of such a board the mayor and council, with assistance of the city engineer, have full power and authority.

The last sentence of section 16-657, R. S. 1943, provided: "The width, height, and strength of any such viaduct and the approaches thereto, and the material thereof, shall be as required by the board of public works, *and* as may be approved by the mayor and council." (Italics supplied.) If the appointment of a board of public works is optional, and we so hold, then the material part of the foregoing sentence should be and is construed to provide: shall be as required by the board of public works, *or* as may be approved by the mayor and council.

In that regard, it was held in State ex rel. Spillman v. Brictson Mfg. Co., 114 Neb. 341, 207 N. W. 664, 44 A. L. R. 1172: "Courts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive." That rule has application and is controlling here. To hold otherwise would give validity to an absurdity which the Legislature never intended.

Respondent argued that there was a material variance between the command of the ordinance imposing the duty attempted to be enforced and the command of the

alternative writ, together with a further variance between both of such commands and that found in the judgment allowing the peremptory writ, which variance was allegedly fatal to relator's action. We conclude that the contention has no merit.

The basis for the contention was that the ordinance referred to plans then on file with the *city clerk,* while the alternative writ referred to plans then on file in the office of the *city engineer,* and that the judgment allowing and ordering issuance of a peremptory writ as prayed, commanded respondent "to commence the construction of the underpass proper and the approaches proper thereto, said approaches not to exceed 800 feet in length, in accordance with the plans introduced in evidence in this cause, Exhibit No. 28, on or before the first day of September, 1949."

In that connection, it will be noted that exhibit 28 was concededly the plans referred to in the ordinance, which plans concededly were and had been on file with the council and the city clerk since September 3, 1947, five copies of which had been at one time or another furnished respondent. No contention is or could be logically made that they were not the same plans.

Relator's petition, motion, and affidavit show exactly what plans were referred to, and referred to them specifically as having been filed in the office of the city clerk. Respondent, in its answer to the alternative writ, without objection to its form, admitted that such plans were prepared as alleged, and that the ordinance heretofore referred to was introduced and prepared as alleged. The entire case was tried upon the theory that exhibit 28 was such plans and no peremptory writ has ever been issued because it was stayed by respondents.

Doubtless, under the circumstances, the purported variance was at most a stenographic or clerical error, and immaterial. As stated in 38 C. J., Mandamus, § 712, p. 932: "However, even where this strict rule prevails, mere verbal and immaterial variances between the two

writs will be disregarded. * * * It is said that in those states where either by statute or by the prevailing rules of practice the right of amendment of pleadings has been extended to writs of mandamus, the practice now is to direct the mandate of the alternative writ to be so amended as to conform to the command of the peremptory writ."

Section 25-2164, R. R. S. 1943, specifically provides: "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action."

In that regard, it was said in State v. Karr, 64 Neb. 514, 90 N. W. 298: "No doubt the particular thing commanded by the peremptory writ must be found in 'a similar form' in the alternative writ; that is, nothing can be contained in the peremptory writ that is not embraced in the alternative writ. The liberal rules of amendments provided by the Code apply to this proceeding. If the relators are entitled to the thing commanded in the alternative writ, no doubt verbal inaccuracies in the writ might be amended to conform to the proofs." See, also, Kas v. State, 63 Neb. 581, 88 N. W. 776; Steidl v. State, 63 Neb. 695, 88 N. W. 853.

The foregoing rules control defendant's contention. Respondent was not actually misled to its prejudice in maintaining its defense to the material issues raised by relator's pleadings, which stated a cause of action. An amendment to the order for, or to the alternative writ itself, could not materially change respondent's defense already made as if so amended. Therefore, in conformity with section 25-852, R. R. S. 1943, they will be treated here as amended to conform to the proof, by changing the word "engineer" therein to "clerk"

with directions that the peremptory writ shall issue in conformity therewith.

There remains for decision respondent's primary contention that the enactment of Chapter 28, Laws 1949, effective April 30, 1949, was a bar to maintenance of this action. We conclude that the contention has no merit.

In that regard, the question of whether or not the Legislature had the power and authority to enact such legislation is not presented. We may assume for the purpose of argument only that it did have such power and authority. We may even assume for the purpose of argument only that it could have made such legislation operative retrospectively and could have provided that the general saving clause, section 49-301, R. S. 1943, should have no application. This is true because the act itself did neither the one nor the other.

This court only recently reaffirmed the rule that: "A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550. Neither the title nor the act itself, nor any other related statute contains any provision, express or implied, from which this court could conclude that the Legislature intended the act to operate either retrospectively or abrogate the general saving clause.

The general saving clause statute, section 49-301, R. S. 1943, was passed in 1873. See General Statutes of 1873, p. 1056.

Bennet v. Hargus, 1 Neb. 419, relied upon by respondent, was decided in 1859, but did not appear in the Nebraska Reports until 1871. Therein it was held that: "A right of action or remedy, founded solely upon a statute or a suit to enforce such remedy, not prosecuted to judgment, is determined by the repeal of the statute." That holding, however, as hereinafter ob-

served, was abrogated in all material respects by enactment of the general saving clause.

Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854, decided in 1894, followed and reaffirmed Bennet v. Hargus, *supra,* in spite of and without mentioning the general saving clause statute then in full force and effect.

Thereafter followed Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469; Thompson v. West, 59 Neb. 677, 82 N. W. 13, 49 L. R. A. 337; and Hanscom v. Meyer, 61 Neb. 798, 86 N. W. 381, all of which took cognizance of, discussed, and applied the general saving clause statute.

The last-cited opinion, after quoting such statute, said: "The repealing act of the sections mentioned is general in its terms and contains nothing to indicate any legislative intent other than that the general section governing repeals, just quoted, should apply with the same force it possesses in relation to any other repealed statute. A general saving clause regarding repealed statutes is by the authorities held to apply as though it was expressly incorporated in the repealing act, and this view of its effect has heretofore been announced by this court in the case of Kleckner v. Turk, 45 Nebr., 176, 195, where it is observed * * *: 'The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed, or causes of action not in suit, that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891, which repealed sections 136 and 139, that it was not the purpose of the legislature that such pending actions and those accrued, but not in suit, should be preserved,' citing Gilleland v. Schuyler, 9 Kan., 569; State v. Boyle, 10 Kan., 113. Sutherland on Statutory Construction states the rule as follows: 'The legislature has the power to pass a general saving statute, which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the in-

tention of the legislature that such rights and remedies should be saved. Though one legislature cannot bind future legislatures, and each can make its laws prevail against any that exist, and its intention in that regard will be law; yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view.' Sutherland, Statutory Construction, sec. 226, and cases cited. In section 167 it is observed by the same author: 'The effect of repeal upon inchoate rights, upon offenses and upon incomplete proceedings may be avoided by a saving clause providing that it shall not affect such rights, prosecutions for such offenses, or such proceedings, or by a general statute for that purpose. Such general statutes have been enacted in nearly all of the states as well as by congress.' In Thompson v. West, 59 Nebr., 677, recently decided in this court, it is held first: 'In the absence of a general saving clause, the repeal of a statute will not affect a suit previously brought to enforce a right founded thereon or accrued thereunder.' "

In Lower v. State, 109 Neb. 590, 191 N. W. 674, this court said: "However, we do not find it necessary to decide that question in view of the provisions * * * cited by the attorney general, commonly known as the 'general saving clause act.' " The opinion then quoted such statute, and said: "The same question that is before us arose in Michigan where a criminal statute was repealed, as in the present case, without an express saving clause. But that state has a general saving clause statute similar to ours, and, as in our statute, the word 'actions' is used without any qualifying words. The court there held that if the legislature did not intend that the word 'actions' should be used in its broad sense, so as to include both civil and criminal actions, it would have used other restrictive expressions, such as 'civil actions' or 'actions for damages,' and that, having failed to do so, it plainly appeared that it was the legislative

intention to include both civil and criminal actions within the purview of the statute. In re Adler, 171 Mich. 263.

"The word 'actions,' in a legal sense, has been defined as 'a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Webster's New International Dictionary.

"It will, of course, be presumed that the legislature knew that section 3097 (now section 49-301, R. S. 1943) was and had been a part of the substantive law of the state almost 50 years when the 1921 act was adopted. It goes without saying that, if it had not been for the general saving clause statute, the legislature would in all probability have incorporated such a clause in the new act when the section in question was repealed."

In State ex rel. Spillman v. Security State Bank, 116 Neb. 223, 216 N. W. 803, this court said: "Further, section 39, ch. 191, Laws 1923, involved in this case, was repealed, without a saving clause, by section 18, ch. 30, Laws 1925, which became effective April 1st of that year. However, such repeal did not affect the matters involved herein, as section 3097, Comp. St. 1922 (which section took effect February 21, 1873, after Bennet v. Hargus, 1 Neb. 419, was decided) provides: * * *." The opinion then quoted the statute, and said: "This section was construed by us in Lower v. State, 109 Neb. 590, wherein we gave it a *literal* interpretation. It follows that our holding in Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 175, filed June 6, 1894, in so far as the same conflicts with our conclusion herein, and with Lower v. State, *supra,* is overruled." (Italics supplied.) See, also, Arnold v. Hawley, 128 Neb. 766, 260 N. W. 284.

City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, and City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777, relied upon by respondent, are not controlling here. The title of Chapter 88, Laws 1935, p. 284, the act involved in those cases, read in part: "to provide that the general saving clause of

the statutes of Nebraska, Section 49-301, Compiled Statutes of Nebraska, 1929, shall not apply to this act; to repeal said original section, and to declare an emergency."

The body of such act also read in part: "Provided, further, that the general saving clause of the statutes of Nebraska, Section 49-301, Compiled Statutes of Nebraska, 1929, shall not apply to preserve to any municipality or governmental subdivision any right which such municipality or governmental subdivision may have had or claimed with respect to said moneys collected in counties under township organization as a county road levy and which have not heretofore been paid to such municipality or governmental subdivision, and provided further that the provisions of this section as amended shall take effect from and after its passage and approval, and shall be held and taken to apply to any case now pending and in which judgment has not become final in a court of last resort and to any case hereafter brought in any court in this state."

The primary question raised and affirmatively answered in those two cases was whether or not legislation so providing was constitutional. The act involved in the case at bar contained no such provisions. Therefore, as heretofore observed, the question presented here is not what the Legislature could lawfully do but rather what it did do.

The opinion in City of Beatrice v. Gage County, *supra,* at page 854, cited and quoted from Bennet v. Hargus, *supra,* simply to illustrate the applicable rule and conclusion to be reached in those cases wherein no comprehensive saving clause appeared in the repealing act itself, and there was no general saving clause statute existent, or by analogy, wherein there was such a statute, but the repealing act itself expressly provided that a general saving clause statute such as our own should not apply.

Insofar as applicable here, section 49-301, R. S. 1943, is all-inclusive and thus controlling. Relator's rights and cause of action matured and accrued, and this action was

brought and pending long before Chapter 28, Laws 1949, was enacted repealing sections 16-656 and 16-657, R. S. 1943. There was no express abrogation therein of the general saving clause and the repeal without such abrogation did not affect the case at bar. State ex rel. Cleveland Ry. Co. v. Atkinson, 138 Ohio St. 157, 34 N. E. 2d 233; Lincoln County v. Oneida County, 80 Wis. 267, 50 N. W. 344.

People ex rel. City of Buffalo v. New York Central & Hudson River R. R. Co., 156 N. Y. 570, 51 N. E. 312, parallels the case at bar upon the foregoing question presented. There is a difference in the wording of the two general saving clause statutes, but in all material respects one is as all-inclusive as the other upon all future legislation. Relator therein brought mandamus against respondent under the provisions of an 1853 act to require respondent to cause a street to be taken across its tracks. While that action was pending, the Legislature repealed the statute. Respondent contended that such repeal barred the proceeding because there was no saving clause in the repealing act. Relator argued, as in the case at bar, that by virtue of the general saving clause statute the act of 1853 was not repealed but continued in full force and effect so far as that proceeding was concerned. The court sustained that contention, saying: "These provisions are general in character and apply to all future legislation."

Thereafter, in People ex rel. City of Niagara Falls v. New York Central & Hudson River R. R. Co., 158 N. Y. 410, 53 N. E. 166, dealing with a converse situation, the court said: "We held in People ex rel. City of Buffalo v. New York Central & Hudson R. R. R. Co., (156 N. Y. 570) that the effect of the provisions of section 31 of the Statutory Construction Law (Laws of 1892, chap. 677) is to preserve a proceeding pending in a court to compel a railroad to take a street across its tracks after the preliminary steps have been taken as provided by chapter 62 of the Laws of 1853, notwithstanding the re-

peal of such act by chapter 754 of the Laws of 1897. In that case the city of Buffalo had not only acquired the right to compel the railroad to take a street across its tracks, but it had also instituted proceedings by mandamus to effectuate that result before the act of 1897 went into operation, and the right to prosecute a proceeding thus commenced to final effect, notwithstanding the repeal of the statute authorizing it, is preserved by the section of the Statutory Construction Law to which we have referred.

"This case presents an entirely different situation; for when the act of 1897 took effect, this relator had not instituted a proceeding by mandamus to compel defendants to carry the street over its tracks; indeed, it had not even acquired the right to institute such a proceeding."

In the light of the foregoing, this court will not by judicial interpretation conclude that the Legislature intended in the act involved to abrogate the operation of section 49-301, R. S. 1943.

Respondent argued that sections 17 and 18 of Chapter 28, Laws 1949, were special saving clauses which nullified or made inoperative the general saving clause by reason of the construction doctrine of expressio unius est exclusio alterius.

We conclude that the contention has no merit because sections 17 and 18 were not saving clauses in any sense as generally understood. A saving clause is a restriction in a repealing act, which is legislatively intended to save "pending actions founded" on the statute repealed, and "causes of action not in suit that accrued prior to any such repeal." § 49-301, R. S. 1943.

On the other hand, as stated in 59 C. J., Statutes, § 638, p. 1087: "A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation of it, as by extending it to cases not

intended by the legislature to be brought within its purview. The proviso is generally introduced by the word 'provided,' but its existence and effect are to be determined rather by its matter and substance than by its form; * * *."

Section 17, and section 18 as well, upon which respondent relies, were simply special provisos and nothing more. We must assume that the Legislature was familiar with the purposes and provisions of the general saving clause statute. Admittedly, as disclosed by respondent's reply brief, the Legislature knew about the situation in Grand Island, and the pendency of this litigation, yet it passed the act without any mention of the general saving clause statute. The legislative intent is clear. This court cannot abrogate the general saving clause statute by judicial fiat.

Other propositions of law presented in the briefs require no discussion.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

HENRY MULDER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

42 N. W. 2d 858

Filed June 8, 1950. No. 32747.

1. **Evidence.** 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.
2. ———. 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.
3. **Trial.** In passing upon the validity of part of an instruction, it must be considered not only in the light of all the language

used in the particular instruction of which it is a part, but also all other instructions given by the trial court.

4. ———. In the absence of requested instructions upon the subject, it is not error for a trial court in a criminal case to fail to instruct upon lesser included offenses.
5. ———. Where misconduct of a prosecutor in argument has not violated the fundamental rights of a defendant, the error is ordinarily cured by timely objection which is sustained, with instructions for the jury to disregard the statement.
6. **Trial: Appeal and Error.** Affidavits used in the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error.

ERROR to the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

Herbert W. Baird, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

CHAPPELL, J.

An information charged that plaintiff in error, hereinafter called defendant, committed an assault with intent to do great bodily injury. Upon a plea of not guilty he was tried to a jury and found guilty as charged. The trial court overruled his motion for new trial and sentenced him to imprisonment for a year in the penitentiary.

Thereupon defendant prosecuted error to this court, assigning substantially that the trial court prejudicially erred: (1) In receiving in evidence, over objections of defendant, photographs of complainant which reflected his disabled condition after the alleged assault; (2) in giving instruction No. 10; (3) in failing, upon its own motion, to instruct upon the lesser offenses included in the crime charged; and (4) that there was prejudicial and incurable misconduct by the county attorney in argument to the jury. We conclude that the assignments have no merit.

Defendant conceded the sufficiency of the evidence to sustain the verdict and it will not be recited herein except insofar as may be necessary to clarify disposition of errors assigned.

Over general objections, rather gruesome photographs of complainant, taken by police officers almost immediately after the assault, were received in evidence. They concededly reflected complainant's then physical appearance, injuries, and disabilities. Numerous State witnesses, including complainant and his physician, as stated in defendant's brief, "testified to these injuries and described them in clarifying detail." Complainant's wife described his injuries as she observed them, and referred to the photographs to clarify her testimony.

An examination of the record discloses that ample foundation was laid for admission of the photographs, and the gravity of complainant's injuries resulting from the alleged assault was a material element or controverted issue in the State's case to establish defendant's intent to do great bodily injury.

In Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873, this court held: "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.

"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." See, also, Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109. We conclude that the first assignment of error has no merit.

Without citation of any supporting authority, defendant quoted from only a part of a sentence in instruction No. 10, and therefrom argued that the instruction was prejudicially erroneous. It is elementary that in passing upon the validity of part of an instruction, it must be

considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court. In doing so, we conclude that the instruction was not in any manner prejudicially erroneous. To quote its provisions at length herein would serve no purpose.

No instructions were given by the trial court upon the lesser included offenses of assault, or assault and battery. None were requested by defendant. Concededly the rule applicable in this jurisdiction is that in a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define or instruct upon lesser offenses included in the crime charged, unless requested so to do. Barr v. State, 45 Neb. 458, 63 N. W. 856; Curtis v. State, 97 Neb. 397, 150 N. W. 264; Haynes v. State, 137 Neb. 69, 288 N. W. 382; Guerin v. State, 138 Neb. 724, 295 N. W. 274.

In other words, in the absence of requested instructions upon the subject, it is not error for a trial court, in a criminal case, to fail to instruct upon lesser included offenses. However, defendant argued that this court should change the rule. He suggested no logical reason for so doing, and we have found none. We therefore adhere to the rule, and conclude that the third assignment of error has no merit.

Finally, we turn to defendant's contention that there was prejudicial and incurable misconduct by the county attorney in arguing to the jury the possibility of an offense other than the one charged, by saying in effect that defendant was the luckiest man in the world that complainant did not die, and in arguing matters of punishment by saying in effect that the jury should not worry about the sentence because the court had the power to parole defendant.

With regard to the first purported statement, concededly defendant's objection thereto was sustained and the jury was told to disregard it, thereby correcting the error, since it could not be said to have violated the

fundamental rights of defendant. Argabright v. State, 62 Neb. 402, 87 N. W. 146; Swartz v. State, 118 Neb. 591, 225 N. W. 766. No objection whatever was made by defendant to the latter more flagrant statement during the trial.

On the other hand, as shown by the transcript, both such matters of alleged misconduct were factually urged by affidavit filed in support of defendant's motion for new trial. However, such affidavit was never offered in evidence and does not appear in the bill of exceptions. The alleged misconduct of a county attorney may be sustained by affidavits. § 29-2102, R. R. S. 1943. Nevertheless, it is of no avail to attach the affidavits to a motion for a new trial made a part of the transcript. They must be offered and received in evidence to support the contention, and as such made a part of the bill of exceptions.

Wright v. State, 45 Neb. 44, 63 N. W. 147, presented a situation comparable with that at bar. In that opinion it was said: "It is the settled rule of this court that affidavits used on the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error." See, also, Connolly v. State, 74 Neb. 340, 104 N. W. 754; 24 C. J. S., Criminal Law, § 1686, p. 339. The rule has application in this case, and the fourth assignment of error has no merit.

For the reasons heretofore stated, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

GILBERT J. NICKERSON, APPELLEE, v. ELLEN LOUISE NICKERSON, APPELLANT.

42 N. W. 2d 861

Filed June 8, 1950. No. 32788.

1. **Appeal and Error: Divorce.** An appeal lodged in this court

from a decree rendered in a divorce action brings the case here for trial de novo.

2. **Divorce.** In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.
3. **Divorce: Attorney and Client.** The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed.

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

Fitzgerald, Tesar & Welch, and *H. G. Wellensiek,* for appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

WENKE, J.

This is a divorce action commenced in the district court for Douglas County by Gilbert J. Nickerson against Ellen Louise Nickerson. The court granted defendant a divorce on her cross-petition and awarded her permanent alimony. She filed a motion for new trial and from the overruling thereof appealed. Plaintiff has cross-appealed.

We shall refer herein to the parties as they appeared in the original action.

By her appeal defendant questions the adequacy of the alimony awarded her and also claims the court abused its discretion in taxing her with her own attorney fees and costs. By his cross-appeal plaintiff questions the correctness of the trial court's granting defendant a divorce on her cross-petition, contending that it should have been granted to him.

An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo. § 25-1925, R. R. S. 1943; Westphalen v. Westphalen, 115 Neb. 217, 212 N. W. 429; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808; Peterson v. Peterson, *ante* p. 571, 41 N. W. 2d 847.

The evidence in the record establishes that the plaintiff was guilty of such conduct toward the defendant as constitutes extreme cruelty within the intent and meaning of our statute. To relate the facts in this opinion which constitute such conduct would serve no useful purpose. We are satisfied that the decree granting defendant a divorce on her cross-petition should be affirmed.

The trial court awarded defendant alimony, referred to in the decree as a property settlement, in the sum of $7,000. She was also given a 30-day option to take the furniture, fixtures, and supplies in the home of the parties in lieu of $2,000 thereof. That is, either take $7,000 or $5,000 and the furniture, fixtures, and supplies in the home, except such items as are strictly personal to the plaintiff.

In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and

their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just. Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625; Stefan v. Stefan, *ante* p. 23, 39 N. W. 2d 918; Holmes v. Holmes, *ante* p. 556, 41 N. W. 2d 919; Peterson v. Peterson, *supra.*

Prior to their marriage the plaintiff and defendant lived in Nebraska, she with her folks in Shelton and he with his folks in Omaha. They were married on January 24, 1942, at San Luis Obispo, California, he being in the armed forces at the time and stationed there. They lived there until he left the states, which was about three months after their marriage. She then returned to Shelton and lived with her folks. While at home she worked as secretary for her father in the bank of which he was in charge.

Plaintiff returned from the service in the fore part of October 1945. About the time of his return his father bought and gave him a residence property located at 1202 South 52d Street in Omaha. While plaintiff was in the service defendant received his allotment from the government. These monthly allotment payments she saved and they totaled $2,064.37. She also saved $1,246.68 from her salary while working in the bank. With these funds, and with gifts from both his and her parents, they furnished the home which his father had given him and started housekeeping therein in the latter part of November or the first part of December 1945.

The evidence shows he is a fine young man with good habits and willing to work. At the time of the trial he was working for Byron-Reed Company of Omaha at a salary of $275 a month. It also shows that she was a

fine young woman and an excellent housekeeper. However, he suddenly decided to leave her and advised her of that fact and then left. At her request and solicitation there was an attempted reconciliation. It was of very short duration. He again left and this action followed immediately. It was commenced on March 3, 1949.

Since he left and instituted this action defendant has continued to occupy the home. During the pendency of this action plaintiff has been paying her $100 a month for her support. There are no children as the result of the marriage. Defendant is a well-educated young woman with past secretarial experience but has not worked in that capacity since they took up housekeeping in the latter part of 1945. Both are comparatively young people. At the time of the trial in July 1949 plaintiff was 30 years of age and defendant 27. Both are in good health although affected somewhat by the occasion of their difficulties.

At the time of the trial the property of the parties consisted of the home, given plaintiff by his father, which the evidence shows was reasonably worth $10,000; the furniture and furnishings in the home, the source of which has already been stated, which both parties agree was reasonably worth $1,500; equities in land contracts and mortgages in the sum of $10,680.78, about half the purchase price of which was furnished by plaintiff and half by plaintiff's father; 12 shares of stock in the Byron-Reed Company reasonably worth $1,800, the accumulation by stock dividend of three shares given them as a wedding present by a friend; bonds in the sum of $500; and cash in the sum of $90.83.

From all of these relevant facts and circumstances we find $7,000 to be a just and equitable award of permanent alimony. We also find that it is desirable to give defendant an option to take the furniture, fixtures, and supplies in the home at a fixed figure. However, we think that figure should be what both parties agree is the value thereof, that is, $1,500.

The court directed defendant to pay her attorneys the sum of $500 and that each party was to pay his or her own costs. There is no authority for a court, in a divorce action, to fix the amount of the attorney fees each party is to pay their respective attorneys. Section 42-308, R. S. 1943, does provide: "In every suit brought either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, * * *."

"The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed." Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390.

We find the sum of $500 to be a reasonable and proper amount for attorneys' fee in the district court but that it should have been charged to the plaintiff along with all the other costs incurred in the district court. As to all costs in this court we find they should be charged to plaintiff, including a fee of $250 allowed defendant for services of her attorneys in this court.

We therefore modify the decree of the trial court accordingly. The cause is remanded to the district court with directions to enter its decree accordingly, that is, to change the amount defendant is to have deducted from her allowance of alimony in case she elects to take the furniture, fixtures, and supplies in the home from $2,000 to $1,500, thus leaving a balance of $5,500, and to charge to the plaintiff the attorneys' fee of $500, allowed defendant in that court, together with all the costs incurred therein. The decree, when so modified, is affirmed.

AFFIRMED AS MODIFIED.

JOSEPH MILLER, APPELLEE, V. EDWARD SCHLERETH, APPELLANT.

42 N. W. 2d 865

Filed June 8, 1950. No. 32800.

1. **Judgments.** Material questions which were in issue in a former appeal and which were therein judicially determined are conclusively settled thereby and such determination becomes the law of the case. They may not again be litigated in a subsequent appeal in the same action.
2. **Workmen's Compensation.** In a workmen's compensation case the right of recovery is statutory and unless the case has been brought within the conditions imposed by the statute it must fail.
3. ———. Whether an accident arises out of and in the course of employment must be determined by the facts of each case.
4. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.

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

Bayard T. Clark and *John C. Mullen,* for appellant.

Jean B. Cain and *Paul P. Chaney,* for appellee.

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

WENKE, J.

This is a workmen's compensation case tried in the district court for Richardson County pursuant to our mandate in Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497. The court entered a decree in favor of the claimant, Joseph Miller, finding he was totally and permanently disabled and fixing his benefit payments accordingly. His motion for a new trial having been overruled the employer, Edward Schlereth, has appealed.

Appellant discusses issues which were disposed of by our opinion on the first appeal of the case. See Miller v. Schlereth, *supra.*

Material questions which were in issue in a former

appeal and which were therein judicially determined are conclusively settled thereby and such determination becomes the law of the case. They may not again be litigated in a subsequent appeal in the same action. Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660; Blum v. Truelsen, 139 Neb. 282, 297 N. W. 136; Kuhns v. Live Stock National Bank, 138 Neb. 797, 295 N. W. 818; Smith v. Neufeld, 61 Neb. 699, 85 N. W. 898.

As stated in Anheuser-Busch Brewery Assn. v. Hier, 61 Neb. 582, 85 N. W. 832: "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated."

Appellant contends that appellee's physical condition is not due to any injuries he may have suffered in the accident he had on October 2, 1945, and further, that the accident did not arise out of and in the course of his employment with the appellant.

The burden is upon the appellee to establish the facts which will entitle him to recover. As stated in Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102: "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."

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

On October 2, 1945, the day of the accident, appellee lived at Falls City, Nebraska. He was married and had a family of six children, the oldest then being 22 years of age and the youngest 6. He was about 48 years of age at the time and worked as a laborer. On that day he was employed as such by the appellant. Appellant

had for many years been engaged in the business of handling junk, hides, and furs at Falls City.

On October 2, 1945, appellee, together with Jess Kerns and Elmer Schlereth, hauled a truckload of second-hand material from the basement of Gerhardt's, a business place in Falls City, to the junk yards of appellant. During the afternoon appellee was engaged in dismantling the material obtained from Gerhardt's, which included old radios, washing machines, and two electric refrigerators. The dismantling of this material was a part of his work.

While engaged in dismantling or taking apart a gas tank unit of one of the refrigerators it exploded. The top or lid thereof hit him in the chin and the gas therefrom got in his eyes and lungs. This happened about 4 p. m. He was immediately taken to a hospital. He stayed there for three weeks and a day. He has needed medical care ever since.

As a result of the accident scar tissue formed on the cornea of his eyes and, as a result thereof, he became practically blind. His lungs were also affected by the gas and are getting progressively worse. Because of these injuries, which the evidence shows resulted directly from the accident, the appellee has become totally and permanently disabled. The evidence also establishes that the accident arose out of and in the course of appellee's employment with the appellant.

Appellant complains that the trial judge was prejudiced. This contention is without merit.

The trial court allowed appellee an attorney's fee of $750. The allowance thereof was proper as section 48-125, R. S. 1943, provides, so far as here material, as follows: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme

Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

Nor do we think, considering the nature of the litigation that has been involved in order to obtain the decree, that it is excessive. We also find, since we are affirming the decree of the district court, that appellee should be allowed a reasonable attorney's fee in this court in the sum of $250. These attorney fees are to be taxed to the appellant as costs.

Appellee's counsel admit they have an agreement with their client as to attorney fees which they entered into pursuant to the provisions of section 48-108, R. S. 1943. It is not our intention that the attorney fees herein approved for appellee, both in the district and in this court, shall inure to appellee's counsel in addition to those provided for in said agreement but that they shall apply thereon. That is, the total received by them shall not be in excess of whichever is the greater.

Other errors are assigned but not discussed. Therefore we do not find it necessary to discuss them.

The decree of the district court is affirmed.

AFFIRMED.

W. L. PHILLIPS SONS, A COPARTNERSHIP, APPELLANT, V. NORTHWEST REALTY COMPANY, A CORPORATION, ET AL., APPELLEES.

43 N. W. 2d 6

Filed June 15, 1950. No. 32736.

1. **Contracts.** The rule that where a contract is ambiguous as to the rate of compensation it will be interpreted most strongly against the owner in favor of a contractor has no application where there is an absence of proof of the contractor's theory of compensation and that of the owner is definite and unequivocal.
2. ———. The rule that where the terms of a contract are uncertain the interpretation which evolves the more reasonable

and probable contract should be adopted has no application where there is an absence of proof of the terms of a contract by one party and clear and definite proof of its terms by the other party.

3. **Appeal and Error.** The law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion, but the court will, in determining the weight of the evidence, where there is an irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

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

Crosby & Crosby, for appellant.

Van Pelt, Marti & O'Gara, Cline, Williams & Wright, and *Dent & Plummer,* for appellees.

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

YEAGER, J.

This is an action by W. L. Phillips Sons, a copartnership, plaintiff and appellant, against Northwest Realty Company, a corporation; Henry M. Jones and Mary M. Jones, his wife; Alfonso W. Shilling and Flora M. Shilling, his wife; John N. Collier and Helen L. Collier, his wife; James S. Hatcher and Audrey F. Hatcher, his wife; Amos A. King and Martha A. King, his wife; Charles Brittan; The First Trust Company of Lincoln, Nebraska, a corporation; and Kenneth J. Brownell, doing business as North Platte Electric Company, defendants, to foreclose a mechanic's lien filed against five lots and the houses thereon which houses had been constructed by the plaintiff under contract with the defendant Northwest Realty Company while it was owner of the lots. This defendant will be hereinafter referred to as the company. Charles Brittan was made a defendant as president of the company. Kenneth J. Brownell was made a defendant as the holder of a subcontractor's lien.

The First Trust Company of Lincoln was made a defendant as the holder of mortgages on the houses. The other defendants are subsequent purchasers of the lots and houses.

By its petition the plaintiff alleged that on or about September 14, 1946, it entered into a verbal contract with the defendant corporation to construct for it five dwelling houses on five parcels of real estate in North Platte, Nebraska, the description of which is not important here, and to furnish all materials and labor therefor for which the company agreed to pay a fixed amount of $40,712.45; that it completed the houses; and that a proper lien was filed setting forth the items of cost of construction chargeable against the company and the payments made under the contract. After deducting the payments made it claimed that there was a balance due and owing of $12,459.85 with interest from May 15, 1948. For this amount it prayed judgment and for foreclosure of its lien.

To the petition of the plaintiff the company and Charles Brittan filed an answer and cross-petition. Following a general denial they admitted the corporate existence and capacity of the company and the filing of the lien. They alleged that all acts in the premises by the defendant Brittan were on behalf of the company and involved no personal liability on the part of this defendant. They admitted that an oral contract was entered into with plaintiff for the construction of the five dwelling houses whereby the plaintiff was to furnish all materials and labor but that the agreed price therefor was $26,650 which was later increased by ten percent or to $29,315, all of which, after taking credit for payments made and payments made on behalf of plaintiff, has been paid except $498.90 which was tendered to the plaintiff. The cross-petition requires no consideration.

The defendant Kenneth J. Brownell filed an answer and cross-petition the substance of which was a declara-

tion of his lien and a prayer for foreclosure. As to it there is no controversy.

The First Trust Company of Lincoln filed an answer setting up its mortgages. Concerning these there is no controversy.

The remaining defendants filed an answer and concerning their rights no controversy arises in this action.

A trial was had to the court which resulted in findings and decree that the plaintiff had not sustained proof of the agreement alleged in its petition and in effect that the company had sustained the agreement alleged in its answer. It was found and decreed that the company was indebted to plaintiff in the sum of $1,062.40 with interest at six percent from May 15, 1948, from which accumulated amount the company was entitled to deduct $636.49 in favor of Kenneth J. Brownell, leaving a net amount of $518.47 with interest at six percent from date of decree due and owing to plaintiff from the company.

The decree in its other aspects has no pertinence to the questions which are presented for determination on appeal.

A motion for new trial was duly filed and at the same time a motion for leave to amend the petition so as to set forth a cause of action grounded on quantum meruit rather than on the contract alleged in the petition. Both motions were overruled. From the decree, the order overruling the motion for new trial, and the order overruling the motion for leave to amend, the plaintiff has appealed.

The plaintiff, as grounds for reversal, has set forth eight assignments of error.

As we interpret them the first two amount to a contention that the evidence preponderantly supports the cause of action set forth in the petition and that the court erred in not so finding.

Again as we interpret them, the third, fifth, sixth, and seventh amount to a contention that assuming that the evidence does not sustain the cause of action set forth

in the petition it preponderantly sustains a cause of action in quantum meruit for the amount sued for and the court, either on the petition without amendment or with amendment which was requested after trial, should have rendered judgment in plaintiff's favor accordingly.

The fourth is a contention that the court erred in holding that the burden was not on the company to prove the verbal contract alleged in the answer.

The eighth relates to the admissibility of evidence.

The fourth assignment will be considered first. It has been pointed out herein that the plaintiff in its petition relied on what it alleged was an oral agreement between the parties. The company relied on an oral agreement which with regard to service to be rendered was like that alleged by plaintiff but entirely different as to payment for the service. The particular complaint here is that the court erred in holding that the burden was not on the company to prove the verbal contract alleged in the answer.

Whether or not the legal proposition presented here is sound we are not called upon to determine. No such pronouncement by the trial court has been preserved in the record for presentation here on review. At no place in the decree does the court refer to the burden of any party. The effect of the conclusions arrived at as disclosed by the decree is that the cause of action of plaintiff was not sustained but that the contentions of the company in its answer found sufficient support in the evidence. The decree was entered, if we are to consider the record only, as we must, on that basis.

As to the first two assignments, the evidence does not sustain the agreement claimed by the plaintiff as literally alleged. The agreement as literally alleged recites a consideration of $40,712.45. Proof of this has not been attempted. The proof adduced by plaintiff supports an oral agreement by the terms of which the plaintiff agreed to build the five houses and furnish all materials and labor for which he was to receive the equivalent of what the

Federal Housing Administration would allow as a final loan on the completed buildings plus about ten percent of such final loans. The pertinent testimony in this regard is found in questions Nos. 420, 421, 422, 423, 431, 432, 433, and answers. This, according to Delmond J. Phillips who acted for and on behalf of the plaintiff, constituted the contract for the construction of these houses. He, however, in other testimony referred to later in this opinion expressly repudiated the theory advanced here that he contracted with reference to a Federal Housing Administration loan.

The petition was based on a theory other and different from that of the mechanic's lien and also that of the contract testified to by the witness Delmond J. Phillips. The mechanic's lien and the contract testified to were based on the theory that there was a contract which required the defendant corporation to reimburse plaintiff for all material and labor and to pay in addition ten percent of some amount.

The record is devoid of proof on the part of plaintiff of any definite contractual basis for the construction of the houses or for a lien except the one testified to by Delmond J. Phillips to which attention has already been directed, that is for cost of material and labor plus ten percent of a final Federal Housing Administration loan.

By the mechanic's lien the plaintiff claimed a right of recovery for material and labor, $34,899.95; social security, job insurance, compensation, etc., $1,804.88; use of small tools, $306.49; and contractor's fee, $3,701.13; total, $40,712.45, less payments of $27,592.60, leaving a balance due of $13,119.85. The item of $3,701.13 is ten percent of the total of the other items. It is this item together with the other items which are charged as materials and labor used in the construction of the buildings for which plaintiff seeks to recover under the terms of the contract alleged.

As to the contract concerning which the plaintiff offered proof, that is that it should receive an amount

equivalent to a maximum final Federal Housing Administration loan plus ten percent, no evidence was adduced to inform the court as to the amount which would be recoverable on that theory. It is true that plaintiff sought to introduce evidence as to loan limits on the properties. This was not to sustain the theory of this claimed contract but to discredit the theory of the company that there was another and different contract.

As to the theory of the mechanic's lien, which was the substantial theory on which the case was presented to the district court and on which it is being presented here, there is no evidence whatever to give it a contractual basis.

The two assignments of error being discussed relate to alleged error of the court in relation to proof of the cause of action set forth in the petition. The assignments must fail since it becomes clear from what has been said that there has been a total failure of proof of right of recovery on any contractual theory or basis.

The plaintiff contends that in the circumstances there is ambiguity and uncertainty as to the arrangement between the two parties directly involved and in consequence it is entitled to the benefit of the following rules:

Where a contract is ambiguous as to the rate of compensation it will be interpreted most strongly against the owner in favor of the contractor. 17 C. J. S., Contracts, § 367, p. 825.

Where the terms of a contract are uncertain the interpretation which evolves the more reasonable and probable contract should be adopted. 17 C. J. S., Contracts, § 319, p. 739.

While these may be salutary rules in appropriate situations they can have no application in this situation. Here we are considering a case wherein on one theory there is no proof of a right of recovery and on another theory there is an absence of proof of a contract.

It follows then that if the plaintiff is to recover for

any amount on any theory of its own it must be on quantum meruit. Whether or not a recovery may be had on quantum meruit depends upon whether or not by its own conduct it has been prevented from pursuing that theory, and whether or not the company has as a defense to any cause of action sustained proof of a definite agreement under which the buildings were to be constructed and for which they were to be paid.

On the trial of the case the theory of quantum meruit was not presented to the court. The court had only the contractual theories of the plaintiff which have been considered and discussed neither of which, as has been pointed out, was sustained, and the contractual theory of the defendant which the trial court by its decree concluded had been sustained.

If, therefore, this being an action in equity, this court considering the case de novo arrives at the same conclusion as did the trial court in this respect it will be unnecessary to consider either the propriety of the proposed amendment embodying the theory of quantum meruit or the evidence which plaintiff contends supports the theory. We therefore proceed to a consideration of the evidence adduced in support of this theory.

Charles Brittan who handled the transactions on behalf of the company gave testimony as to the agreement between the parties. The pertinent parts will be set forth in summary rather than by quotation. He said that he first talked to Delmond J. Phillips about the construction of the houses in May or June 1946 for about 30 minutes. The plans were submitted at that time. At that time no figures were submitted. About three weeks later he talked to Phillips again and asked him what he figured he could build the houses for and Phillips told him $26,650. He then asked when building could start and Phillips said soon and that he thought he could have them finished about Christmas. Brittan told him to go ahead. As a part of the conversation it was agreed that plaintiff was to furnish all material and labor in-

cluding plumbing. He stated that nothing was said about percentage relating to insurance, overhead, or a contractor's fee over cost. He said that there was no further conversation relative to cost until November 24, 1946, when Phillips told him that he doubted if he could build the houses for the agreed amount of $26,650. He then informed Phillips that they were going to get some raises in amount of loans and had gotten some raises and asked Phillips if he could build them for ten percent additional whereupon Phillips replied that he could. Brittan then in agreement with plaintiff added ten percent to the original cost and made a contemporaneous memorandum thereof which memorandum was adduced in evidence. Thus the company contends that the total consideration ultimately agreed upon for the construction of the houses was $29,315.

Corroborative of the contention of the company is a check made payable to the plaintiff in the amount of $2,931.50 which was cashed without protest at the time or later which had on its face the following: "10% payment on 5 houses at N. Platte." This amount was exactly ten percent of the final amount which the company says was agreed upon.

On August 2, 1947, Brittan wrote Phillips the following letter:

"I today received second payment on the houses, and I took up your note at the Guardian State Bank and am enclosing them herewith to you, marked paid. Here is the way I have this, and if it isn't correct let me know. Total amount due you $29,315.00 Amount due you for ½ payment $14,657.50. We paid you $2931.50, leaving a balance due you on ½ $11,726. We paid you in checks $3000.00. We paid the bank $8064.90, making a total payment of $11064.90. This deducted from the amount due you, make the payment due you for ½ $661.10, check enclosed herewith. This makes now paid to you a total of $14,657.50, or ½ contract price.

"I hope you are getting along all right on these houses,

and that we can soon get them lined up for the final inspection and approval. We have been at them over a year now, and should try to finish them up. I think I may be down that way sometime in the next week."

It will be observed that in this letter specific attention is directed to the adjusted contract price and an adjustment and payment made at that time on the basis of one-half of that amount. Particular attention is directed to the following sentence in the letter: "Here is the way I have this, and if it isn't correct let me know." The accompanying check bore on its face the following: "bal. due on 5 houses N.P. for ½ contract Price." The check was cashed and no protest as to it or as to the letter was made to Brittan.

In opposition to this is the evidence of Delmond J. Phillips already outlined and what amounts to a denial of that part of the testimony of the company which it contends proved the agreement under which the buildings were to be constructed, that is that it was agreed that they were to be constructed for $29,315.

From an examination of the record it becomes apparent that the evidence of the company is sufficient as proof of the agreement contended for by it. Unless it be said that the evidence of the company is incapable of belief in this respect the necessary conclusion on the record is that such evidence preponderates in its favor when weighed against that of the plaintiff.

There is nothing apparent on the face of the record to indicate that this evidence is incapable of belief. Also it is apparent that the trial court accepted this evidence as true.

It appears therefore that in the light of the record and the following expression of this court in Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355, the necessary conclusion here is that the evidence establishes the agreement pleaded in the answer and that the plaintiff is entitled to recover only that which is found to be due, if anything, under that agreement:

"While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying."

This conclusion together with the observations on which it is based disposes of the third, fourth, fifth, sixth, and seventh assignments of error.

The remaining assignment relates to the rejection of evidence offered to show that the company obtained increased loans based on representations that costs of labor and material had gone up. Just how such evidence was material to any issuable matter before the court is not apparent. This is especially true since it clearly appears from the testimony of Delmond J. Phillips that the plaintiff did not enter into any agreement or perform any service which depended upon the amount of any loan. The testimony referred to is the following: "Q Now, did you agree to take these houses and build them for 10% more than F. H. A. would loan? A No. I told Mr. Brittan that I couldn't take them on a lump sum basis. Q Did you agree to build them with reference to the F. H. A. loan in any manner? A No. Q Then regardless of how much money was ever borrowed on these houses, that wasn't to enter into what you were to be paid—is that your understanding of it? A No; I was to make a little money out of the job. Q What was borrowed on them wasn't to enter into what you were to be paid? A No."

The trial court did not err in rejecting the evidence offered in this respect by the plaintiff.

There is no objection by any party that the decree is in anywise improper if the position taken by the company is to be sustained.

The errors assigned are without merit, and accordingly the decree of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF ILSE REED. ILSE REED, APPELLANT, v. LESLIE W. REED ET AL., APPELLEES.

43 N. W. 2d 161

Filed June 15, 1950. No. 32761.

1. **Habeas Corpus.** In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
2. ———. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court.
3. **Parent and Child.** In a controversy for the custody of an infant of tender years, the court will consider the best interest of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.
4. ———. The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents, but has its origin in the protection that is due to the incompetent or helpless.
5. **Infants: Domicile.** The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.
6. **Divorce: Habeas Corpus.** A decree of divorce of a court of another jurisdiction, awarding the custody of the child of the parties to one of them, rendered while the child is in this jurisdiction, does not preclude the courts here from determining the question of the custody of the child; and in a habeas corpus proceeding brought to enforce such foreign decree, the full faith and credit clause of the Constitution is not involved.

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

James I. Shamberg and *Joseph H. Glass,* for appellant.

Davis & Vogeltanz, for appellees.

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

MESSMORE, J.

This is a habeas corpus action brought by the petitioner in the district court for Sherman County to obtain the custody of a minor daughter from the respondents, the child's father and paternal grandparents. The basis for her cause is that the minor child is unlawfully and forcibly detained by the respondents in violation of a decree of the district court for Wyandotte County, Kansas. The petitioner was granted a decree of divorce from her husband Leslie W. Reed on her answer and cross-petition to a supplemental petition filed by him in the district court for Wyandotte County, Kansas. The decree found the petitioner to be a fit and proper person to have the custody of the minor child. The husband, represented by counsel who appeared before the district court for Wyandotte County, Kansas, orally objected to the jurisdiction of the court over the custody of the child. No evidence was offered in the husband's behalf. Decree was rendered as heretofore stated.

The respondents' defense to the instant action may be summarized as follows: That the decree of divorce awarding petitioner the custody of the minor child involved in this proceeding was void for want of jurisdiction over the child; that the best interests and welfare of the child required the custody of the child to be awarded to the respondent father or one or both of the other respondents; and that the relief prayed for by the petitioner should be denied.

Hearing was had before the district court. Thereafter the trial judge rendered a decree finding generally in

favor of the respondents and against the petitioner, awarded the custody of the minor child to its father, Leslie W. Reed, and dismissed petitioner's application for the writ. Upon the overruling of the motion for new trial, the petitioner appeals.

The petitioner, as appellant in this court, assigns as error that the decree of the district court is contrary to law and to the evidence. In support of this contention the appellant objected to and moved to strike all testimony and evidence relating to the fitness and suitability of the appellant to have the care, control, and custody of the minor child, prior to the judgment and divorce decree in the district court for Wyandotte County, Kansas, rendered June 21, 1948, awarding the custody of the child to the appellant, on the grounds of res adjudicata, and that the decree so awarded by the district court for Wyandotte County, Kansas, should be given full faith and credit as provided for by Article IV, section 1, of the Constitution of the United States.

Apparently the appellant relies on the following authorities which, for convenience, we are numbering separately:

1. A decree awarding custody of a child, or modifying a prior decree in this respect, will be considered binding and recognizable in another state even though the child was physically outside of the state. See, Annotation in 9 A. L. R. 2d 454, cases cited under part V, section 11, Jurisdiction of foreign court (validity of prior foreign award); Wear v. Wear, 130 Kan. 205, 285 P. 606, 72 A. L. R. 425.

2. Where the custody of a child has been awarded to one parent by a court having jurisdiction so to do, the right of this parent will be recognized by other states. The facts upon which the award was based have become res adjudicata, and cannot be reexamined in the second state. This rule affords exactly the same recognition to a decree of a foreign court that would be afforded to an adjudication within the forum, for it is well established

that a decree awarding custody may be modified or changed by the court making it as circumstances may warrant. See, Kruse v. Kruse, 150 Kan. 946, 96 P. 2d 849; Burrowes v. Burrowes, 78 F. 2d 742; Wear v. Wear, *supra;* 25 Am. Jur., Habeas Corpus, § 82, p. 206. This estoppel extends only to conditions which existed at the time of the original decree. The second court may examine any facts which have occurred since the original decree which throw light on the fitness of the parents to have the custody of the child. Kruse v. Kruse, *supra;* Wear v. Wear, *supra;* Annotation in 9 A. L. R. 2d 454.

3. The changed conditions must be substantial, and only a change in circumstances and conditions materially affecting the existing welfare of the minor, occurring since the former adjudication, may properly become the subject of inquiry and the basis of a change in the award of the minor's custody. In addition to the authorities above cited, see: Evens v. Keller, 35 N. M. 659, 6 P. 2d 200; Albright v. Albright, 45 N. M. 302, 115 P. 2d 59; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. N. S. 988; Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E 587; Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860.

4. As conventionally stated, the rule has been that the most the full faith and credit clause can require is that the prior ruling shall be deemed conclusive in the absence of an asserted change in circumstances. See, Yarborough v. Yarborough, 290 U. S. 202, 54 S. Ct. 181, 189, note 19, 78 L. Ed. 269, 90 A. L. R. 924; Calkins v. Calkins, 217 Ala. 378, 115 So. 866.

In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. See, 39 C. J. S., Habeas Corpus, § 41, p. 568; Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388.

After the court's jurisdiction has been invoked by

habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. See Hanson v. Hanson, *supra.*

This jurisdiction, in habeas corpus actions instituted in the courts of this state for the custody of a minor child, has for a period of more than 60 years adhered to the following rule. In Sturtevant v. State, 15 Neb. 459, 19 N. W. 617, 48 Am. R. 349, it was held: "In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child." In the opinion the court said: "But rather, taking our statute as a general guide, we will look to the particular necessities of the case and give our special attention to the best interests of the child about whom this unfortunate controversy has arisen." See, also, Giles v. Giles, 30 Neb. 624, 46 N. W. 916; State ex rel. Filbert v. Schroeder, 37 Neb. 571, 56 N. W. 307; Schroeder v. State, 41 Neb. 745, 60 N. W. 89; Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500; State v. Porter, 78 Neb. 811, 112 N. W. 286; State ex rel. Britton v. Bryant, 95 Neb. 129, 145 N. W. 266; State ex rel. Edmisten v. Highberger, 103 Neb. 258, 170 N. W. 906; In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294; Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617; Hanson v. Hanson, *supra.*

It will be observed that in this jurisdiction, in a controversy for the custody of an infant of tender years the court will consider the best interests of the child and will make such order for its custody as will be for its welfare without reference to the wishes of the parties.

The welfare of the child is the primary consideration to which all other questions must yield, and the court must consider, not only the spiritual and temporal welfare, but the minor's further education, training, and morals of the contesting parties, or for that matter some other party to whom custody of the child might be awarded fit and suitable to best take care of the child.

With further reference to the appellant's contention that evidence relating to the fitness and suitability of the appellant to have the care, control, and custody of the minor child here involved should have been stricken upon motion made by the appellant appearing in the record, the authorities supporting the appellant's contention in such respect hold generally, in considering the question of changed circumstances since the award of custody of a child by an order or decree of another state, the court before which the changed conditions affecting the welfare of the child is in issue with respect to awarding custody may consider the evidence of events which occurred prior to the adjudication, notwithstanding that it is conclusive as regards the facts and circumstances which existed at the time of its rendition, for the reason that unless the original circumstances are before the court it cannot be told whether or not those circumstances have changed. See Sheehy v. Sheehy, 88 N. H. 223, 186 A. 1, 107 A. L. R. 635.

As heretofore stated, in cases of this nature the rule has long been firmly established in this state that in questions of custody, the primary consideration is the present and prospective welfare of the child. On this issue the field of inquiry is necessarily broad. Our courts are appealed to in the usual way by habeas corpus to interpose in respect to the custody of the child, and the matter is to be determined in accordance with the rules and policy of this state in such matters. This state is constructively a party to this proceeding and to all of like character within its jurisdiction. Where the child is within the jurisdiction of this state and is before the court in a controversy as to its custody, such as the present action, the court is required to inquire and may investigate the parents' past conduct as a guide to what may be expected in the future, and this investigation into the past is limited, not only by the date of some prior decree, but by the application of the broader general rule of remoteness.

The court in determining the custody of a child may consider the character and resources of the parents, their fitness, temperamental and otherwise, for the trust of guardianship, and the advantages which may be expected to accrue to the child in the event that the custody is given to either of them. See, Sheehy v. Sheehy, *supra,* and the afore-cited cases from this jurisdiction.

We conclude the trial court did not err in the overruling of the appellant's motion to strike the evidence touching upon the fitness and suitability of the appellant to have the care, control, and custody of the minor child before the court.

In furtherance of what we have said with regard to the custody of a minor child in a habeas corpus proceeding in this state, we deem the following authorities applicable to this appeal. As stated in Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937: "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless (Woodworth v. Spring, 4 Allen, 321, 323; White v. White, 77 N. H. 26; Hanrahan v. Sears, 72 N. H. 71, 72; Matter of Hubbard, 82 N. Y. 90, 93). For this, the residence of the child suffices though the domicile be elsewhere (Matter of Hubbard, supra). But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status * * * Griffin v. Griffin, 95 Oreg. 78; Lanning v. Gregory, 100 Tex. 310; Blackinton v. Blackinton, 141 Mass. 432, 436; Matter of Standish, 197 App. Div. 176)." See, also, Steele v. Steele, 152 Miss. 365, 118 So. 721.

"The jurisdiction of a State to regulate the custody of infants found within its territory does not depend

upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the State suffices even though the domicile may be in another jurisdiction." The People v. Wingate, 376 Ill. 244, 33 N. E. 2d 467.

Decrees entered in divorce actions disposing of the custody of a child then outside the jurisdiction of the court where the decree is entered are generally held not to be entitled to full faith and credit in a proceeding involving the child's custody in an action in a state other than where the decree was entered. See The People v. Wingate, *supra.* See, also, Kline v. Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. R. 47; Harris v. Harris, 115 N. C. 587, 20 S. E. 187, 40 Am. S. R. 471; Weber v. Redding, 200 Ind. 448, 163 N. E. 269.

The fact that custody of a minor child has been awarded in an action in another state does not prevent inquiry into the question in a proper action by a court subsequently acquiring jurisdiction of the parties. The full faith and credit clause of the Constitution of the United States does not prevent such inquiry. But this is not to say that a prior and valid order as to custody of minors is not in full faith and effect until lawfully modified or superseded in a subsequent action. See, In re Bort, 25 Kan. 308, 37 Am. R. 255; Annotations in 72 A. L. R. 441, and 116 A. L. R. 1299; Yarborough v. Yarborough, *supra.* See, also, Elliott v. Elliott, 181 Ga. 545, 182 S. E. 845; Milner v. Gatlin, *supra;* Steele v. Steele, *supra;* In re Alderman, *supra;* Griffin v. Griffin, 95 Or. 78, 187 P. 598; Seeley v. Seeley, 30 App. Cas. D. C. 191; Linch v. Harden, 26 Wyo. 47, 176 P. 156; Gilman v. Morgan, 158 Fla. 605, 29 So. 2d 372; Re Application of Ashley, 113 Or. 43, 231 P. 153; Barnes v. Lee, 128 Or. 655, 275 P. 661; White v. White, 160 Kan. 32, 159 P. 2d 461.

To give full faith and credit to the decree of the Wyan-

dotte County district court in awarding the custody of the child to its mother in the case before us would be contrary to the laws and public policy of this state where the enforcement thereof is sought. There is a further reason that full faith and credit should not be given the Kansas decree awarding the custody of the child to its mother. The best interests of the child and its future welfare under all circumstances is the vital question in the case and is superior to all other considerations where the question is raised upon a writ of habeas corpus.

We conclude that we are not bound by the decree of the Wyandotte County, Kansas, district court in awarding the custody of the minor child to its mother. The record discloses that prior to the time of the instituting of divorce proceedings in the Wyandotte County district court of Kansas, the minor child here involved was in this state under the custody and care of its father and paternal grandparents, and has since remained in the same manner, and the district court for Sherman County, under the law and public policy of this state, had jurisdiction to determine into whose custody the child would be placed in proceedings such as habeas corpus.

This brings us to a summarization of the evidence upon which the trial court based its judgment.

For convenience we will refer to the appellant as Ilse Reed, or Ilse, and to the respondent-appellee Leslie W. Reed as Leslie Reed, or Leslie.

The record discloses that the appellant was born in Berlin, Germany, November 21, 1919. She became a graduate nurse. In December of 1938, to escape living under the Hitler regime, she went to Shanghai, China, arriving in January 1939, and renounced her German citizenship at the end of 1939. Her first husband died in September 1945, of malnutrition. She was later interned by the armed forces of Japan when they took over the city, and subsequently she was liberated by the allied forces. She met Leslie W. Reed during the

holiday season of 1945-1946, when he was connected with the armed forces of the United States and stationed at Shanghai. They were married at Shanghai on March 1, 1946. They arrived in the United States May 7, 1946, and Leslie Reed was separated from the Army May 22, 1946.

Leslie is a high school graduate, and before entering the military service engaged in farming. He informed Ilse that he was a farm boy and without much financial support. After his discharge from the Army he and Ilse went to his parents' home near North Loup where they remained from about June 1, 1946, until sometime in August 1946, when they returned to Kansas City, Kansas. They resided there with Leslie's aunt until December 15, 1946, when they moved into a residence that Leslie was to help remodel for the privilege of becoming a tenant. The minor child involved in these proceedings, Joyce Aileen Reed, was born October 12, 1946, in Kansas City. Both parties were employed, and the child was left in the care of a nurse during the day. Leslie testified that he took care of the child most of the time at night.

The record discloses that the appellant had love and affection for the child on occasions when friends and company were present, and on other occasions she would lay the child down and pay no further attention to it. There is also evidence that the manner in which she fed the child was improper, and by her conduct and manner in caring for the child, the child became nervous and irritable. Ilse wanted Leslie to take the child to his parents as she wanted rest. Argument ensued between the parties and as a consequence they went to his home. This was in the latter part of October 1947. After arriving at the home of Leslie's parents, Ilse and the child stayed and Leslie returned to Kansas City to resume work and pay up some accumulated bills so he could return to North Loup where he wanted to make his home. During his absence Ilse called him

on several occasions, and on Thanksgiving Day, November 27, 1947, she returned to Kansas City, as she stated, to study for her citizenship. She left the child in the care of Leslie's parents.

Several witnesses acquainted with the respondents Oliver, Freda Mae, and Leslie Reed who had visited in their home or who had observed the child since it has resided in their home, testified that the child was calm, healthy, happy, and properly cared for. The appellant offers no evidence to the contrary, but admits that the child is well cared for in its present home.

There is also evidence with reference to the conduct of the appellant which tends to show that she is temperamentally and emotionally unsuited and unfit to have the custody of the child at this time, which we deem unnecessary to detail.

It appears from the record that the apartment Ilse occupies in Kansas City is a small efficiency apartment. She has been employed in various vocations, was employed at the time of trial, and had the prospects of employment thereafter, and under the conditions as shown by the record she would be required to continue to work. She had made arrangements to have her mother, a seamstress, leave Germany and come to this country and reside with her. The record does not show whether or not the mother had arrived at the time of the hearing in this case. Ilse also testified that she had a lady friend who had arrived from China and lived in Kansas City, who would come to her apartment, care for and cook for the child during the day, and that she would probably be required to pay the carfare for such services. She further testified that while she had not been physically able to carry on her profession as a nurse and in addition thereto was unable legally to qualify to do so, in the event of her subsequently qualifying she proposed to resume her profession of nursing. The record does not show, and is not clear, on the qualifications of the person or persons to whom the care of

the child would be committed, or the competency of such persons in that respect.

It is true, this court in divorce cases and in habeas corpus actions has recognized that a child of tender years, in the event the mother is a fit, proper, and suitable person to have the control, care, and custody of such child, will be awarded the custody. See, Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Feather v. Feather, 112 Neb. 315, 199 N. W. 533; Hanson v. Hanson, *supra*. There must be sufficient evidence that when the custody of a child of tender years is awarded to the mother, the mother must be able to furnish a good home. Also, if there are peculiar circumstances by virtue of which the mother is unable to furnish the child a good and suitable home, and for other reasons the custody of the child should be denied the mother, such circumstances are to be taken into consideration in awarding the custody of the child. The best interests of the child and its welfare are the dominant factors in an action such as the instant case. The only evidence in this respect is that of the appellant with reference to her fitness and suitability to have the care and custody of the child, or as to the nature of the home and the care the child would receive. The child involved in this proceeding, since a trifle more than a year old, has been in the custody of its father and paternal grandparents. The child was more than two and one-half years old at the time of the hearing, and knew no other home. The trial court had all of the evidence before it and obviously took into consideration the circumstances surrounding the custody of the child and determined that the best interests and welfare of the child required that the care, control, and custody of it be awarded to its father, Leslie W. Reed. A review of the record shows the evidence sufficient to support the decree and judgment of the trial court.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

AGAPITA GALLEGOS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

43 N. W. 2d 1

Filed June 15, 1950. No. 32781.

1. **Criminal Law: Homicide.** Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another.
2. **Evidence: Criminal Law.** A conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the defendant that a crime has been committed.
3. ———: ———. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.
4. ———: ———. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
5. ———: ———. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury.

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

Mothersead, Wright & Simmons, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

WENKE, J.

A jury in the district court for Scotts Bluff County found the defendant, Agapita Gallegos, guilty of manslaughter. His motion for a new trial was overruled and he was sentenced to serve ten years in the penitentiary. To review the record of his conviction and sentence the defendant has instituted this error proceeding.

For convenience we shall refer to the plaintiff in error as the defendant.

Defendant contends that the corpus delicti, which means that a crime has actually been committed, has not been established. Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. 23 C. J. S., Criminal Law, § 916, p. 181. "Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another." Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539.

The confessions of the defendant, the first on September 23, 1949, and the second on October 1, 1949, fully detail the crime and its commission. Defendant therein confessed that in the early part of October 1948, while Mrs. Genovesa Carrillo was living with him and his two children in a tenant house located on a farm near Minatare in Scotts Bluff County, Nebraska, he got into an argument with her; that the argument started while they were getting ready to retire; that while arguing he picked up a piece of stove wood; that he hit her with this piece of wood, the blow being on the head and just behind the left ear; that when struck she fell to the floor in a sort of dazed condition but continued to talk; that while she was on the floor he hit her twice with the same piece of wood and in about the same place; that some blood flowed from her head and formed a spot on the floor; that she died from the blows; that this all took place in the east room of the two-room tenant house in which they were living; that he buried her the next day, just

after dark, at a point east of the tenant house; that he dug the grave north and south, placing her with her head to the north; that he wrapped her body in a blanket and placed a handkerchief in her mouth to keep the dirt from getting in; and that she had on one of his overalls and a lady's shirt, but no shoes.

We said in Sullivan v. State, 58 Neb. 796, 79 N. W. 721, that: "The uniform doctrine of the American courts is that a conviction for felony will not be sustained when the only evidence of guilt is the extra-judicial confession of the defendant that a crime has been committed. His confession may be sufficient to prove his own connection with the alleged criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime."

As stated in 23 C. J. S., Criminal Law, § 916, p. 182: "The corpus delicti cannot be presumed, but must be established by evidence sufficient to show the commission of a crime. Extrajudicial admissions or confessions of the accused are not alone sufficient to establish the corpus delicti, but ordinarily may be considered in connection with other evidence in the establishment thereof."

See, also, Cryderman v. State, 101 Neb. 85, 161 N. W. 1045; Egbert v. State, 113 Neb. 790, 205 N. W. 252; Limmerick v. State, 120 Neb. 558, 234 N. W. 98; Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627; Clark v. State, 151 Neb. 348, 37 N. W. 2d 601; Reyes v. State, *supra.*

However, as stated in 23 C. J. S., Criminal Law, § 916, p. 184: "* * * although there is authority which holds that the corpus delicti must be established by independent evidence alone and the extrajudicial statements, admissions, or confession of accused cannot be used in aid of the establishment of any necessary element thereof, as a general rule it is not required that the corpus delicti shall be established by independent evidence alone. Extrajudicial admissions, declarations, or confessions of accused may be considered in connection with other in-

dependent evidence in determining whether the corpus delicti is sufficiently proved; and it is sufficient when the evidence independent of the confession, together with the confession, establishes the corpus delicti. It is not required that the suppletory evidence be conclusive in its character; and slighter evidence of the corpus delicti is sufficient for its establishment where the commission of the crime has been confessed by accused; but it is necessary that there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce a conviction of guilt."

That we have followed this general rule is evidenced by many holdings of this court. After stating the foregoing, quoted from Sullivan v. State, *supra,* the court therein went on to say: "But while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. Discussing this question Nelson, C. J., in People v. Badgley, 16 Wend. (N. Y.) 53, said: 'Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient.' The doctrine of this case was distinctly approved in People v. Jaehne, 103 N. Y. 182, where it was held that equivocal circumstance offered as proof of the corpus delicti, might be interpreted in the light of the prisoner's confession and the fact under investigation be thus given a criminal aspect. In State v. Hall, 31 W. Va. 505, the court, considering this question, said: 'We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed.' It has often been held in cases where there was no direct proof of the crime, as in prosecutions for adultery and trials for

homicide where the body of the deceased had not been found, that the defendant's extrajudicial confession, in connection with other incriminating circumstances, would warrant a conviction. (Ryan v. State, 100 Ala. 94; State v. Lamb, 28 Mo. 218; State v. Patterson, 73 Mo. 695; Commonwealth v. McCann, 97 Mass. 580; United States v. Williams, 1 Cliff. (U. S.) 20; United States v. Gilbert, 2 Sum. (U. S.) 19; Commonwealth v. Tarr, 4 Allen (Mass.) 315.)"

"The rule that the corpus delicti cannot be proved by the confession of the defendant is true as a general proposition, yet confessions or admissions may be considered in connection with the other evidence to establish the corpus delicti. It is not necessary to prove the corpus delicti by evidence entirely independent and exclusive of the confession or admissions. Groover v. State, 82 Fla. 427; 26 A. L. R. 380; 17 R. C. L. 64, sec. 69." Limmerick v. State, *supra.*

This principle has often been reaffirmed by this court. See, Egbert v. State, *supra;* Whomble v. State, *supra;* Clark v. State, *supra.*

Other than the confessions there is evidence that defendant, an illiterate Mexican beet field worker about 38 years of age, returned to Nebraska from Mexico shortly after Christmas 1947; that he had with him at that time his son, about 10 years of age, his daughter, about 13 years of age, and a Mexican woman between 35 and 40 years of age by the name of Mrs. Genovesa Carrillo, who he held out as his wife; that in April 1948 he obtained employment with a farmer by the name of Carl Mowry who lived about 15 miles northeast of Scottsbluff and moved into a tenant house on his farm; that defendant and Mrs. Carrillo were having trouble between themselves because she didn't always stay with him but moved around and lived with others; that because of this condition Carl Mowry made them leave his farm; that in September 1948 he obtained employment with Alex Bauer to help harvest beets;

that the Alex Bauer farm is located 6 miles east and ¾ mile north of Scottsbluff in Scotts Bluff County, Nebraska; that in the first part of October 1948 defendant, with his children and this woman, then moved into a two-room tenant house on the Bauer farm; that beginning sometime in October Bauer did not see the woman around the place; that about the middle of the month, when defendant and his two children were in the field, Bauer asked defendant where she was; that defendant waved his hands in a manner which Bauer took to mean that she was gone; that thereafter Bauer did not see her again; that defendant, with his two children, stayed at the Bauer place until the last of October 1948; that thereafter defendant, with his two children, left the Bauer place and worked for Paul Franco for about a week; and that shortly thereafter they, defendant and his two children, left for Mexico.

Mrs. Genovesa Carrillo is described as a Mexican woman about 35 to 40 years of age, 5 feet 1 or 2 inches in height, and weighing about 140 pounds. That she was fairly light complected for a woman of that nationality and had dark brown wavy hair of average length.

There is also evidence that on September 23, 1949, the authorities of Scotts Bluff County went out to the farm located 6 miles east and ¾ mile north of Scottsbluff and at a point east of the two-room tenant house, which defendant had occupied while working for Alex Bauer, they discovered a grave; that they did not remove the body from the grave on that day but came back on the 24th and then uncovered it and caused it to be lifted therefrom; that the body was buried with its head to the north; that it apparently had been wrapped in a blanket when buried; that it was in such condition that it could be removed from the grave in one piece; that the hair of the corpse was dark brown, wavy, and longer than that of a man; that it appeared to be the hair of a woman; that the body had on overalls but no

shoes; that it appeared to be the body of a lady of Mexican or Spanish origin; and that there was observed a dark brown stain or spot on the floor in the east room of the tenant house at the place where defendant pointed out she had fallen when hit and where she had bled.

We think this evidence, together with the confessions, is sufficient to establish the corpus delicti and that defendant was guilty, beyond a reasonable doubt, of the crime of which he has been convicted and for which he has been sentenced.

Defendant also contends that the court erred in admitting in evidence the confessions of September 23, 1949, and October 1, 1949, already referred to, and the evidence of his admission of guilt made at the preliminary hearing on the complaint had in the county court for Scotts Bluff County on October 13, 1949. This contention is based on the fact that they were involuntarily made. If that be true the contention is well made but, on the contrary, if they were voluntarily made it needs no citation of authorities to state that they were admissible and properly for consideration by the jury.

As to the determination of that issue we said in Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283, that:

"In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.

"The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still

a question of fact to be determined by the jury."

We shall not set out all the detailed facts as they relate to this issue as the record is voluminous and it would serve no useful purpose. Chronologically the evidence discloses the defendant was arrested by the authorities of El Paso County, Texas, on Monday, September 19, 1949, while he was working on a farm near Ysleta, Texas. At that time he gave an assumed name and professed not to know anyone by the name of Agapita Gallegos. He was taken into custody because of information given the authorities by the Immigration Department. Defendant was committed to the jail at El Paso and questioned on that day and again on the following day, Tuesday, September 20, 1949. He was again questioned on Thursday, September 22, 1949. At that time he admitted his identity and that he had previously been in Nebraska. He was again questioned on Friday, September 23, 1949. At that time he made the confession which has already been referred to. On September 27, 1949, defendant was turned over to the authorities of Scotts Bluff County, Nebraska, he having voluntarily signed a waiver of extradition. He was thereupon returned to Nebraska, arriving in the early morning of September 29, 1949. He was immediately committed to the jail at Scottsbluff under a complaint filed against him on September 24, 1949, charging him with first degree murder.

During the time defendant was held in jail at El Paso no charges were filed against him in any state court nor was he brought before any magistrate. He was not represented by counsel and had not asked to be.

After defendant was returned to Nebraska the authorities of Scotts Bluff County talked to him on October 1, 1949, and he made the confession already referred to as having been made on that date. He was held in jail at Scottsbluff until October 13, 1949, before being brought before the county judge for preliminary hearing. The complaint of first degree murder filed against

him on September 24, 1949, was dismissed on October 12, 1949, and a new complaint charging him with second degree murder was filed against him on that date. The latter is the complaint on which preliminary hearing was had. Defendant was not represented by counsel at the preliminary hearing or at any time prior thereto and the record discloses that he never asked to be. However, subsequent thereto he was at all times represented by counsel appointed by the court.

While there is testimony given by the defendant from which the jury could have found that the confessions made were involuntary due to the manner in which defendant was held in confinement, the treatment received while so held, and the threats made; however, the testimony of the authorities in charge, both at El Paso and Scottsbluff, deny these facts and when their testimony is taken together with certain testimony of the defendant, it presents a factual situation from which the jury could properly find that the confessions were freely and voluntarily made. This includes the issue presented by the evidence offered as to whether or not the complaint was properly translated at the preliminary hearing so it was understood by the defendant in making his plea thereto. It also includes the question of whether or not he understood the nature or degree of the crime with which he was charged. These issues both relate themselves directly to the question of whether or not he understood what he was doing when he made his admission of guilt and consequently relate directly to whether it was voluntarily or involuntarily made.

In regard to how soon after a person is arrested he must be given a preliminary hearing we said in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641: "The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of a person, in which he must be given a hearing. The theory of the law is that he must be given a hearing

as soon as possible. A person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit."

As already stated the testimony as to what took place during the time defendant was held in custody both in the El Paso jail and that in Scottsbluff is voluminous and detailed. It sets forth all the facts as they relate to the taking of the two confessions and the admission of guilt at the preliminary hearing. This is the proper foundation for their admission. The question of whether or not the foundation laid for their admission is sufficient is, in the first instance, one of law for the court. Here the court, in the first instance, heard all of the evidence relating thereto and determined that sufficient foundation had been laid for their admission. The evidence was then presented to the jury and the question as to their character, whether voluntary or involuntary, was submitted to it by the court's instructions Nos. 12, 13, and 14. We find the facts and circumstances relating to the giving of the two confessions and the admission of guilt at the preliminary hearing justified the trial court in admitting them in evidence in the first instance and submitting their character, whether voluntary or involuntary, to the jury. See Kitts v. State, *supra*.

The defendant does not understand our language and an interpreter was always used except in those instances where the El Paso authorities were able to converse with him in his native language. The record does not sustain defendant's charge that these interpreters violated or abused the functional purpose for which they were serving. Nor was the plea entered by the defendant at the preliminary hearing in violation of or contrary to any statutory requirement relating thereto.

From the record we find the defendant had a fair trial and that the conviction and sentence should be affirmed.

AFFIRMED.

ROY G. OWENS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

43 N. W. 2d 168

Filed June 23, 1950. No. 32751.

1. **Forgery.** The signing of a fictitious name of a person to an instrument which is the subject of a forgery, with an intention to defraud, is a false and fraudulent making of such instrument, and constitutes the offense of forgery.
2. ———. Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud.
3. ———. Where the evidence establishes the forgery of a bank check, it is wholly immaterial as to whether the check was ever presented for payment or not.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

John E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for defendant in error.

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

WENKE, J.

Roy G. Owens, defendant below, was convicted by a jury in the district court for Adams County of the offense of forgery. He thereupon filed a motion for new trial and a motion in arrest of judgment. From the overruling thereof, and after being sentenced to 15 months in the penitentiary, he brings this error proceeding to review the record of his conviction and sentence. Roy G. Owens will herein be referred to as the defendant.

There is evidence in the record from which the jury could properly find that on the afternoon of Saturday, August 13, 1949, the defendant, a resident of Harvard, Nebraska, entered the store of Brach's Limited located in Hastings, Adams County, Nebraska; that he purchased a billfold for the sum of $14; that in payment thereof he gave a check in the sum of $50 drawn on the Harvard

State Bank, Harvard, Nebraska, and payable to "Brach's Ltd., Hastings, Nebr."; that he signed the name of J. W. Kirby thereto as the maker; that the name he signed thereto was not his own but fictitious; that the check was accepted by Brach's Limited; and that defendant received the billfold and $36 from Brach's Limited.

Defendant contends the evidence is insufficient to sustain his conviction because it does not show that the check was ever presented for payment to the bank on which it was drawn and by it dishonored. Assuming that the evidence is insufficient to establish this fact, a question which we need not and do not decide, the point is not well taken for section 28-601, R. R. S. 1943, under which the prosecution was brought, contains no such requirement as an essential element of the crime.

In Randolph v. State, 65 Neb. 520, 91 N. W. 356, we said: "The signing of a fictitious name of a person to an instrument which is the subject of a forgery, with an intention to defraud, is a false and fraudulent making of such instrument, and constitutes the offense of forgery."

"Our statutes, in effect, provide that forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Cooper v. State, 123 Neb. 605, 243 N. W. 837; Uerling v. State, 125 Neb. 374, 250 N. W. 243; Roush v. State, 34 Neb. 325, 51 N. W. 755." Mitchell v. State, 132 Neb. 891, 273 N. W. 806.

And in Bullington v. State, 123 Neb. 432, 243 N. W. 273, we held: " 'Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud.' 26 C. J. 974."

While the precise point here raised has apparently never been passed upon by this court it has been correctly disposed of in other jurisdictions contrary to defendant's contention.

As stated in State v. Garcia, 26 N. M. 70, 188 P. 1104: "If appellant in fact forged the name of Lucero to the

check, it was wholly immaterial as to whether it had ever been presented for payment or not."

As discussed in People v. Breuer, 15 Cal. App. 2d 745, 60 P. 2d 162: "The statute contains no requirement (as contended by appellant) that to constitute the crime of forgery it is necessary either that the check be dishonored, or that it even be 'presented to any bank for payment'. As far as that feature of the crime of forgery was concerned, it was complete at the moment the forged check was delivered by defendant to the seller of the automobile in payment thereof, provided that it was so delivered 'with intent to defraud'; and such an intent was clearly deducible from the facts to which attention hereinbefore has been directed."

Defendant contends the court erred by giving instructions Nos. 6 and 7 which, in effect, define what constitutes reasonable doubt. He bases his contention primarily upon our holdings in Cowan v. State, 22 Neb. 519, 35 N. W. 405; Carr v. State, 23 Neb. 749, 37 N. W. 630; and Childs v. State, 34 Neb. 236, 51 N. W. 837. Therein we held that it is error to charge a jury that it is a doubt for the having of which the juror can give a reason derived from the testimony.

Instructions Nos. 6 and 7, given by the court, are as follows:

"You are further instructed that the Defendant is presumed to be innocent of the offense with which he stands charged until he has by sufficient evidence been proved to be guilty and it is the duty of the Jury to give the defendant the full benefit of this presumption as evidence in his favor, and to acquit him unless the Jury from the evidence believes that he has been proven guilty in a manner and form as charged in the Information beyond a reasonable doubt. This does not mean beyond a possibility of a doubt, but as a language of the instruction expresses it, beyond a reasonable doubt."

"The Jury are instructed that a reasonable doubt within the meaning of the law is a doubt which has some rea-

son for its basis; it does not mean a doubt from mere caprice or groundless guess. A reasonable doubt is that state of mind, which after a full comparison and consideration of all the evidence, both for the state and defense, or for want of evidence on the part of the State, leaven the minds of the Jurors in that condition that they cannot truthfully say that they feel an abiding faith amounting to moral certainty, from the evidence in this case, that the defendant is guilty of the charge laid in the Information. If after a careful and impartial consideration of all the evidence in this case the Jury can truthfully say and feel that they have an abiding conviction of the guilt of the defendant, as charged in the Information and are fully satisfied of the truth of the charge, then they are satisfied beyond a reasonable doubt."

A careful study of these instructions shows they are not phrased in language like the instructions held erroneous in the foregoing cases nor in language subject to such construction. They are therefore not subject to the holdings therein. But even if they were we think, in view of our holding in Baker v. State, 109 Neb. 558, 191 N. W. 666, together with what is now section 29-2308, R. R. S. 1943, it would be harmless error.

Holdings of this court approving like or similar instructions defining reasonable doubt are numerous. For example see Turley v. State, 74 Neb. 471, 104 N. W. 934; Goemann v. State, 100 Neb. 772, 161 N. W. 421; Hiller v. State, 116 Neb. 582, 218 N. W. 386, 58 A. L. R. 1322.

What was said in Goemann v. State, *supra,* is applicable here. Therein we said: "But this court has frequently refused to reverse a judgment of the district court solely on account of an instruction worded as in the case at bar."

Defendant also complains of the court's failure to give part of his requested instruction No. 4 and instruction No. 5.

As to this contention the following from Davis v. State, 51 Neb. 301, 70 N. W. 984, is applicable: "When

complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case."

Also the following from Brice v. State, 138 Neb. 853, 295 N. W. 894: "Defendant also complains of rulings of the trial court in refusing to give a number of instructions requested by him. An examination of the record discloses that the substance of such requested instructions as were proper under the issues, the law and the evidence was given by the trial judge on his own motion. The instructions given do not as a whole contain error prejudicial to defendant. He is therefore not entitled to a reversal on account of the refusing or the giving of instructions. Samuels v. State, 101 Neb. 383, 163 N. W. 312; Forman v. State, 126 Neb. 619, 253 N. W. 898." See, Stevens v. State, 84 Neb. 759, 122 N. W. 58; Koch v. State, 130 Neb. 119, 264 N. W. 172.

For the reasons stated we find no merit in the contention of defendant that there were errors in the proceedings which resulted in his conviction and sentence. They are therefore affirmed.

AFFIRMED.

MADONNA MCNALLY, APPELLEE, V. JANE MCNALLY ET AL., APPELLANTS.

43 N. W. 2d 170

Filed June 23, 1950. No. 32772.

1. **Process: Judgments.** Under section 25-525, R. R. S. 1943, to entitle a party to open a judgment rendered against him upon service by publication, it must appear by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense.

2. **Judgments.** Section 25-2001, R. R. S. 1943, provides that a district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made for the death of one of the parties before the judgment in the action. Section 25-2008, R. R. S. 1943, provides that proceedings to vacate or modify a judgment or order for the reason above stated must be commenced within three years after the defendant has notice of the judgment.
3. ———. Section 25-2001, R. R. S. 1943, provides that a district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made for fraud practiced by the successful party in obtaining the judgment or order. Section 25-2008, R. R. S. 1943, provides that proceedings for that cause must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after removal of such disability.
4. **Judgments: New Trial.** While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. To be entitled to equitable relief in such a case, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 25-2001, R. R. S. 1943.

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

John A. Menter, William L. Walker, and *Earl Ludlam,* for appellants.

Henry W. Curtis and *Charles R. Shopp,* for appellee.

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

SIMMONS, C. J.

This is a proceeding to set aside a judgment by default and confirmation of a sale in a partition action, and to be permitted to defend. The trial court denied the application. We affirm the judgment of the trial court.

The action was originally instituted in July 1939. Madonna McNally was plaintiff. Two sisters and two brothers and their wives, and the tenants on the land were named defendants.

The petition alleged that Jane McNally, one of the defendants, held the title to the real estate in trust for herself, the plaintiff, and the other defendants, not including the tenants. Plaintiff claimed title to an undivided one-fifth interest as a devisee of a brother of defendants. Plaintiff prayed for a decree that the title was held in trust by Jane McNally for the five named persons and for a partition.

Service was had by publication upon the defendants and answer day was fixed for September 11, 1939. Personal service was had on the tenants on June 15, 1940, and answer day set for July 15, 1940.

On February 18, 1941, default was entered against each of the defendants and decree taken. The court found that Jane McNally held the property in trust for plaintiff, herself, and the three other defendants, and partition was ordered. On the same day a referee was appointed, and he reported that the premises could not be properly divided, and that the land should be sold and the proceeds divided. On the same day his report was approved and the premises were ordered sold.

On January 8, 1942, the referee filed his bond. Notice of sale was published and the property was sold on February 9, 1942, to Frank T. Hartwell. On February 16, 1942, the sale was confirmed, the deed was ordered, and the proceeds of the sale were ordered distributed. This decree was filed March 2, 1942.

The action originally was instituted by Madonna McNally. She died January 6, 1942. The defendant Jane McNally died in 1949, and Catherine McNally, another defendant, died in 1945. In 1949 the action was revived as to these defendants in the names of their heirs. Finally, when the matter came to a hearing in August 1949, it was essentially a proceeding between the defendants (as revived) and the purchaser.

This proceeding is one to set aside the decree, the sale, and the order of sale under the provisions of sections 25-525 and 25-2001 (2), (4), (6), R. R. S. 1943, and the

equitable powers of the court, for three reasons: First, there was no actual notice to the defendants of the pendency of the action in time to come in and defend; second, the plaintiff died January 6, 1942, prior to the sale and confirmation; and, third, there was constructive fraud on the part of the plaintiff in failing to give personal notice to nonresident defendants and in failing to inform the court of the death of the plaintiff prior to confirmation. We determine these contentions in the order named.

The question as to failure to receive notice in time to appear and defend was presented by motion on April 27, 1942, by the defendants Jane McNally, William McNally, and Joseph McNally and his wife. It was presented by several subsequent pleadings.

The question presented is one of fact. It is the rule that under section 25-525, R. R. S. 1943, to entitle a party to open a judgment rendered against him upon service by publication, it must appear by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Stover v. Hough, 47 Neb. 789, 66 N. W. 825.

By affidavit dated December 22, 1942, Jane McNally swore that the first notice she had of the pendency of this action was on March 3, 1942, when she received the referee's check for her distributive share. By affidavit dated April 14, 1942, William McNally denied actual notice of the pendency of the action. Joseph McNally did so by affidavit dated April 15, 1942, and Jane McNally did so by affidavit dated April 21, 1942. These affidavits were prepared by an Illinois lawyer and sent to an attorney at Grant.

The tenant testified that he gave Jane McNally notice that the property had been sold, and that he had given her no notice prior thereto.

In 1945, defendants secured a continuance in order to take their own depositions. The depositions of the three defendants were taken in January 1946. From

those depositions and other evidence the following facts appear quite certain.

The plaintiff's attorney called upon Jane McNally in Chicago before this action was brought and, among other things, told her that this action was to be brought. Jane testified as to that conversation. She further testified that she learned from friends in Cleveland (the home of the plaintiff) of the action in 1938 or 1939, and that she then "consulted a lawyer for some time" but did nothing. Joseph testified that his sister told him of the conversation with plaintiff's attorney. William testified that he first learned about the action "4 or 5 or 6 years ago" in a letter from his sister. (As pointed out, this testimony by deposition, so far as we can determine from the record, was taken not later than January 29, 1946.)

William further testified that she wrote him they were going to try to "sell her place on her" and that she got that information from Perkins County, Nebraska.

Contrary to the tenant's testimony, Jane testified that the tenant wrote her that the property was advertised for sale; that she received that notice before the property was sold and consulted a lawyer who advised her that they could not sell her property; and that she had consulted an attorney before that time. She gave this letter from the tenant to her brother Joseph. Joseph testified that he knew in 1942 that the property was up for sale; that he got that information from his sister Jane; that that knowledge came to him before he received the referee's check for his distributive share; that the letters which he took to the lawyer informed his sister that the proceeding was pending in Perkins County; and that she tried several lawyers who did not "do much." William testified that he had that knowledge before he got the referee's check for his distributive share.

So it appears from their own testimony that these moving defendants had knowledge of the pendency of this action both prior to the decree and prior to the order

of confirmation. Not only have they not sustained their burden of proof, but they have disproved their own contentions. The finding of the trial court on this phase of the case is patently correct.

The second contention is that the motion should be granted because of the death of the plaintiff prior to the date of sale and the confirmation.

The record shows that plaintiff died January 6, 1942. The first knowledge the plaintiff's resident attorney had of the death came to him in November 1942. A suggestion of death was filed February 15, 1943. A certificate of death was filed March 11, 1946, together with a motion by defendants for leave to amend so as to allege plaintiff's death as an additional reason for granting the motion to set aside the judgment and confirmation decree. It was presented by motion filed October 1, 1946. The motion to amend was granted October 21, 1946, and an amended motion was filed December 4, 1946.

Section 25-2001, R. R. S. 1943, provides that a district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made "for the death of one of the parties before the judgment in the action." Section 25-2008, R. R. S. 1943, provides that proceedings to vacate or modify a judgment or order for the reason above stated must be commenced within three years after the defendant has notice of the judgment. Clearly these defendants had notice of the judgment prior to April 27, 1942, the date when they filed their first motion to vacate and set aside. They first undertook to raise this issue in this case on March 11, 1946. More than three years having elapsed, relief on that ground must be denied.

The third contention is that there was constructive fraud on the part of plaintiff and her attorneys in failing to give personal notice to those defendants whose addresses they knew, and in failing to advise the court of the death of plaintiff before confirmation.

Section 25-2001, R. R. S. 1943, provides that a district

court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made "for fraud practiced by the successful party in obtaining the judgment or order." Section 25-2008, R. R. S. 1943, provides that proceedings for that cause must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after removal of such disability. The first mention of this contention that we find in the record is in a reply to the answer of the purchaser filed on June 17, 1949, and in an amended answer and application filed on August 12, 1949. Clearly the statute does not authorize relief on the ground so dilatorily advanced. In addition to that, it should be said that there is neither fact nor suggestion of fact in this record to sustain the contention. It has no merit.

Defendants also contend that they are entitled to equitable relief independent of the statutory provisions. We have recently restated the applicable rule: " 'While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. * * * To be entitled to equitable relief in such a case, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 25-2001, R. S. Supp., 1947.' " Nemetz v. Nemetz, *ante* p. 178, 40 N. W. 2d 685. No such showing is made. The facts in the record negative it.

The judgment of the trial court is affirmed.

AFFIRMED.

JOE A. LAW AND YALE HALPERIN, COPARTNERS DOING BUSINESS AS WHITE LINE TRANSFER COMPANY, APPELLEES, V. EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH SAM FRIEDMAN, APPELLEE.

43 N. W. 2d 188

Filed June 23, 1950. No. 32775.

1. Carriers. Merchandise in order to be regarded as merchandise in the hands of a common carrier must be received for immediate shipment and unconditionally accepted with nothing remaining to be done by the shipper to complete the shipment.
2. ———. If goods are delivered to a carrier and held at the request of or subject to the control or direction of the shipper their status is not that of goods in the hands of a common carrier.

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

Joseph H. McGroarty, for appellant.

Ephraim L. Marks, and *Shrout, Brown & Thurmond,* for appellees.

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

YEAGER, J.

This is an action which, as originally instituted, was by the plaintiffs Joe A. Law and Yale Halperin, copartners doing business as White Line Transfer Company, against Employers Mutual Casualty Company, a corporation, and Sam Friedman, defendants, to have declared, under the Declaratory Judgments Act, the liability, if any, of the defendant Employers Mutual Casualty Company on a policy of insurance issued to the plaintiffs for the loss of 93 kegs of nails belonging to the defendant Sam Friedman which were stolen from the dock of the plaintiffs and for an appropriate judgment for the value of the nails in case of a finding of liability.

The policy of insurance in question protected the plaintiffs against loss by theft of merchandise such as is

involved here while in the hands of the plaintiffs as a common carrier. The policy insured against theft from cargo or storage on docks or in warehouses for not more than 24 hours provided the merchandise was in actual transit or in other words in the hands of plaintiffs as a common carrier. Insofar as the matters herein involved are concerned there was no liability under the policy unless at the time the nails were stolen they were in the status of merchandise in the hands of plaintiffs as a common carrier. This the defendant Employers Mutual Casualty Company contends, and the plaintiffs and the defendant Sam Friedman concede the contention in their brief filed herein as follows:

"The issue on this appeal therefore narrows down to the question:

"Was the merchandise in the custody and control of the White Line Transfer Company, at the time of theft, as a common carrier, while temporarily on docks or in warehouse for a period of not exceeding 24 hours, and while in actual transit, so as to come within the specific coverage of the Marine and Cargo Theft Endorsement?"

There is no contention that there is any liability under the policy of insurance to the defendant Friedman. Apparently he was made a party on the theory that a recovery by the plaintiffs would redound to his benefit and that to join him as a party and set up his rights against the plaintiffs would have the effect of avoiding unnecessary litigation.

In any event the litigation was so conducted apparently without objection. A trial was had and the court determined that the Employers Mutual Casualty Company was liable under the policy of insurance for the loss, and judgment was rendered in favor of the defendant Sam Friedman for the value of the merchandise stolen. From the judgment the defendant Employers Mutual Casualty Company has appealed.

There are four assignments of error but their substance is found in one which the parties agree, as has already

been pointed out, contains the only question to be considered in this case. It is as follows: "The Court erred in holding that at the time and place of the theft the plaintiff was holding the cargo as a common carrier."

There is no question but that it is the rule that merchandise in order to be regarded as merchandise in the hands of a common carrier must be received for immediate shipment and unconditionally accepted with nothing remaining to be done by the shipper to complete the shipment. If goods are delivered to a carrier and held at the request of or subject to the control or direction of the shipper their status is not that of goods in the hands of a common carrier. Chicago, B. & Q. R. R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678; Burrowes v. Chicago, B. & Q. Ry. Co., 85 Neb. 497, 123 N. W. 1028, 34 L. R. A. N. S. 220; Barron v. Eldredge, 100 Mass. 455, 1 Am. R. 126; Watts v. Boston & Lowell R. R. Corporation, 106 Mass. 466; St. Louis, A. & T. H. R. R. Co. v. Montgomery, 39 Ill. 335; Schmidt v. Chicago & N. W. Ry. Co., 90 Wis. 504, 63 N. W. 1057; Adair v. Yazoo M. V. R. R. Co., 142 Miss. 345, 107 So. 371; 9 Am. Jur., Carriers, § 674, p. 828; 13 C. J. S., Carriers, § 150, p. 297; Annotation, 22 A. L. R. 970; Annotation, 113 A. L. R. 1459; 1 Michie on Carriers, § 1090, pp. 882 to 884; Van Zile, Law of Bailments and Carriers, § 186, p. 158.

It follows therefore that the status of these nails at the time they were stolen must be ascertained by reference to the facts as disclosed by the record. The facts are not in dispute. The only evidence adduced was on behalf of the plaintiffs and defendant Sam Friedman. Their interests insofar as the questions involved in the litigation are concerned were in nowise adverse. Their interests were concurrently adverse to those of the defendant Employers Mutual Casualty Company.

By evidence of these parties it was made to appear that on December 23, 1948, a truck belonging to plaintiffs picked up at the direction of and for Sam Friedman 124 kegs of nails. These were to be a part of a carload

shipment which was to be made to California on the following day. Friedman directed that the load be taken to the place of business of plaintiffs where it was to remain overnight when it was to be taken to the team track of the Union Pacific Railroad Company where it was to be loaded on a car with other nails for shipment. No car had been ordered or was ever ordered for the shipment. On account of the condition of the weather and the lack of space to hold the trailer on which the nails were loaded the nails were by direction of one of the plaintiffs unloaded on an inside dock. During the night the place was forcibly entered and 93 of the kegs of nails were stolen.

On the question of control over this lot of 124 kegs of nails after they had been picked up on December 23, 1948, Friedman testified: "Q- * * * Now, what did you do with that one hundred and twenty-four kegs of nails? A- They went back to the White Line Transfer. Q- Do you remember about what time of the day? A- Yes, I remember exactly what happened. It was getting late in the afternoon after my last stop was made at the Sutherland Lumber Company, and it was beginning to drizzle a little bit, and as I recall it turned into snow later and the driver said, 'Do you want these put in the car tonight?' and I said, 'No it is too late and Joe and Yale don't like to pay overtime, and it is getting late so you run them into the White Line and leave them on the truck and I will move it to the dock the next morning.'" "Q- Did you talk to anybody when you got to the White Line? A- I talked to Mr. Law. Q- Tell us the substance of your conversation? * * * A- I said, 'Joe, I want you to take these nails that are on the truck, and leave it on the dock and I will call you in the morning and we will run them down to the team track, and I will call you and give you the number.'" "Q- So when the nails were returned to the White Line Transfer Company you say you had a talk with Joe Law? A- Yes. Q- And you told Joe that you intended to ship the nails out in the morn-

ing? A- That is right? Q- At that time, of course, you, I presume, told him you would call him in the morning? A- I told him to leave them on the dock if he would come and we would run them out to the team track in the morning, and he said that it could be arranged and he would do it. Q- And you told him you would give him the instructions as to your car number in the morning? A- I gave him those instructions that night. Q- But you did not have any car on the team track? A- No."

In addition to this evidence which has been in part summarized and in part quoted, there is evidence indicating a possibility of inability to procure a car at the Union Pacific team track in which event if it occurred he had made available to him a car at Council Bluffs, Iowa, in which he would make the shipment which of course would involve from him direction for transfer of the nails to that location.

In the light of this evidence it becomes clear that every move and handling made or contemplated of these nails except one was under the direct supervision and control of Sam Friedman. The single exception was the unloading from the trailer to the dock at the location to which he had directed them to be taken on December 23, 1948, and where by his direction they were to remain until the following day.

Within the clear meaning of the decisions of this court and the courts of other jurisdictions and the texts hereinbefore cited, quotations from which would needlessly encumber this opinion, it cannot well be said that the nails for which recovery is sought in this action were at the time they were stolen in transit or held by the plaintiffs as property in the hands of a common carrier so as to attach to their loss the liability of a common carrier.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

HAZEL M. ANDERSON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM M. ANDERSON, DECEASED, APPELLANT, V. ROY NINCEHELSER, APPELLEE.

43 N. W. 2d 182

Filed June 23, 1950. No. 32790.

1. **Trial.** A motion to dismiss admits the truth of all material and relevant evidence, and the party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of a court in granting the motion.
2. **Sheriffs and Constables.** Section 28-728, R. R. S. 1943, provides that a private citizen may be impressed into service by a sheriff or other ministerial officer, in any county in this state, to assist in apprehending any person charged with or convicted of any offense against the laws of the state.
3. **Highways: Sheriffs and Constables.** A private citizen impressed into service as provided for by section 28-728, R. R. S. 1943, and stationed on a public highway to assist in setting up a road block for the purpose of apprehending an escaped prisoner, is required to use reasonable care for his own safety and the safety of others in the performance of his duties in such respect, and his rights on the public highway, under the circumstances, are equal with the rights of an operator of a motor vehicle in the use of the public highway.
4. **Negligence.** Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.
5. **Evidence.** Admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party.
6. **Negligence: Automobiles.** In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury.

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

Lloyd E. Peterson and *Betty Peterson Sharp,* for appellant.

Armstrong & McKnight, and *Dwight Griffiths,* for appellee.

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

MESSMORE, J.

The plaintiff, administratrix of the estate of William M. Anderson, deceased, brought this action at law to recover damages from the defendant, charging the defendant with operating his automobile in such a negligent manner as to cause the death of the plaintiff's decedent.

The plaintiff's amended petition set forth several acts of negligence on the part of the defendant which relate to whether or not the defendant failed to keep a proper lookout and failed to use due care in the operation of his automobile which struck plaintiff's decedent, wrongfully causing his death.

The defendant's answer was a general denial of any negligence on defendant's part as alleged in plaintiff's amended petition, and affirmatively alleged that the negligence of plaintiff's decedent was the proximate cause of his injuries which resulted in his death.

The plaintiff's reply denied any negligence on the part of plaintiff's decedent as affirmatively pleaded in defendant's answer.

The record discloses that about 8 a. m., May 12, 1949, a prisoner escaped from the Nemaha County jail at Auburn, Nebraska. The county sheriff endeavored to contact his deputy, but was unable to do so. He called Donald Grieb, a patrolman connected with the Nebraska Safety Patrol. Search was made to apprehend the escapee. In the early part of the evening a plan was formulated at a stop light in the city of Auburn at four intersection points, to set up a road block. The pur-

pose of the road block was to stop all cars proceeding out of Auburn. Those present when the road block plan was set up were the sheriff, his deputy, city police, patrolman Grieb, and William M. Anderson. Patrolman Grieb and William M. Anderson were designated to form the road block north of Auburn on U. S. Highway No. 75. They proceeded to what is known as "Three Mile Hill," three miles north of Auburn. They remained at this station for 15 minutes then moved south approximately one-half mile. At that point there was a crossroad. Before the accident the patrol car was parked on the crossroad two feet off the east edge of the pavement, headed toward the pavement, with parking lights on. About 15 or 20 cars were stopped when they were stationed at the "Three Mile Hill" point. Grieb and William Anderson were equipped with flashlights. Anderson's flashlight was in good working condition at all times, and gave a good light. All cars proceeding north from Auburn heeded the warning to stop, and none of the cars ran the road block. None of the cars proceeding south were stopped. Anderson was armed, and carried a revolver inside his waistband. Grieb remained with Anderson until 9:30 p. m. There were no barricades set up or flares set out. At 9:30 p. m., Mac Anderson, the son of William M. Anderson, arrived at the point where William Anderson and Grieb were stationed. Mac Anderson was desirous of obtaining the services of the patrol car for the purpose of using the spotlight to ascertain if the prisoner could be apprehended at a certain locality in the city upon information he had received. Patrolman Grieb and Mac Anderson left in the patrol car, and Elmer Chapp who had accompanied Mac Anderson stayed with William M. Anderson.

Chapp testified that he and Anderson proceeded to stop traffic going north from Auburn. Before the accident they had stopped 15 or 20 cars. Mac Anderson had left his car parked approximately one hundred feet

south of the road block on the east or right side of the road facing north, with the parking lights on. Chapp was stationed on the left or west side of the highway, as was William Anderson. Chapp noted that before the accident Anderson's flashlight was shining. He was standing 20 or 25 feet south of Anderson at that time on the west side of the center line of the highway. Two cars approached from the south, and the first one went by Chapp. The next thing he heard was a "thud." At that moment he was facing south and was going to check the second car. When he heard the thud he turned around and saw Anderson lying on the highway with his feet east of the center line and the rest of his body west of the center line of the pavement. The defendant's car stopped after the thud. The defendant got out of his car and asked Chapp what he had hit. Chapp told him that he had hit William Anderson. The last time Chapp saw William Anderson he was 20 or 25 feet north of him and about a foot and one-half or two feet west of the center line of the highway. This was about two to five minutes before the accident. He did not know where Anderson was standing at the time of the impact. He asked the defendant to help him carry Anderson's body across the road. One car proceeding from the north passed before the body was removed. The second car stopped. Anderson was placed in the back seat of this car and taken to the hospital. Chapp related a conversation had with the defendant wherein the defendant asked where Anderson was standing. Chapp pointed with his finger to where he was standing, which was just west of the center line of the highway.

The highway at the point where the accident occurred is a paved highway approximately 22 feet in width, with a four or five foot level shoulder on each side of the pavement, and a marked center line to separate the north and south-bound traffic. The highway is level, and the view unobstructed one-half mile south and one-

quarter mile north of the point where the accident occurred. The night was clear. The accident occurred between 9:30 and 10 p. m. The defendant's car came to a stop after the accident in the east or right side of the traveled portion of the highway.

The defendant's wife contacted the sheriff who was west of Auburn, and he went to the scene of the accident. He examined the road, and asked the defendant what had happened. The defendant said he had hit Anderson, and that he did not see Anderson until "he came up over the radiator." He did not say whether or not he saw Anderson before that time. The sheriff examined the defendant's automobile which was a 1947 Willys Jeep. The left headlight of the jeep was broken out, and there was glass on the concrete slab. The defendant's car was on the right shoulder of the road. He recalled no other damage to the defendant's car. He observed William Anderson's hat on the highway, and his flashlight which had been run over and mashed. On cross-examination the sheriff testified that he understood the defendant to say very distinctly that he saw Anderson first when he "came up over the radiator."

The plaintiff offered testimony of the defendant appearing in a deposition taken by the plaintiff before trial. We set forth in substance such part thereof as may be necessary in determining this appeal. As he proceeded north on U. S. Highway No. 75, he thought he saw a man get in front of his car, was not positive where the man was, and he struck the man. He made no observation of any object before the collision. He saw a little light on the west side of the road, a reflection of some kind of light about 15 feet from him, and saw no flashing of the light before that time. He did not know whether his lights would shine down the road a distance of 150 feet or not.

The examination of William M. Anderson made by a doctor at the hospital revealed that the patient had marked shock and delirium. There was a trauma to the

entire section of the upper abdominal organs which was severe; a compound-comminuted fracture of the left tibia and fibula, and fracture of the lower left femur; and there were numerous superficial wounds, a deep, large, scraping wound of the upper right abdomen, and other injuries. The patient was 52 years old. He was conscious during the early part of his stay in the hospital, and died about 11 p. m., May 14, 1949. The doctor gave as his opinion that the death was caused by external violence of recent origin.

Mac Anderson testified that he and his father each purchased a new flashlight on the day of the accident; that his father's flashlight had new batteries in it and was bright; and that his father was armed. He detailed the evidence with reference to the road block, his meeting with Chapp, the proceedings until the time that he left his father, and that his father was conscious when he saw him in the hospital, and suffered great plain.

There was no evidence introduced by the plaintiff as to the rate of speed the defendant was operating his automobile prior to or at the time of the accident.

At the close of the plaintiff's evidence the defendant moved to dismiss the petition of the plaintiff for the reason that the evidence of the plaintiff was insufficient to sustain a verdict against the defendant, and further, that the evidence of the plaintiff did not show that the defendant was in any manner negligent in the operation of his automobile as alleged in the plaintiff's amended petition. The trial court sustained the defendant's motion. Upon the overruling of the plaintiff's motion for a new trial, the plaintiff appeals.

For convenience we will refer to the parties as originally designated in the district court.

The plaintiff assigns as error (1) the order of the trial court in dismissing the plaintiff's petition as being contrary to law, and (2) that the trial court erred in excluding evidence offered by the plaintiff.

The question to determine in this appeal is whether

or not the evidence introduced on behalf of the plaintiff was sufficient to warrant submission of the case to the jury.

In Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court held: "A motion to dismiss admits the truth of all material and relevant evidence, and the party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of a court in granting the motion." See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807.

We have the foregoing rule in mind in determining this appeal.

The record discloses that the sheriff met with the deceased, the safety patrolman, and the city police, where a plan was formulated to set up a road block, and under the sheriff's direction, and that also of the patrolman, the deceased accompanied the patrolman to the place designated.

A private citizen may be impressed into service by a sheriff or other ministerial officer, in any county in this state, to assist in apprehending any person charged with or convicted of any offense against the laws of the state. See section 28-728, R. R. S. 1943.

The decedent had a right to be on the highway to perform the duties assigned to him. The proper discharge of his duties required him to assume a position on the highway which, in view of the heavy traffic, was necessarily a place of danger. In order to perform his assigned duties with reasonable adequacy, he could not be expected, nor did the law require him, to watch constantly and continuously for the approach of cars from any and all directions. His duty was to keep a reasonable lookout and to exercise care in the circumstances commensurate with the dangers and consistent with his faithful performance of the duties of his employment.

See Shaffer v. Torrens, 359 Pa. 187, 58 A. 2d 439.

The deceased's use of the highway was analogous to that of a pedestrian in that he was required to use reasonable care for his own safety and the safety of others, and in this respect his rights were equal with the rights of the operator of a motor vehicle in the use of the public highway. See Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114.

There were no eyewitnesses to this accident. The rule is that, in the absence of an eyewitness, or in the absence of any obtainable evidence as to what deceased did or failed to do by way of precaution, at and immediately before the injury, the presumption that he, prompted by a natural instinct, was in exercise of care for his own safety, obtains, and this presumption is one of fact, and whether it is overcome by circumstances shown in evidence is for the jury to determine. See Edwards v. Perley, 223 Iowa 1119, 274 N. W. 910.

"Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523.

There is no evidence as to what the decedent was doing immediately prior to the impact. When last seen before the impact he was 20 to 25 feet north of the witness Chapp, and a foot and one-half to two feet west of the center line of the highway. This was within a period of two to five minutes prior to the time of the accident. No presumptions of negligence will be indulged against him, and no evidence of his contributory negligence appears in the record. The burden of presenting this proof, of course, is imposed on the defendant.

The plaintiff offered evidence of the editor of the

Nemaha County Herald, a weekly newspaper, concerning a conversation had between the editor and the defendant for the purpose of formulating a newspaper article. This conversation occurred on May 15th or 16th, 1949, and was about the accident which resulted in the death of plaintiff's decedent. The witness was handed a newspaper article appearing in the May 19th edition of the paper to refresh his memory as to whether or not the article contained the statements of the defendant made to the editor with reference to the accident. He answered that it did. Objection was made to the competency of this testimony, which was sustained. An offer of proof was made that if the witness was allowed to testify he would testify that the defendant stated to him that he did not see anyone on the highway ahead of him nor at the side of the highway, did not see Anderson until he was right upon him, and it was too late to stop his automobile quickly enough to keep from hitting him. The offer of proof was objected to on the ground of competency, and the objection sustained. The plaintiff contends that the ruling of the trial court in rejecting such evidence constituted prejudicial error. The testimony was offered as an admission against interest.

Admissions against interest are defined as follows: "'Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him.'" Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

In Gentry v. Burge, 129 Neb. 493, 261 N. W. 854, this court said: "It is a well-settled rule that admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party."

We conclude the evidence should have been admitted for the purpose offered.

It is apparent from the evidence that the defendant did not see the deceased until his automobile struck him.

The operator of an automobile equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question for the jury. The question whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide. Whether the defendant was negligent in not sooner seeing the deceased and in not so operating his automobile with reference to the concurrent right of the deceased and himself upon the public highway as to avoid a collision was for the jury. The only question properly determinable was whether the defendant was negligent in failing to see the deceased in time to avoid the accident. See Johnson v. Anoka-Butte Lumber Co., *supra.*

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury." Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422. See, also, Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

We believe the plaintiff's evidence standing alone and acknowledged as true has probative force enough to make a prima facie case for the plaintiff. The evidence is sufficient to support a finding that the acts of the plaintiff's decedent were not the proximate cause of the collision, and that the defendant negligently injured the plaintiff's decedent which resulted in his death.

We deem it unnecessary to discuss other assignments of error.

For the reasons given herein, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED.

WENKE, J., concurs in the result.

MIDWEST POPCORN COMPANY, A CORPORATION, APPELLANT, v. RAY C. JOHNSON, STATE AUDITOR, ET AL., APPELLEES.

43 N. W. 2d 174

Filed June 23, 1950. No. 32797.

1. **Statutes.** The Legislature may properly classify counties according to population for purposes of legislation when the classification rests upon reasonable differences of situation or circumstance which call for distinctive legislation as to class.
2. ———. A statute which becomes operative within 30 days from the date it takes effect as to existing counties in the class, but specifies no machinery by which it shall become immediately operative in counties subsequently entering the class, does not violate Article III, section 18, of the Nebraska Constitution, prohibiting the passage of local or special laws.
3. ———. Where a bill has but one general object, no matter how comprehensive that object may be, and contains no matters not germane thereto, and the title clearly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution.
4. ———. Article III, section 14, of the Constitution, does not require that the title to an act shall be a complete abstract of the bill. If the act contains but one subject and that subject is clearly expressed in the title, the constitutional requirements have been met, even though the title contains duplicitous or extraneous provisions not necessary to its validity.
5. **Injunction: Statutes.** An invalid appropriation of funds is not subject to injunction where such funds have been expended or have lapsed into the unappropriated funds of the state at the time the suit was commenced.
6. **Statutes.** Where a part of an act is invalid, and the remainder is complete and perfect in all its parts and is capable of execution, it will be upheld where it is evident that the invalid part was not an inducement to the enactment of the remainder.
7. ———. The attempt to appropriate funds for the salaries of members of the tax appraisal boards or committees contrary to Article III, section 22, of the Constitution, was not an inducing element to the passage of the remainder of the Tax Appraisal Board Act.
8. ———. The Tax Appraisal Board Act does not change the uniformity requirements as to taxation of property which theretofore existed. It does not therefore violate Article VIII, section 1, of the Constitution.
9. ———. The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done.

10. ———. An act which purports to amend a statute which has not become effective will be held to be amendatory of the original statute which the amendatory act purported to repeal. When and if the ineffective statute becomes effective, all will be considered together in determining the intent of the Legislature.

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

Munger & Rhodes, for appellant.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer,* and *Homer L. Kyle,* for appellees.

King, Haggart & Kennedy, amicus curiae.

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

CARTER, J.

This is a suit in equity for a declaratory judgment determining the constitutionality of the Tax Appraisal Board Act, sections 77-1301 and 77-2501 to 77-2510, R. S. 1943, as amended in 1947 and 1949. The trial court sustained a demurrer to the petition and, plaintiff having declined to further plead, dismissed the action. Plaintiff appeals.

The action was brought by the plaintiff on behalf of itself and all taxpayers similarly situated, to enjoin the Auditor of Public Accounts and the State Treasurer from paying out any funds appropriated for the use of the Douglas County tax appraisal board as illegal expenditures of public moneys because of the unconstitutionality of the Tax Appraisal Board Act. That the courts have jurisdiction of such an action has been heretofore determined. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548.

Briefly stated, the act provides for the establishment, in the discretion of the county board, of a classification and appraisal committee for real estate in counties having not more than 200,000 population, the recommendations of such committee to be taken into consideration by the county assessor and filed with the county clerk for the

use of the county board of equalization. The act also provides for a tax appraisal board in all counties having a population in excess of 200,000. Such board consists of three members appointed by the Governor with the advice and consent of the Legislature, for terms of six years with a maximum salary of $6,000 a year to be fixed by the Governor. The act provides for a revolving fund by appropriating $50,000 from the General Fund of the state and providing that the Auditor of Public Accounts shall certify the annual cost to the county board at the end of each fiscal year upon which the county board is to include the amount in the county levy and remit the same to the State Treasurer, when collected, to replenish the revolving fund. At the 1949 session of the Legislature $50,000 was appropriated to the revolving fund as contemplated by the 1947 act, and in addition thereto a further sum of $50,000 was appropriated to be credited to such revolving fund until 1953. Other provisions of the act will be discussed in connection with the consideration of the issues raised by this appeal.

It is argued that the act is unconstitutional in that it is a local or special law and therefore violative of Article III, section 18, of the Nebraska Constitution. The plaintiff is a resident of Douglas County. It is the only county in Nebraska having a population in excess of 200,000 people. It is urged that no reason exists which warrants any different law for the appraisal of property in Douglas County than in any other. In this respect it must be conceded that the Legislature has the power to classify counties on the basis of population when the classification rests upon reasonable differences of situation or circumstance which call for distinctive legislation for the class. State ex rel. Cone v. Bauman, 120 Neb. 77, 231 N. W. 693. The provisions of the Tax Appraisal Board Act do not freeze the classes. Any county which has a population of 200,000 people comes within the act as does any county which subsequently reaches that figure. An act so operating is considered to be general

in its nature. The appraisal of property for tax purposes in the various counties of the state is a matter which is directly affected by the population of the county. It has been a common legislative practice to classify counties on a population basis in prescribing the manner of conducting their functions. Problems of administration have a direct relation to population. This is particularly true in the appraisal, assessment, and equalization of property for purposes of taxation. Consequently, the Legislature acted within recognized principles of law in classifying counties in the statute before us as it did. Dorrance v. County of Douglas, 149 Neb. 685, 32 N. W. 2d 202.

Plaintiff contends that the class is frozen for the reason that the act provides no machinery by which it may become operative in counties subsequently attaining a population of 200,000 persons. The contention advanced is based on the provision of the act providing: "The tax appraisal board shall consist of three members, to be appointed by the Governor, by and with the advice and consent of the Legislature if in session. The initial appointments shall be one for a term of two years, one for a term of four years and one for a term of six years, to be designated in the order of appointment. * * * Initial appointments of the members of the tax appraisal board shall be made within thirty days after the effective date of this act." No provision is contained in the act as to any initial appointments of the members of the tax appraisal board in counties which subsequently attain a population of 200,000 people. It is asserted that this has the effect of freezing the class. In a similar case the Supreme Court of Iowa stated: "But, plaintiffs argue, the law by its terms becomes operative in Des Moines within thirty days from the date it takes effect by publication but specifies no machinery by which it shall become operative in cities other than Des Moines which subsequently attain the required population. If we are to follow our decision in State ex rel. Welsh v. Darling,

supra, 216 Iowa 553, 560, 561, 246 N. W. 390, 88 A. L. R. 218, the contention must be rejected. * * * The law provides no machinery by which the act can operate in cities subsequently attaining such population. Nevertheless, we upheld the act against the same attacks now made against the assessor law by plaintiffs, on the theory that the act by implication becomes operative in other cities of the designated class." Knudson v. Linstrum, 233 Iowa 709, 8 N. W. 2d 495. See, also, State ex rel. Welsh v. Darling, 216 Iowa 553, 246 N. W. 390. The act before us clearly classifies counties under and over 200,000 population and demonstrates a clear intent to include within the 200,000 class all counties which subsequently attain the population entitling them to enter the class. We do not think the questioned provision can be said to freeze the class within the meaning of Article III, section 18, of the Constitution.

It is contended also that the act is violative of Article III, section 14, Constitution of Nebraska, which states in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." It will be noted that the constitutional prohibition above cited is against the bill containing more than one subject. If the bill contains but one subject, that subject must be clearly expressed in the title. It is of no import if other matters are contained therein if the subject of the bill is clearly expressed. This rule was well stated in Van Horn v. State, 46 Neb. 62, 64 N. W. 365, as follows: "We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here discussing is not violated."

The act before us deals with taxation of property and the establishment of a tax appraisal committee or board to classify and appraise property for taxation purposes. Other provisions of the act are incidental and germane

to this one subject. An act, no matter how comprehensive, is valid as containing but one subject if a single main purpose is within its purview and nothing is included within it except that which is naturally connected with and incidental to that main purpose. Van Horn v. State, *supra*. See, also, Gauchat v. School District, 101 Neb. 377, 163 N. W. 334; State ex rel. Hall County Farm Bureau v. Miller, 104 Neb. 838, 178 N. W. 846. The provisions dealing with the establishment of the committees or boards, the fixing of the terms of office of members and compensation for their services, the appropriation of funds to cover the expense of same, and the creation of a revolving fund as the method of financing such expense, are all matters incidental to the single main purpose of the act. Merrill v. State, 65 Neb. 509, 91 N. W. 418.

The plaintiff argues, however, that the title to the act does not meet constitutional requirements in that the title makes no mention of an appropriation of funds, the creation of a revolving fund, or the levy to be made each year to replenish the revolving fund. It is contended also that the title is fatally defective in that it provides in part "that the county assessor shall take into consideration the recommendations of such committee or board in valuing and assessing land, improvements thereon, and tangible personal property;" when the bill itself provides that the assessor shall take into consideration the tabulation of the board in assessing "any property," a term which includes personal property other than that designated as tangible. As we have heretofore said, if the act contains but one subject and that subject is clearly expressed in the title, it matters not that duplicitous or extraneous provisions are contained in the title. The test is not whether the title chosen is the most appropriate but whether it fairly indicates the scope and purpose of the act. The constitutional provision under consideration does not require that the title to an act shall be a complete abstract of the bill. Its purpose is to prevent the inclusion of unrelated matters not within the legal con-

templation of the title. The Constitution does not fix the degree of particularity with which a title to a bill is to express the subject other than it must be clearly expressed. The title to the act before us clearly indicates that it has to do with the appraisal and assessment of real and personal property and a comprehensive plan with reference thereto. The title is not deceptive or indefinite in this respect. The objection raised goes to its form and not the substance of the act. When dealing with form and not substance we are required to give a liberal construction to the constitutional provision. The variance of the language used in the body of the bill and its title with reference to the personal property within its provisions, though improvident, is not sufficient to invalidate the act. The main purpose of the act being clearly expressed, the prohibition of the act has been avoided, and errors of statement in duplicitous or extraneous provisions placed in the title will not nullify the legislation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451; Elliott v. Wille, 112 Neb. 78, 198 N. W. 861; Spier v. Thomas, 131 Neb. 579, 269 N. W. 61; The People v. McCallum, 1 Neb. 182; City of Beatrice v. Masslich, 108 F. 743.

We conclude that the bill (L. B. 92, Chapter 255, Laws 1947) contains but one subject which is clearly expressed in the title, and that the act does not offend Article III, section 14, Constitution of Nebraska.

It is contended that L. B. 92, passed at the 1947 session, is invalid for the reason that it contained an appropriation for salaries of officers of the government contrary to Article III, section 22, Constitution of Nebraska, which provides in part: "Bills making appropriations for the pay of members and officers of the Legislature, and for the salaries of the officers of the Government, shall contain no provision on any other subject." This suit was filed on December 2, 1949. It is evident that the appropriation contained in the act was expended or had lapsed into the General Fund of the state as unappropriated

moneys at the time the suit was brought. Nothing remained to be done that could properly be enjoined. The Legislature at its 1949 session made a new appropriation which is not attacked as being violative of Article III, section 22. This for the reason that the 1949 appropriation was contained in the general appropriation bill and contained no provision on any other subject in violation of the quoted provision of the Constitution. It is argued, however, that such invalid appropriation in the 1947 act was an inducement to the passage of the bill and for that reason the whole act is nullified. There is no merit to this contention. This court has held in a similar case that a salary appropriation made in connection with provisions dealing with another subject is inimical to Article III, section 22, and therefore void. State v. Cornell, 60 Neb. 276, 83 N. W. 72. But in Merrill v. State, *supra,* it was held: "The act is complete, symmetrical and perfect in all its parts, without an appropriation for the salary of the deputy food commissioner. Nor can we believe that the attempted appropriation of the salary was an inducement to the passage of the act. The legislature doubtless, in its wisdom, regarded such an act as necessary for the welfare of the citizens of the state, and the appropriation of the salary of the deputy food commissioner was merely an incident, an ill-advised attempt to provide by the same act compensation for the services of the deputy food commissioner, when by the constitution, such an appropriation should be contained in an act devoted exclusively to the subject of appropriations. In Scott v. Flowers, 61 Nebr., 620, 622, it is held that where there is a conflict between an act of the legislature and the constitution, the statute must yield to the extent of the repugnancy, but no further; and if the residue is intelligible, complete, and capable of execution after striking out the invalid part, it will be upheld and enforced except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." The holdings of this court are contrary to

plaintiff's contention. Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; Logan County v. Carnahan, 66 Neb. 685, 92 N. W. 984, on rehearing, 66 Neb. 693, 95 N. W. 812. In the latter case it was said: "* * * a statute will yield only to the extent of its repugnancy to the constitution, and if the remainder be found complete and capable of enforcement notwithstanding the invalid portion, it will be held valid unless the unconstitutional part was manifestly an inducement to the legislature for the passage of the remainder." We hold the remaining portions of the act to be valid insofar as Article III, section 22, is concerned.

Plaintiff further contends that the act violates Article VIII, section 1, of the Nebraska Constitution which provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." There is no merit to this argument. The tax appraisal committee or board does not put a binding value on any property. The committee or board merely makes recommendations to the assessor and furnishes evidence for the use of the board of equalization. The valuation of property and the assessment of taxes is now, as it was prior to the passage of the act before us, the function of the assessor and the board of equalization. No changes have been made as to their duties and the requirements of uniformity. The duties of the tax appraisal committee or board in no manner disturb the requirements as to the uniformity of taxation. It remains as before. Consequently, Article VIII, section 1, is not violated.

Plaintiff urges that the act is violative of Article III, section 14, of the Constitution of Nebraska which provides in part: "And no law shall be amended unless the

new act contain the section or sections as amended and the section or sections so amended shall be repealed." It is contended that L. B. 92, Chapter 255, Laws 1947, attempts to amend section 77-1301, R. S. Supp., 1945, as amended by section 31 of L. B. 100, Chapter 251, Laws 1947, before the latter amendment had taken effect, and that the amendment creating a tax appraisal board was not germane to the subject of the section amended. It is asserted that the foregoing constitutes a violation of the quoted provision of the Constitution.

The purpose of the constitutional provision under consideration is to secure certainty in legislation. To accomplish this purpose within the meaning of the provision it is required that the amendatory act be definite and certain as to the law amended and germane to the original act. It appears that L. B. 92 which amended section 77-1301, R. S. Supp., 1945, as amended by L. B. 100 at the same session, contained an emergency clause and that L. B. 100 did not. Consequently L. B. 92 had the effect of amending L. B. 100 before the latter went into effect. It is asserted that this is violative of Article III, section 14, in that it purports to amend one section of a statute when in reality it amends another. While the precise point has not been determined by this court, our decisions point to a result contrary to that asserted by the plaintiff. In Morgan v. City of Falls City, 103 Neb. 795, 174 N. W. 421, an amending statute was passed with an emergency clause. Afterwards at the same session another amendatory act was passed amending the same section which did not contain an emergency clause. This court held "that the first act was in force until the latter act became operative three months after the adjournment of the session."

The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done. 59 C. J., Statutes, § 18, p. 526; State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W.

639. "The legislature must be presumed to know the state of legislation on the subject matter, more particularly the changes in the former law made by its enactments at that very session, and to intend the consequences of its action." Morgan v. City of Falls City, *supra*. Under the peculiar situation here existing, the amendatory act was a valid amendment of an existing statute. If L. B. 100 was not effective at the time L. B. 92 went into effect, it would operate as an amendment of section 77-1301, R. S. Supp., 1945. We think the rule announced in Sullivan v. City of Omaha, 146 Neb. 297, 19 N. W. 2d 510, on rehearing, 146 Neb. 305, 21 N. W. 2d 510, and State ex rel. Baldwin v. Strain, *ante* p. 763, 42 N. W. 2d 796, is controlling. It was there stated: "An act which purports to amend an unconstitutional statute may be held to be amendatory of the valid statute, if such there be, which the unconstitutional act purported to amend and repeal." We see no reason why the rule would not apply where the act amended was not in effect the same as where the act amended was unconstitutional. The amendatory act was clearly germane to the section amended. The rule applicable is stated in County of Dawson v. South Side Irrigation Co., 146 Neb. 512, 20 N. W. 2d 387, as follows:

" 'That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject-matter, or have the same object in view, and this subject-matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient.

" 'The purpose of the constitutional provision under consideration, * * * is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legisla-

tion embraced in the bill. * * * The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient that they are referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it.'" See, also, State ex rel. Baldwin v. Strain, *supra*. We find no merit in plaintiff's claim that the act is violative of Article III, section 14, in the respects claimed.

Plaintiff further contends that L. B. 424, Chapter 244, Laws 1949, which purports to appropriate $50,000 to the revolving fund and an additional sum of $50,000 thereto until June 30, 1953, after which date it is to revert to the General Fund, is violative of Article III, section 22, Constitution of Nebraska, which provides in part: "Each Legislature shall make appropriations for the expenses of the Government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." It is not necessary to determine whether the act contravenes this provision of the Constitution. See, Rein v. Johnson, *supra;* State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. S. R. 538. Even if it does, it cannot materially affect the situation before us for the reason that L. B. 434, Chapter 277, Laws 1949, the general appropriation bill passed at the same session of the Legislature, appropriates the funds in conformity with the constitutional provision.

We conclude that the Tax Appraisal Board Act is not violative of the provisions of the Constitution asserted by the plaintiff to have been violated. The demurrer to plaintiff's petition was therefore correctly sustained and the action properly dismissed.

AFFIRMED.

YEAGER, J., participating on briefs.

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4. Where on an issue of fact the evidence is conflicting it is error for the court to direct a verdict or to render judgment notwithstanding the verdict with such conflicting evidence as a basis. *Krepcik v. Interstate Transit Lines* 39

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9. The furnishing of a bond, its approval by a county court, and the filing of a transcript in the district court in the manner and within the time provided by law, vests jurisdiction of the case in that court on an appeal from the county court. The failure of appellant to timely file a petition in the district court does not affect or defeat jurisdiction. *In re Estate of Myers* 165

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11. The Supreme Court is without power to recall a mandate which has been issued and filed in the district court, and upon which some action has been taken in that court. *Rehn v. Bingaman* 171

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13. Under statute, the Supreme Court is required in equity cases to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof. *Trowbridge v. Donner* 206

14. The Supreme Court, in reaching its own conclusions in equity cases, will consider the fact, where the evidence is in irreconcilable conflict on material issues of fact, that the trial court saw the witnesses and had opportunity to observe their manner of testifying, but nevertheless, it is the duty of the Supreme Court, if the party upon whom the burden is imposed has failed to establish his case by a preponderance of the evidence, to so find, and reverse the judgment. *Trowbridge v. Donner* 206

15. A cross-appeal based on the contention that a verdict should have been directed in favor of the party cross-appealing must be denied when the evidence is in conflict on the essential issues pleaded and tried. *Hickman-Williams Agency v. Haney* 219

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20. In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics. *O'Dell v. Goodsell* 290
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26. An order of the Nebraska State Railway Commission denying permission to discontinue motor passenger trains on a branch line of railroad was based on findings without support in the evidence and consequently unreasonable and arbitrary. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

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29. The period of time provided by statute within which to perfect an appeal from a judgment or decree rendered in the district court does not commence to run until judgment or decree is entered on the journal. *Ash v. City of Omaha* 393

30. Any person or persons, jointly or severally aggrieved by any decision of the zoning board of appeals may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of such illegality, and such petition must be presented to the district court within 30 days after the filing of the decision in the office of the board. *Roncka v. Fogarty* 467

31. The district court may take evidence and is empowered to reverse or affirm, wholly or partly, or may modify the decision of the zoning board of appeals brought up for review. *Roncka v. Fogarty* 467

32. When a petition to review an order of the zoning board of appeals is filed in the district court in the prescribed time, the action of said court is one for trial de novo within the limitations of the pleadings and the evidence taken before the court, and constitutes an attack upon the action of the board of appeals as to whether such board acted within the scope of its authority under the city charter, or whether such action on the part of the board of appeals was illegal. *Roncka v. Fogarty* 467

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52. Where the evidence received in a criminal case contains no testimony to which an instruction relating to self-defense would be applicable, no error is committed by the trial court's refusal to instruct thereon. *Kirkendall v. State* 691
53. The appeal of a holder of a real estate broker's

license from an order of the State Real Estate Commission revoking his license requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court. *Rhoades v. State Real Estate Commission* 701

54. In a trial in the district court wherein revocation of a real estate broker's license is sought, the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the State Real Estate Commission were contrary to the weight of the evidence. *Rhoades v. State Real Estate Commission* 701

55. A proceeding for revocation of a real estate broker's license is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made. *Rhoades v. State Real Estate Commission* 701

56. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that the adverse finding and order were wrongfully entered raises a justiciable issue, even if the license has expired or the disciplinary order satisfied. *Rhoades v. State Real Estate Commission* 701

57. On any appeal to the Supreme Court in a workmen's compensation case the cause will be considered de novo upon the record. *Miller v. Schlereth* 805

58. The Supreme Court, in determining an appeal in an equity action involving questions of fact, is required to reach an independent conclusion, but the court will, in determining the weight of the evidence, where there is an irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. *W. L. Phillips Sons v. Northwest Realty Co.* 808

Assault and Battery.

Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances, inclusive of the assault. *Kirkendall v. State* 691

Attorney and Client.

1. Only when provided for by statute can an attorney's fee be allowed and taxed as costs. *Baum v. McBride* 152
2. In cases where a controversy arises with relation to the allowance of an attorney's fee by the court, a determination thereof is largely within the discretion of the court, and it may be fixed by the trial or appellate court, either with or without the aid of expert testimony as to value, although neither the trial nor appellate court can, in assessing such fees, arbitrarily ignore the undisputed evidence and findings based thereon. *Lippincott v. Lippincott* 374
3. In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Lippincott v. Lippincott* 374
4. The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed. *Nickerson v. Nickerson* 799

Automobiles.

1. When the driver of an automobile entering an intersection not protected by stop signs looks but fails to see an approaching automobile on his right, and the driver of the car on the right claims that he had the right-of-way but the position of his car is not definitely located in a favored position, the question of which car had the right-of-way is one for the jury. *Costello v. Hild* 1
2. Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles. Whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence. *Costello v. Hild* 1
3. The duty of a guest riding in an automobile is to use reasonable care in keeping a lookout commen-

surate with that of an ordinary prudent person under similar circumstances. The guest is not required to use the same degree of care as the driver, and ordinarily the guest need not watch the road or advise the driver in the management of the car. *Costello v. Hild* 1
Erickson v. Morrison 133

4. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence. *Costello v. Hild* 1
5. It is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence. *Costello v. Hild* 1
6. A vehicle entering a public highway from a private road must yield the right-of-way to vehicles approaching on the highway. *Kubo v. Fish* 74
7. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. *Kubo v. Fish* 74
8. Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar a recovery as a matter of law. *Kubo v. Fish* 74
9. Ordinarily a guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver, and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented. *Erickson v. Morrison* 133
10. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a

highway at night that he cannot stop in time to avoid a collision with an object within the area illuminated by his lights. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

11. Where the evidence of a party to a personal injury action is that he was struck from the rear by an automobile, while crossing a street intersection on the crosswalk provided for pedestrian use, it is prejudicial error for the court to fail to instruct that such party was under no duty to maintain a lookout to the rear to avoid a charge of negligence on his part. *Dunlap v. Welch* 459

12. It was a question of fact whether or not it was negligence to park and leave unattended a truck in the manner and situation described in the opinion, and it was for the jury to determine whether or not it was contributory negligence for a person to go between a truck and building under the circumstances and at the time as stated therein. *Bolio v. Scholting* 588

13. A person entering an intersection of two streets is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. If he fails to see an automobile, favored 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 question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pahl v. Sprague* 681

14. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Anderson v. Nincehelser* 857

Banks and Banking.

1. The transfer of a bank deposit to take effect only at the death of the depositor is testamentary in character and void if not executed in accordance with the statute of wills. *Young v. McCoy* 138

2. The statute with respect to joint bank deposits is intended for the protection of the bank and to fix the property rights of the persons named where compliance with the statute has been had. *Young v. McCoy* 138

3. A deposit not made in the name of two or more persons and not made deliverable or payable to each of them is not within the purview of the statute with respect to joint bank deposits. *Young v. McCoy* 138
4. The statute with respect to joint bank deposits contemplates the conveyance of a present interest in the deposit even though the actual enjoyment thereof by one or more of the joint payees may be postponed until some future time. *Young v. McCoy* 138
5. The words "deliverable or payable to either," contained in the statute with respect to joint bank deposits, mean that the deposit must be made deliverable or payable to each of two or more persons. *Young v. McCoy* 138

Bills and Notes.

The owner of a negotiable instrument payable to bearer negotiates it or transfers the title thereto to another by delivery of the instrument to him with intent to do so. *Masonic Temple Craft v. Stamm* 604

Bridges.

A statute makes counties responsible for any special damage occasioned by the accumulation of water due to the construction or repair of any bridge, culvert, or highway, which the county is liable to construct or keep in repair, through the fault, neglect, or oversight of the board of county commissioners. *Schwank v. County of Platte* 273

Buildings.

In an appeal from an order of the district court determining the propriety of an order of the State Fire Marshal condemning premises as a fire hazard the review is de novo as in equity. *Iverson v. Keith County* 565

Carriers.

1. To be regarded as merchandise in the hands of a common carrier, goods must be received for immediate shipment and unconditionally accepted with nothing remaining to be done by the shipper to complete the shipment. *Law v. Employers Mutual Casualty Co.* 852
2. If goods are delivered to a carrier and held at the request of or subject to the control or direction of the shipper their status is not that of goods in the

hands of a common carrier. *Law v. Employers Mutual Casualty Co.* 852

Constitutional Law.

1. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. *Nebraska Mid-State Reclamation District v. Hall County* 410
2. It is not within the province of courts to annul a legislative act or any part thereof unless its provisions so clearly contravene some provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. *Nebraska Mid-State Reclamation District v. Hall County* 410
3. The provisions of the Reclamation Act do not contravene the Constitution of Nebraska or the Fourteenth Amendment to the Constitution of the United States. *Nebraska Mid-State Reclamation District v. Hall County* 410
4. A constitutional provision is not self-executing if the language of the Constitution is directed to the Legislature, or if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. *State ex rel. Shineman v. Board of Education* 644
5. The provision of the Constitution relating to giving instruction in the common schools to all children between the ages of 5 and 21 years is not self-executing. *State ex rel. Shineman v. Board of Education* 644

Contracts.

1. The question as to what is a reasonable time for rescission of a contract is not an abstract question which can be answered merely by reference to a certain period of time, but depends on the particular circumstances, as the subject matter, the relation and location of the parties, their opportunities for communication, change in condition of the property, or injury to the seller by delay, and any other factors which bear on the issue of what should reasonably be expected or required. *McGuire v. Thompson* 28
2. Whether one seeking to rescind a contract on the ground that it was procured by fraud or duress has acted with reasonable promptness is, ordinarily, a question of fact and in a law action is for the jury to determine. *McGuire v. Thompson* 28
3. An abandonment of a contract may be effected by

acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party. *Nelson v. Cross* 197

4. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purposes and in course of the same transactions are, in the eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. *Farmers Union Cooperative Elevator Federation v. Carter* 266
Employers Mutual Casualty Co. v. Brazda 633

5. Whether a contract is entire or severable is a question of intention. In an unambiguous contract it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in the light of the surrounding circumstances. *Farmers Union Cooperative Elevator Federation v. Carter* 266

6. The application of the statute of frauds in case of the purchase of a number of articles at the same transaction may depend upon whether there is one contract or more. *Farmers Union Cooperative Elevator Federation v. Carter* 266

7. Whether the negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct may depend on many circumstances. *Farmers Union Cooperative Elevator Federation v. Carter* 266

8. It does not necessarily follow that a transaction is not a single transaction constituting but one contract because a separate price was agreed upon for each article of merchandise or because some of the articles purchased were to be delivered at one time and some at another. *Farmers Union Cooperative Elevator Federation v. Carter* 266

9. In determining whether a contract is severable, the controlling question is that of the intent of the parties. *Farmers Union Cooperative Elevator Federation v. Carter* 266

10. Where both parties to a contract fail to perform their mutual covenants on the day named, they will be held to have waived its strict performance as to time, but the contract will remain unimpaired as to its effect. *Oman v. City of Wayne* 341

11. A clause in a contract making time of the essence

thereof may be waived by the subsequent acts of the parties. *Oman v. City of Wayne* 341

12. Where acts to be performed by parties to a contract are mutual and dependent, and are to be performed concurrently, one party must at least be able and willing to perform at time of performance, in order to enable him to declare a default on account of non-performance by the other. *Oman v. City of Wayne* 341

13. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. *Bradway v. Higgins* 724

14. While parol evidence may not be offered for the purpose of varying the terms of a written instrument, such evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. *Bradway v. Higgins* 724

15. The rule that where a contract is ambiguous as to the rate of compensation it will be interpreted most strongly against the owner in favor of a contractor has no application where there is an absence of proof of the contractor's theory of compensation and that of the owner is definite and unequivocal. *W. L. Phillips Sons v. Northwest Realty Co.* 808

16. The rule that where the terms of a contract are uncertain the interpretation which evolves the more reasonable and probable contract should be adopted has no application where there is an absence of proof of the terms of a contract by one party and clear and definite proof of its terms by the other party. *W. L. Phillips Sons v. Northwest Realty Co.* 808

Corporations.

1. An action to recover the penalty provided for failure to publish notice of indebtedness must be brought in equity in behalf of all creditors and against all stockholders. *Kennedy & Parsons Co. v. Schmidt* 637

2. In pursuing the remedy provided by statute for failure of corporation to publish notice of indebtedness, creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and

who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court. *Kennedy & Parsons Co. v. Schmidt* 637

Costs.

1. An award of costs to one party, or against another, is a part of the judgment. It can be set aside or modified only in the manner provided generally for the vacation, modification, or reversal of judgments. *Rehn v. Bingaman* 171
2. A claim that an award of costs was improperly made raises an issue that can be appropriately presented on motion for a rehearing in the same manner as any other justiciable issue that is claimed to have been erroneously decided. *Rehn v. Bingaman* 171
3. A motion to retax costs erroneously or illegally computed by the Clerk of the Supreme Court may properly be made at any time, even after the district court has taken action on the mandate. *Rehn v. Bingaman* 171

Counties.

A statute makes counties responsible for any special damage occasioned by the accumulation of water due to the construction or repair of any bridge, culvert, or highway, which the county is liable to construct or keep in repair, through the fault, neglect, or oversight of the board of county commissioners. *Schwank v. County of Platte* 273

Courts.

1. The furnishing of a bond, its approval by a county court, and the filing of a transcript in the district court in the manner and within the time provided by law, vests jurisdiction of the case in that court on an appeal from the county court. The failure of appellant to timely file a petition in the district court does not affect or defeat jurisdiction. *In re Estate of Myers* 165
2. The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the records in another case. *Koehn v. Union Fire Ins. Co.* 254
3. The jurisdiction of a court over the subject matter is measured by the extent of the powers of the court. *Nelson v. Nelson* 741

4. In an action for the recovery of money, jurisdiction is not affected by an error of the court in determining the amount of the recovery. *Nelson v. Nelson* 741

Criminal Law.

1. A witness may be asked on cross-examination if he has been convicted of a felony. *Latham v. State* 113
2. The inquiry on cross-examination of a defendant in a criminal case when he is a witness whether he has been convicted of a felony is permissible, and if the answer is in the affirmative he may then be asked the number of his convictions, and if an answer is correctly given, the inquiry must end there. *Latham v. State* 113
3. If any answer of defendant upon being interrogated as to previous conviction of a felony is untrue or if he claims he does not know, the fact of his conviction or convictions may be shown, but only by the record thereof. It is error to explore on cross-examination of defendant the details of any charge of which he has been convicted or the sentence imposed because thereof. *Latham v. State* 113
4. The purpose of the narrow inquiry permitted as to previous conviction of a felony is for impeachment of the defendant as a witness and not to show he is prone to criminal acts, and it should be strictly confined to the limits fixed by the statute as interpreted by the Supreme Court. *Latham v. State* 113
5. An instruction in a criminal case that the jury has no right to reject the testimony of any of the witnesses without good reason, and should not do so unless it finds it irreconcilable with the other testimony which it finds to be true, is erroneous and ordinarily prejudicial. *Latham v. State* 113
6. When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. *Carr v. State* 248
7. Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. *Carr v. State* 248
   Kirkendall v. State 691
8. The statute which directs that a person shall not be tried for an offense while he is in a state of lunacy

or insanity and that sentence, after conviction, shall not be imposed while a person is in that condition, imposes a duty on but does not go to the jurisdiction of the court. *Sedlacek v. Greenholtz* 386

9. Only judgments and sentences of the district court upon convictions for felonies and misdemeanors under the criminal code may be brought to the Supreme Court by petition in error. *Wells v. State* 668

10. The court should fully and correctly instruct as to matters of justification interposed by the accused only when there is some evidence tending to put such matters in issue. *Kirkendall v. State* 691

11. Where the evidence received in a criminal case contains no testimony to which an instruction relating to self-defense would be applicable, no error is committed by the trial court's refusal to instruct thereon. *Kirkendall v. State* 691

12. The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Kirkendall v. State* 691

13. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances, inclusive of the assault. *Kirkendall v. State* 691

14. The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected. *Kirkendall v. State* 691

15. It is a general rule applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. *Kirkendall v. State* 691

16. A presumption that a person intends the natural consequences of his acts, although rebuttable in cases

where specific intent is an element of the crime, is sufficient to establish a prima facie case as to intent and will prevail unless from a consideration of all the evidence the jury entertains a reasonable doubt whether such intention existed. *Kirkendall v. State* 691

17. Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another. *Gallegos v. State* 831

18. A conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the defendant that a crime has been committed. *Gallegos v. State* 831

19. While a voluntary confession is insufficient standing alone to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Gallegos v. State* 831

20. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. *Gallegos v. State* 831

21. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of a confession in evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury. *Gallegos v. State* 831

Damages.

1. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered. *Erickson v. Morrison* 133
Remmenga v. Selk 625

2. Where the law provides a definite measure of damages the court should instruct the jury specifically how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous. *Hickman-Williams Agency v. Haney* 219
3. In an instruction to a jury that the plaintiff is entitled to recover such damages as "she may have sustained" by reason of the injuries complained of, the use of the word "may" does not introduce an element of conjecture and uncertainty, and such an instruction is not erroneous upon that ground. *Remmenga v. Selk* 625
4. An instruction that damages for future pain and suffering must be proved with reasonable certainty is not required where damages already sustained are alone submitted to the jury. *Remmenga v. Selk* 625
5. While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought. *Remmenga v. Selk* 625

Dedication.
1. Where dedication is made for a defined purpose, neither Legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is a common-law or statutory dedication, notwithstanding that changed use may be advantageous to the public. *Ash v. City of Omaha* 393
2. Property dedicated to a particular public use cannot, at least without the exercise of the right of eminent domain, be appropriated to a use of a different character in disregard of the rights of the donors. *Ash v. City of Omaha* 393

Deeds.
1. Whether or not a deed was delivered ordinarily depends upon the intention of the grantor, determinable from the facts and circumstances of each particular case. *Dowding v. Dowding* 61
Phillips v. Vandemoer 145

2. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Dowding v. Dowding* 61
Phillips v. Vandemoer 145
3. The possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it to overcome the presumption. *Dowding v. Dowding* 61
Phillips v. Vandemoer 145
4. The fact that the grantee kept the deed without recording it for a number of years, the grantor remaining in possession having reserved a life estate and the grantee making no claim to the real estate until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession. *Phillips v. Vandemoer* 145

Divorce.
1. In making an allowance of alimony or division of property in a divorce action it is the duty of the court to take into consideration the estate of the parties, if any, at the time of the marriage and their respective contributions since; the duration of the marriage; the wife's loss of her interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age and condition of health of the parties; and all other facts and circumstances, and make an award which appears to be fair and equitable. *Snyder v. Snyder* 20
Stefan v. Stefan 23
Holmes v. Holmes 556
Peterson v. Peterson 571
Ristow v. Ristow 615
Nickerson v. Nickerson 799
2. In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on a review. *Stefan v.*

Stefan 23

3. Record examined and found to support plaintiff's allegations for an absolute divorce. *Stefan v. Stefan* 23

4. After decree of divorce wherein provision is made for the support and maintenance of minor children, it is proper for the court on a showing of changed conditions to change or alter the decree to conform to the changed conditions. *Blue v. Blue* 82

5. Any unjustifiable conduct of a husband or wife which so grievously wounds the mental feelings of the other, or so utterly destroys his or her peace of mind as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty as defined in the statute. *Beals v. Beals* 364

6. The trial court is vested with a sound discretion in determining whether a divorce from bed and board or an absolute divorce shall be granted. *Beals v. Beals* 364

7. Where a decree for alimony is entered, which the husband attempts by his own extrajudicial conduct to avoid, alter, or revise, and litigation in or incidental to the original case necessarily results therefrom, in order to protect and enforce such decree the trial court has power and authority in the original divorce action to award the wife such expenses and reasonable attorneys' fees as were necessary to defend or prosecute such litigation. *Lippincott v. Lippincott* 374

8. A decree for alimony in a divorce action is not a judgment within the meaning of the statutes providing for judgments becoming dormant. *Lippincott v. Lippincott* 374

9. Either party to a divorce action may within six months of the date of entry of decree make application to have the decree set aside or modified. *Reeker v. Reeker* 390

10. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree. *Reeker v. Reeker* 390

11. An appeal lodged in the Supreme Court from a decree rendered in a suit for divorce is for trial de novo upon the issues presented by such appeal as in other equity actions. *Peterson v. Peterson* 571

Nickerson v. Nickerson 799

12. Whether a wife should be granted alimony, where there is no accumulated property from the marriage, is not a question solely of the necessities of her situation, but equally one of fairness and justice, as between the parties, under all the circumstances. *Peterson v. Peterson* 571

13. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect considering all the circumstances. Its amount rests upon the sound discretion of the court. *Peterson v. Peterson* 571

14. In determining provision to be made in a divorce case for support of an infant child of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with the best judgment of the court. *Ristow v. Ristow* 615

15. The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed. *Nickerson v. Nickerson* 799

16. A decree of divorce of a court of another jurisdiction, awarding the custody of the child of the parties to one of them, rendered while the child is in this jurisdiction, does not preclude the courts in this state from determining the question of the custody of the child. In a habeas corpus proceeding brought to enforce such foreign decree, the full faith and credit clause of the Constitution is not involved. *In re Application of Reed* 819

Domicile.

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction. *In re Application of Reed* 819

Easements.

An easement may be acquired by prescription, or by open, notorious, exclusive, and adverse use for a period of ten years, for the flow of water in a water-

course or its flood plane. The rule however has no application to surface waters. *Courter v. Maloley* 476

Ejectment.

1. Ejectment may be maintained by a vendor of real property against his vendee in possession under an executory contract of sale where the vendee is in default and the contract of sale provides that time is of the essence and that a forfeiture may be declared in case of default. *Abbas v. Demont* 77
2. An equitable defense may be pleaded in answer to an action in ejectment. *Abbas v. Demont* 77

Elections.

1. Where the venue of an absent voter's affidavit required on an absent and disabled voter's identification envelope is in a county in this state, and the jurat shows that the oath was administered in a province in Canada, such affidavit is not in compliance with law and the ballot is illegal. *Miller v. Mersch* 746
2. Under a former statutory provision requiring a proposal for the issuance of school bonds to be adopted by three-fifths of the ballots cast at the election on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast. *Miller v. Mersch* 746
3. A proclamation convening an extraordinary session of the Legislature to amend, revise, and supplement the election laws so as to facilitate absentee voting is sufficient to sustain changes as to time in the procedures set forth in the election laws in order to accomplish the stated purpose of the proclamation. *State ex rel. Baldwin v. Strain* 763
4. The Legislature under its police power may properly declare occupants of positions and employees of the state and federal governments ineligible as candidates for delegates to party conventions and caucuses. *State ex rel. Baldwin v. Strain* 763
5. The act of the Legislature making a person ineligible to be a delegate to a county, state, or congressional pre-primary convention, who holds a position or employment under the state or federal government, is not violative of the Nebraska Constitution. *State ex rel. Baldwin v. Strain* 763

Eminent Domain.

1. In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation, and that the land so sold was substantially similar in location and quality to that condemned. *Papke v. City of Omaha* 491
2. The productive quality and productivity of soil is one of the primary elements to be considered in the determination of farm land values. *Papke v. City of Omaha* 491
3. In condemnation proceedings, anything connected with land that would influence the market value thereof in the mind of a good faith intending purchaser would be an element for consideration in determining damage. *Papke v. City of Omaha* 491
4. In condemnation proceedings evidence of the prices paid for and received by a landowner for farm crops or garden produce raised on the land is inadmissible as an element of damage to be considered in determining the market or going value of the land being condemned. *Papke v. City of Omaha* 491
5. In condemnation proceedings where the market value of real estate is in issue, evidence of prices paid by a condemner therefor is inadmissible in like proceedings involving other land, for the reason the same do not furnish a criterion for market or going value of land being condemned. *Papke v. City of Omaha* 491

Equity.

1. A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent. *Dowding v. Dowding* 61
2. The principles precluding reformation of a voluntary conveyance at the suit of the grantee against the grantor during his lifetime do not ordinarily as a matter of law apply in favor of the grantor's heirs at law after his death, because when the reason for a rule ceases to exist, so should the rule itself. *Dowding v. Dowding* 61
3. Each case where reformation of an instrument is sought must be governed by its own facts and cir-

cumstances. If there is equity in plaintiff's case as against the rights asserted by defendants, a reformation should be decreed to rectify a conveyance which is clearly and satisfactorily proved to have by mistake failed to carry out the grantor's intention, but if plaintiff's case is otherwise lacking in the elements that go to move the conscience of a court of equity, relief should be denied. *Dowding v. Dowding* 61

4. In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom. Where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Paul v. McGahan* 578

5. In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. *Paul v. McGahan* 578

Estates.

1. The rule in Shelley's case has application as a rule of property where a testator's death occurred prior to the effective date of the Uniform Property Act. *Sandberg v. Heirs of Champlin* 161

2. Where an estate in fee simple is devised, any attempt by the testator to prevent encumbrance or alienation is ineffective and void for the reason that it is repugnant to the estate devised. *Sandberg v. Heirs of Champlin* 161

3. An estate given or conveyed to two or more persons for their use and benefit so long as they live ordinarily continues during the life of each, and is terminated only at the death of the survivor. *Bodeman v. Cary* 506

4. In construing a will, where the will in one clause makes an apparently absolute bequest of property, but a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the second clause is effective and operates to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended, or undisposed property granted for life by the first.

Tiehen v. Hebenstreit 753

5. 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. *Tiehen v. Hebenstreit* 753

Evidence.

1. Reasonable experience in raising, dealing in, and handling livestock is all the law requires in order to qualify one to give an estimate of their reasonable value. *McGuire v. Thompson* 28
2. The instinct of self-preservation and the disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care. *Bush v. James* 189
3. If a person is killed through the negligence of another, and there is no evidence as to negligence or due care on the part of the deceased, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety. But this presumption obtains only when there is no substantial evidence as to care or want of care on the part of the deceased. When there is such evidence, the presumption has no place in the case. *Bush v. James* 189
4. The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law. It obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject. When such evidence is produced the presumption disappears and is not entitled to be considered. *O'Dell v. Goodsell* 290
5. The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused. *O'Dell v. Goodsell* 290
6. A general objection, if overruled, cannot avail the objector on appeal. The only modification of this broad rule is that if on the face of the evidence, in its relation to the rest of the case, there appears to be no purpose whatever for which it could be admissible, then a general objection, though overruled, will be deemed to have been sufficient. *O'Dell v. Goodsell* 290
7. Where there is a general objection of no proper

foundation laid, if there is some particular respect in which the proof of foundation is lacking, the trial court's attention should be specifically directed thereto by the party making the objection. *O'Dell v. Goodsell* 290

8. In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation, and that the land so sold was substantially similar in location and quality to that condemned. *Papke v. City of Omaha* 491

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11. In condemnation proceedings evidence of the prices paid for and received by a landowner for farm crops or garden produce raised on the land is inadmissible as an element of damage to be considered in determining the market or going value of the land being condemned. *Papke v. City of Omaha* 491

12. In condemnation proceedings where the market value of real estate is in issue, evidence of prices paid by a condemner therefor is inadmissible in like proceedings involving other land, for the reason the same do not furnish a criterion for market or going value of land being condemned. *Papke v. City of Omaha* 491

13. Where cases are interwoven and interdependent and the controversy involved has been considered and determined by the court in former proceedings involving one or more of the parties presently before it, the court has the right to examine its records and take judicial notice of its proceedings and judgment in the former action. *Glissmann v. Orchard* 500

14. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its re-

ception is ordinarily cured. *Kuhlman v. Farmers Union Co-Operative Assn.* 597

15. A municipal court will take judicial notice of the ordinances of the city because it has a like relation thereto as do courts of general jurisdiction toward the general laws of the state. *Wells v. State* 668

16. On appeal of a conviction in a municipal court of a violation of an ordinance, the district court will take notice of the facts the former could have noticed judicially before the removal of the case. *Wells v. State* 668

17. The reception of improper evidence in a case tried by the court without a jury is not ground for a reversal, if there is competent evidence sufficient to sustain the findings of the court. *Wells v. State* 668

18. The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Kirkendall v. State* 691

19. The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected. *Kirkendall v. State* 691

20. It is a general rule applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful acts, knowingly performed. *Kirkendall v. State* 691

21. A presumption that a person intends the natural consequences of his acts, although rebuttable in cases where specific intent is an element of the crime, is sufficient to establish a prima facie case as to intent and will prevail unless from a consideration of all the evidence the jury entertains a reasonable doubt whether such intention existed. *Kirkendall v. State* 691

22. While parol evidence may not be offered for the purpose of varying the terms of a written instrument,

such evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. *Bradway v. Higgins* 724

23. 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. *Mulder v. State* 795

24. 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. *Mulder v. State* 795

25. A conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the defendant that a crime has been committed. *Gallegos v. State* 831

26. While a voluntary confession is insufficient standing alone to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Gallegos v. State* 831

27. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. *Gallegos v. State* 831

28. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of a confession in evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury. *Gallegos v. State* 831

29. Admissions of a party against interest, with reference to and pertinent to the issues being tried, are admissible in evidence against such party. *Anderson v. Nincehelser* 857

Forgery.

1. The signing of a fictitious name of a person to an instrument which is the subject of a forgery, with an intention to defraud, is a false and fraudulent making of such instrument, and constitutes the offense of forgery. *Owens v. State* 841
2. Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. *Owens v. State* 841
3. Where the evidence establishes the forgery of a bank check, it is wholly immaterial as to whether the check was ever presented for payment or not. *Owens v. State* 841

Fraud.

1. The positive statement of a dealer in livestock, or an assertion or affirmation of fact, as to the quality or condition made in the course of exchange, indicating that he intended to bind himself to its truth, and which was so understood and relied upon by the other party to the exchange, may constitute a warranty. *McGuire v. Thompson* 28
2. A person who has made an exchange of a chattel by oral agreement and who desires to rescind such agreement for fraud or breach of warranty must act promptly, and within a reasonable time, taking all of the circumstances into consideration. *McGuire v. Thompson* 28
3. Fraud is generally a question of fact. To be effective, it must be pleaded by suitable allegations of fact. *Nelson v. Nelson* 741
4. The mere charge of fraud is a conclusion and presents no issue. *Nelson v. Nelson* 741

Frauds, Statute of.

1. The application of the statute of frauds in case of the purchase of a number of articles at the same transaction may depend upon whether there is one contract or more. *Farmers Union Cooperative Elevator Federation v. Carter* 266
2. A transaction is not always a single transaction constituting but one contract because a separate price was agreed upon for each article of merchandise or because some of the articles purchased were to be delivered at one time and some at another. *Farmers Union Cooperative Elevator Federation v. Carter* 266

3. Whether the negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct may depend on many circumstances. *Farmers Union Cooperative Elevator Federation v. Carter* 266
4. In determining whether a contract is severable, the controlling question is that of the intent of the parties. *Farmers Union Cooperative Elevator Federation v. Carter* 266
5. 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, satsifactory and unequivocal. *Casper v. Frey* 441
6. Oral contracts where one claims an estate of a deceased person 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. *Casper v. Frey* 441
7. 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. *Casper v. Frey* 441
8. The burden of proving an oral contract where one claims the estate of a deceased person is on the plaintiff (1) to prove 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. *Casper v. Frey* 441
9. Each case where claim is made under an oral contract to the estate of a deceased person is to be determined from the facts, circumstances, and conditions as presented therein. *Casper v. Frey* 441

Gifts.

Mere physical possession of such an instrument by one claiming ownership thereof by gift from an admitted former owner without competent evidence of delivery by him with donative intent is insufficient

to make a prima facie case against such former owner. *Masonic Temple Craft v. Stamm* 604

Habeas Corpus.

1. 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. *Sedlacek v. Greenholtz* 386
2. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. *Sedlacek v. Greenholtz* 386
3. A person convicted and sentenced by a court having jurisdiction of the offense and of the person, when the sentence imposed is within the power of the court, cannot, by habeas corpus, collaterally attack the conviction and sentence upon the ground that he was insane at the time thereof. *Sedlacek v. Greenholtz* 386
4. The writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. *In re Application of Reed* 819
5. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. *In re Application of Reed* 819
6. A decree of divorce of a court of another jurisdiction, awarding the custody of the child of the parties to one of them, rendered while the child is in this jurisdiction, does not preclude the courts in this state from determining the question of the custody of the child. In a habeas corpus proceeding brought to enforce such foreign decree, the full faith and credit clause of the Constitution is not involved. *In re Application of Reed* 819

Highways.

1. A vehicle entering a public highway from a private road must yield the right-of-way to vehicles approaching on the highways. *Kubo v. Fish* 74
2. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. *Kubo v. Fish* 74
3. Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar a recovery as a matter of law. *Kubo v. Fish* 74
4. A private citizen impressed into service as provided for by statute, and stationed on a public highway to assist in setting up a road block for the purpose of apprehending an escaped prisoner, is required to use reasonable care for his own safety and the safety of others in the performance of his duties in such respect, and his rights on the public highway, under the circumstances, are equal with the rights of an operator of a motor vehicle in the use of the public highway. *Anderson v. Nincehelser* 857

Homicide.

Corpus delicti is composed of two elements, the fact or result forming the basis of the charge and the existence of a criminal agency as the cause thereof. Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another. *Gallegos v. State* 831

Infants.

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction. *In re Application of Reed* 819

Injunction.

1. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of flood or surface waters by an adjoining landowner. *Pint v. Hahn* 127
2. An invalid appropriation of funds is not subject to injunction where such funds have been expended or have lapsed into the unappropriated funds of the state at the time the suit was commenced. *Midwest Popcorn Co. v. Johnson* 867

Insane Persons.

The statute which directs that a person shall not be tried for an offense while he is in a state of lunacy or insanity and that sentence, after conviction, shall not be imposed while a person is in that condition, imposes a duty on but does not go to the jurisdiction of the court. *Sedlacek v. Greenholtz* 386

Insurance.

1. A policy against loss or damage caused by lightning to the property insured usually covers all known effects of electricity coming under the general head of lightning, and includes all loss or damage which results as a direct and natural consequence of the lightning, notwithstanding other incidental agencies may be instrumental in adding to the loss or damage. *Clouse v. St. Paul Fire and Marine Ins. Co.* 230
2. Under the terms of policies insuring against loss by lightning, appellant was only liable for "direct loss" caused by lightning. "Direct," as so used, means "immediate" or "proximate," as distinguished from "remote" or "incidental." *Clouse v. St. Paul Fire and Marine Ins. Co.* 230
3. In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss. *Clouse v. St. Paul Fire and Marine Ins. Co.* 230
4. When the terms of an insurance policy which contemplate that the damage or loss to a building therein insured against lightning is the difference in the actual cash value of the building as it stood

prior to being damaged as compared with the actual cash value thereof after being damaged thereby are subject to a provision that the loss or damage shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind or quality, such provision constitutes merely a limitation upon the amount of the recovery and is not a substantive measure of damages which the insured can invoke. *Clouse v. St. Paul Fire and Marine Ins. Co.* 230

5. A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. *Koehn v. Union Fire Ins. Co.* 254

6. When an insurance contract prepared by insurer contains provisions reasonably subject to different construction, one favorable to it and one favorable to insured, the construction favorable to insured will be adopted. *Koehn v. Union Fire Ins. Co.* 254

7. In giving effect to the rule that a contract of insurance is to be construed against the insurer, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction. *Koehn v. Union Fire Ins. Co.* 254

8. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. *Koehn v. Union Fire Ins. Co.* 254

9. Under the automatic insurance provisions, quoted in the opinion, of an automobile public liability policy of insurance, a two-ton truck, acquired by insured after the effective date of the policy, is not within such provisions. *Koehn v. Union Fire Ins. Co.* 254

10. If an application for insurance is prepared by an agent of insurer and he fills in false answers to the interrogatories contained therein, which are truthfully answered by the insured, the insurer cannot rely upon such answers in an action in equity to rescind or reform the policy issued upon the application. *Mutual Benefit Health and Accident Assn. v. Milder* 519

11. If the insured can prove that he made a different

contract from that expressed in the writing, he may have it reformed in equity, and he is not prevented by the mere fact that he accepted and retained the policy and did not examine it until after a loss occurred. *Mutual Benefit Health and Accident Assn. v. Milder* 519

12. If insured states the facts correctly to the agent of the company, he is not bound to exercise vigilance thereafter to determine whether or not the agent exercised good faith or truthfulness in his transactions on behalf of the company. *Mutual Benefit Health and Accident Assn. v. Milder* 519

13. Where a question in the application for insurance calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insured will avoid the policy. *Mutual Benefit Health and Accident Assn. v. Milder* 519

14. Untrue representations made by the insured in his application, where the questions eliciting such statement call for matters of opinion, judgment, or belief, will not avoid a policy issued thereon unless it is shown that the misrepresentations were knowingly made with intent to deceive. *Mutual Benefit Health and Accident Assn. v. Milder* 519

15. Rejection of an application for insurance because the applicant already had insurance exceeding insurer's limit is not material to the risk as respects necessity of disclosure in subsequent application to another company. *Mutual Benefit Health and Accident Assn. v. Milder* 519

16. In an application for accident and health insurance a representation that no other insurance issued to the applicant had been cancelled is not false because of the prior voluntary election of the applicant to surrender a policy which had been issued to him. *Mutual Benefit Health and Accident Assn. v. Milder* 519

17. A policy of insurance must be construed in accordance with its general scope, its design, and the intention of the parties at the time it was made as disclosed by the whole instrument. If its provisions are clear and unambiguous they must be understood in their ordinary meaning and applied in a reasonable manner. *Mutual Benefit Health and Accident Assn. v. Milder* 519

18. The entire insurance contract must be regarded with a conscious effort to give effect to every part of it

without disproportionate emphasis upon one to the neglect of other provisions. *Mutual Benefit Health and Accident Assn. v. Milder* 519

19. An insurance company may limit its liability in any reasonable manner which does not contravene public policy. *Mutual Benefit Health and Accident Assn. v. Milder* 519

20. The health indemnity provision of a policy that insured must, to be entitled to maximum benefits, be confined continuously within doors and have regular medical attendance therein should be reasonably and not literally construed, but it should not be abrogated or disregarded and a recovery allowed because he is totally disabled when he is not confined. *Mutual Benefit Health and Accident Assn. v. Milder* 519

21. Under a policy of health insurance, the insured must be substantially confined within doors and have regular medical attendance therein by reason of illness to be entitled to the maximum benefits by virtue of such a provision. If the insured is able to and does go about as he desires for purposes not connected with his sickness, he is not continuously confined within doors within the meaning of a provision requiring confinement continuously within doors and regular medical attendance therein. *Mutual Benefit Health and Accident Assn. v. Milder* 519

Intoxicating Liquors.

1. Under one of the provisions of the Liquor Control Act, delegating to the governing bodies of cities and villages the power to regulate the business of beer licensees not inconsistent with the provisions of the act, a city or village is not prohibited from exacting additional restrictive requirements where the statute does not limit the requirement for all cases to its own prescription. *Phelps Inc. v. City of Hastings* 651

2. Under the Liquor Control Act, the primary power to permit the sale of beer and alcoholic liquors other than beer in the same room or location rests with the city or village under its delegated authority to regulate the business of beer licensees. *Phelps Inc. v. City of Hastings* 651

3. Where a city or village does not permit beer to be sold in the same room or location with alcoholic liquors other than beer, by virtue of a valid ordinance not inconsistent with the Liquor Control Act, the form of the license issued by the Liquor Control

Commission does not have the effect of nullifying such ordinance. *Phelps Inc. v. City of Hastings* 651

Judgments.

1. It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there admitted or judicially determined are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. *Baum v. McBride* 152
2. The statute enumerating grounds under which a judgment may be vacated after expiration of term at which judgment was rendered does not provide exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. *Nemetz v. Nemetz* 178
3. Where a decree for alimony is entered which the husband attempts by his own extrajudicial conduct to avoid, alter, or revise, and litigation in or incidental to the original case necessarily results therefrom, in order to protect and enforce such decree the trial court has power and authority in the original divorce action to award the wife such expenses and reasonable attorneys' fees as were necessary to defend or prosecute such litigation. *Lippincott v. Lippincott* 374
4. A decree for alimony in a divorce action is not a judgment within the meaning of the statutes providing for judgments becoming dormant. *Lippincott v. Lippincott* 374
5. Generally, insanity as a bar to the imposition of sentence is a factual issue for the determination of the court having jurisdiction of the offense, and a judgment of sentence by a court of competent jurisdiction may not be collaterally attacked on that issue in a habeas corpus proceeding. *Sedlacek v. Greenholtz* 386
6. Proceedings for a declaratory judgment extend to the validity of a statute where there is a justiciable, determinable controversy between parties in respect to rights thereunder. *Nebraska Mid-State Reclamation District v. Hall County* 410
7. The statutory provisions for confirmation of proceedings of a reclamation district do not amend or repeal any provision of the Uniform Declaratory Judgments Act, but are simply part of a general

act complete within itself which authorizes reclamation districts to prosecute a special confirmatory proceeding in the nature of an action in rem in the district court, there to be construed in the light of the holdings of the Supreme Court under the Uniform Declaratory Judgments Act, which does not exclude the awarding of further relief which is or could be claimed. *Nebraska Mid-State Reclamation District v. Hall County* 410

8. It is a general rule that a judgment is a new debt and that the cause of action on which it is founded is merged therein. *Glissmann v. Orchard* 500
9. If the district court attempts to render a judgment on a subject matter within its general jurisdiction but which is not properly before it, such a judgment is a nullity. *Glissmann v. Orchard* 500
10. Any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Glissmann v. Orchard* 500
11. A judgment of personal liability must be supported by a pleading alleging it as a cause of action. *Glissmann v. Orchard* 500
12. In a suit for recovery of money, the amount of indebtedness of defendant is an issue. A judgment against defendant is necessarily an adjudication thereof. *Nelson v. Nelson* 741
13. The payment of a judgment cannot result in a cause of action against the judgment creditor because it was for an amount in excess of the indebtedness owing at the time the judgment was rendered. *Nelson v. Nelson* 741
14. Res judicata means that an issue determined by a valid adjudication is finally concluded as to the litigants and those in privity with them. *Nelson v. Nelson* 741
15. A final judgment fixing the rights of the parties terminates the controversy while it is in force, and in any subsequent litigation is conclusive evidence of those rights. *Nelson v. Nelson* 741
16. Material questions which were in issue in a former appeal and which were therein judicially determined

are conclusively settled thereby and such determination becomes the law of the case. They may not again be litigated in a subsequent appeal in the same action. *Miller v. Schlereth* 805

17. To entitle a party to open a judgment rendered against him upon service by publication, it must appear by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. *McNally v. McNally* 845

18. Proceeding to vacate judgment after term for death of one of the parties must be commenced within three years after defendant has notice of the judgment. *McNally v. McNally* 845

19. Proceeding to vacate judgment after term for fraud must be commenced within two years after judgment was rendered. *McNally v. McNally* 845

20. While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. To be entitled to equitable relief in such a case, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under statute authorizing vacation of judgment after term. *McNally v. McNally* 845

Judicial Sales.

1. A successful bidder at a judicial sale becomes a party to the proceedings and may appear and urge confirmation and appeal from an order setting the sale aside. *County of Lancaster v. Schwarz* 15

2. An upset bid, made after the judicial sale and before confirmation, is relevant only to the extent that it bears upon the fairness of the judicial sale and the adequacy of the high bid there obtained. *County of Lancaster v. Schwarz* 15

3. An upset bid, resulting solely from the enhancement of the value of the property after sale and before confirmation, is not relevant in determining whether the sale should or should not be confirmed. *County of Lancaster v. Schwarz* 15

4. An upset bidder in a tax lien foreclosure, whose bid has not been accepted, has no appealable interest in the litigation. *County of Lancaster v. Schwarz* 15

5. An order overruling a motion to deny confirmation of a judicial sale and to set the sale aside is not

ordinarily a final or appealable order. *County of Lancaster v. Schwarz* 15

Juries.

1. Charges of misconduct by jurors must be substantiated by competent evidence on motion for new trial. The misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and must have influenced the jurors in arriving at a verdict. *Schwank v. County of Platte* 273
2. A statement by a juror of his personal knowledge of a fact not in dispute and not material to the issues is not ordinarily misconduct requiring a new trial. *Schwank v. County of Platte* 273
3. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Schwank v. County of Platte* 273

Landlord and Tenant.

1. A lease by one tenant in common of an entire estate is void as to the interests of his cotenants, if such lease was executed without their knowledge, consent, authority, or ratification. *Trowbridge v. Donner* 206
2. While a lease by a tenant in common of an entire estate may be upheld under certain conditions in a contest between the lessor and lessee, yet it is generally the rule that such a lease may be avoided by any of the tenants in common who did not execute it or subsequently ratify its execution. *Trowbridge v. Donner* 206
3. Where a lease of the entire estate is executed by one tenant in common and such lease is repudiated by cotenants, the lessee therein is held not to be a trespasser but a tenant by sufferance of the estate occupied under such lease. *Trowbridge v. Donner* 206
4. The lessee of one tenant in common stands in the shoes of his lessor, and has no other or greater rights in the common property than that attaching to his lessor. *Trowbridge v. Donner* 206

Licenses.

1. The rights of a licensee can rise no higher than the terms of the statute by which the licensee becomes a holder of the license. *Phelps Inc. v. City of Hastings* 651

2. A license is invalid, whatever may be its form, to the extent to which it purports to grant a permit in excess of the licensing authority's statutory power. *Phelps Inc. v. City of Hastings* 651
3. A city with authority delegated to it to regulate a licensed business, not inconsistent with the licensing statute, may properly impose stricter regulations than the statute without being inconsistent with such statute. *Phelps Inc. v. City of Hastings* 651
4. The appeal of a holder of a real estate broker's license from an order of the State Real Estate Commission revoking his license requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court. *Rhoades v. State Real Estate Commission* 701
5. In a trial in the district court wherein revocation of a real estate broker's license is sought, the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the State Real Estate Commission were contrary to the weight of the evidence. *Rhoades v. State Real Estate Commission* 701
6. A proceeding for revocation of a real estate broker's license is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made. *Rhoades v. State Real Estate Commission* 701
7. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that the adverse finding and order were wrongfully entered raises a justiciable issue, even if the license has expired or the disciplinary order satisfied. *Rhoades v. State Real Estate Commission* 701
8. The Real Estate Commission Act provides that the State Real Estate Commission has authority upon sworn complaint in writing to investigate the actions of a real estate broker, and has the power to revoke or suspend a license issued under this act when such broker has been found guilty of unfair trade practices as provided for in the act. *Rhoades v. State Real Estate Commission* 701
9. The Real Estate Commission Act provides that before the State Real Estate Commission may revoke

or suspend a real estate broker's license the commission shall give the holder of the license a notice in writing containing the exact statement of the charges against him and the date and place of hearing. In the absence of giving such notice, the State Real Estate Commission has no power to conduct a hearing against a holder of a real estate broker's license for the purpose of revoking or suspending such license. *Rhoades v. State Real Estate Commission* 701

Mandamus.

1. A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. *State ex rel. Evans v. Brown* 612
   State ex rel. Shineman v. Board of Education 644
2. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *State ex rel. Evans v. Brown* 612
   State ex rel. Shineman v. Board of Education 644
3. A mandamus proceeding is an action at law, and findings of fact therein based upon conflicting evidence will not be disturbed unless clearly wrong. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
4. The pleadings in a mandamus proceeding may be amended in the same manner as pleadings in a civil action, and the issues thereby joined must be tried and further proceedings therein had in the same manner as in any other civil action. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772

Master and Servant.

1. Ordinarily, the violation of a statute intended to protect the life, health, and safety of employees constitutes actionable negligence, but such negligence must be shown to have been the proximate cause of the injury. *Wertz v. Lincoln Liberty Life Ins. Co.* 451
2. Except where statutes requiring employers to take certain precautions for the protection and safety of their employees expressly abrogate the defense of contributory negligence, a violation of the provisions of such statutes does not ordinarily deprive the employer of the defense of contributory negligence or relieve the employee from exercising due care for his own safety. *Wertz v. Lincoln Liberty Life Ins. Co.* 451
3. The status of employee or independent contractor

cannot be determined by any single test or rule, but must be established from a consideration of all the facts and circumstances of the case. *Wilds v. Morehouse* 749

4. An independent contractor is one who renders service in the course of an independent occupation and who regards the will of the one for whom the work is done only as to the result of the work and not as to the means or mode by which it is accomplished. *Wilds v. Morehouse* 749

Mortgages.

In a suit to foreclose an agreement, the character of which is an equitable mortgage on the real estate affected, the execution of the agreement, the breach thereof, the identity of the real estate described therein, and the amount due thereon, are material and necessary issues to be determined by the decree. *Glissmann v. Orchard* 500

Municipal Corporations.

1. Where injuries are a consequence of a defect in a public sidewalk not caused by any positive negligent act of a municipality either in its contruction or maintenance, the municipality may not be subjected to liability if the requirement of the statute and charter thereof as to notice of defect before the occurrence complained of has not been complied with. *Anthony v. City of Lincoln* 320
2. Where injuries are caused by a defect in or obstruction of a public sidewalk created by the positive misfeasance of a municipality, the giving of notice to it of the defect or obstruction as prescribed by statute and charter thereof is not a prerequisite to maintaining an action therefor. *Anthony v. City of Lincoln* 320
3. A municipal corporation is not an insurer of the safety of pedestrians using its sidewalks, but is required only to keep them in a reasonably safe condition for travel on them by the public. *Anthony v. City of Lincoln* 320
4. Persons using the sidewalks of a municipality are required to exercise ordinary care and caution for their safety and to keep a lookout for danger in their path. *Anthony v. City of Lincoln* 320
5. Where there is an accumulation of debris upon a sidewalk that constitutes an obstruction thereof,

placed there by a municipality, in consequence of which a traveler falls and is injured while using the sidewalk, the question of whether or not the municipality was negligent is one of fact to be determined by a jury, when the evidence is such that reasonable minds may draw different conclusions from it. *Anthony v. City of Lincoln* 320

6. What is reasonable care in keeping a sidewalk in a reasonably safe condition for travel by the public must be determined by the particular facts and circumstances of each case by the jury, if reasonable minds may arrive at different conclusions from the evidence. *Anthony v. City of Lincoln* 320

7. Previous notice and knowledge of a defect in a sidewalk will not constitute contributory negligence to bar a recovery as a matter of law for injuries received on account of the defect. *Anthony v. City of Lincoln* 320

8. The care required of a pedestrian in walking over a sidewalk is not that he must go around an obstruction or defect, but in passing over it he must use some care and caution beyond the ordinary care exercised by a person walking upon a sidewalk knowing of no defect therein. *Anthony v. City of Lincoln* 320

9. When the duly constituted representatives of a metropolitan city refuse or neglect to defend any suit at law or in equity brought against it, any resident taxpayer may defend said suit on its behalf at the cost of the city, not including attorney's fees. *Ash v. City of Omaha* 393

10. The home rule charter of the city of Omaha denouncing gifts by contractors condemns the action of the city official and not the donor or donors to a fund by virtue of which the city may procure the acquisition of land for a specific purpose. *Ash v. City of Omaha* 393

11. The city of Omaha, acting through its council and upon recommendation of its planning commission, may acquire by gift real estate for establishing parks and playgrounds. *Ash v. City of Omaha* 393

12. Before the acceptance of a gift by a city for park and playground purposes, recommendation of the city planning commission must be obtained. *Ash v. City of Omaha* 393

13. The home rule charter of the city of Omaha does not define a specific form of recommendation to

be made by the city planning commission to the city council with reference to acquiring real estate as a gift to the city for a specific purpose. Where the evidence discloses the city planning commission made a recommendation to the city council that the acquisition of a tract of land for a specific purpose was desirable, such a recommendation on the part of the city planning commission met the requirements of the city charter in such respect. *Ash v. City of Omaha* 393

14. Under the home rule charter of the city of Omaha wherein the city may accept a gift for a specific purpose, no notice of hearing or time thereof to the public is required. The charter making provision for notice to the public and time of hearing thereon is applicable only to procedure before the city planning commission. *Ash v. City of Omaha* 393

15. Municipal corporations may take and hold realty by deed of gift in trust for purpose of a public nature including uses germane to the objects of the corporation. *Ash v. City of Omaha* 393

16. The fact that a city can only acquire and hold land for public uses does not prevent it from acquiring absolute title to land which it is about to use for public parks and recreation. *Ash v. City of Omaha* 393

17. By accepting a gift of land for a specific purpose, a municipality is bound to use the land for such purpose and no other. *Ash v. City of Omaha* 393

18. Cities of the metropolitan class, for the purpose of promoting the health, safety, morals, or general welfare of the community, are empowered to regulate and restrict the size of buildings and other structures, the percentage of the lot that may be occupied, size of yards, courts, and other open spaces, the density of population, and the location and use of the buildings, structures, and land for trade, industry, residence, or other purposes. *Roncka v. Fogarty* 467

19. With reference to the regulations which a city of the metropolitan class is empowered to make with respect to building regulations, its zoning board of appeals may vary the application of such regulations in harmony with the general purpose and intent and in accordance with the general or specific rules therein provided. *Roncka v. Fogarty* 467

20. Zoning regulations of a metropolitan city are required to be made in accordance with a comprehensive plan designed to lessen congestion in the streets.

Roncka v. Fogarty 467

21. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of an ordinance, the zoning board of appeals has the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the erection of buildings or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. *Roncka v. Fogarty* 467

22. The zoning board of appeals may, upon hearing, reverse or affirm, wholly or partly, or may modify any order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all of the powers of the official from whom the appeal was taken. *Roncka v. Fogarty* 467

23. Any person or persons, jointly or severally aggrieved by any decision of the zoning board of appeals may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of such illegality, and such petition must be presented to the district court within 30 days after the filing of the decision in the office of the board. *Roncka v. Fogarty* 467

24. The district court may take evidence and is empowered to reverse or affirm, wholly or partly, or may modify the decision of the zoning board of appeals brought up for review. *Roncka v. Fogarty* 467

25. When a petition to review an order of the zoning board of appeals is filed in the district court in the prescribed time, the action of said court is one for trial de novo within the limitations of the pleadings and the evidence taken before the court, and constitutes an attack upon the action of the board of appeals as to whether such board acted within the scope of its authority under the city charter, or whether such action on the part of the board of appeals was illegal. *Roncka v. Fogarty* 467

26. An examination of the city charter, the pleadings, and evidence, required the district court to enter judgment in accordance with the action taken by the zoning board of appeals. *Roncka v. Fogarty* 467

27. A city with authority delegated to it to regulate a licensed business, not inconsistent with the licens-

ing statute, may properly impose stricter regulations than the statute without being inconsistent with such statute. *Phelps Inc. v. City of Hastings* 651

28. Under one of the provisions of the Liquor Control Act, delegating to the governing bodies of cities and villages the power to regulate the business of beer licensees not inconsistent with the provisions of the act, a city or village is not prohibited from exacting additional restrictive requirements where the statute does not limit the requirement for all cases to its own prescription. *Phelps Inc. v. City of Hastings* 651

29. Under the Liquor Control Act, the primary power to permit the sale of beer and alcoholic liquors other than beer in the same room or location rests with the city or village under its delegated authority to regulate the business of beer licensees. *Phelps Inc. v. City of Hastings* 651

30. Where a city or village does not permit beer to be sold in the same room or location with alcoholic liquors other than beer, by virtue of a valid ordinance not inconsistent with the Liquor Control Act, the form of the license issued by the Liquor Control Commission does not have the effect of nullifying such ordinance. *Phelps Inc. v. City of Hastings* 651

31. A prosecution for violation of a city ordinance, which does not include an offense made criminal by a statute of this state, is a civil procedure to recover a penalty, and a judgment and sentence therein may be reviewed in the Supreme Court only by appeal. *Wells v. State* 668

32. A municipal court will take judicial notice of the ordinances of the city because it has a like relation thereto as do courts of general jurisdiction toward the general laws of the state. *Wells v. State* 668

33. On appeal of a conviction in a municipal court of a violation of an ordinance, the district court will take notice of the facts the former could have noticed judicially before the removal of the case. *Wells v. State* 668

34. The greater weight of the evidence, not proof beyond a reasonable doubt, is required to sustain a conviction of violation of a city ordinance not based upon an offense made criminal by the laws of the state. *Wells v. State* 668

35. The statutory duty of a railroad company to construct or repair a subway viaduct within a city is

enforceable by mandamus. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772

Negligence.

1. The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Costello v. Hild* 1
2. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence. *Costello v. Hild* 1
3. It is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence. *Costello v. Hild* 1
4. If contributory negligence is relied on by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence, except insofar as it may appear in the plaintiff's evidence. *Costello v. Hild* 1
   Pahl v. Sprague 681
5. Plaintiff is entitled, in the absence of evidence to the contrary, to a presumption of due care. *Costello v. Hild* 1
6. 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. *Costello v. Hild* 1
   Novak v. Laptad 87
7. Under the comparative negligence statute where

action is brought to recover damages for personal injuries or for injuries to property caused by the negligence of another the plaintiff, if he was guilty of negligence, may recover only if his negligence was slight in comparison with that of the defendant which was gross. *Krepcik v. Interstate Transit Lines* 39

8. Ordinarily the question of the existence of negligence or contributory negligence is one for the jury. *Krepcik v. Interstate Transit Lines* 39

9. Ordinarily in a case where on the one hand negligence is charged and on the other contributory negligence, the question of comparison is for the jury. *Krepcik v. Interstate Transit Lines* 39

10. Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant. *Krepcik v. Interstate Transit Lines* 39

11. A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. *Kubo v. Fish* 74
Bush v. James 189

12. Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. *Novak v. Laptad* 87

13. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Novak v. Laptad* 87

14. Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *In re Estate of Kinsey* 95
Hamilton v. Omaha & Council Bluffs St. Ry. Co. 328
Bolio v. Scholting 588

15. The rules of law generally operative in tort cases have application to the issues of negligence resulting from the operation and management of airplanes, except insofar as specifically applicable statutes

or authoritative rules and regulations are controlling. *In re Estate of Kinsey* 95

16. The pilot of an airplane is bound only to use the ordinary care and diligence required of pilots of ordinary care and skill under the same conditions and circumstances. *In re Estate of Kinsey* 95

17. The instinct of self-preservation and the disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care. *Bush v. James* 189

18. If a person is killed through the negligence of another, and there is no evidence as to negligence or due care on the part of the deceased, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety. But this presumption obtains only when there is no substantial evidence as to care or want of care on the part of the deceased. When there is such evidence, the presumption has no place in the case. *Bush v. James* 189

19. The elements comprising the doctrine of the last clear chance are stated in this opinion. *Bush v. James* 189

20. In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the last clear chance doctrine. *Bush v. James* 189

21. The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law. It obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject. When such evidence is produced the presumption disappears and is not entitled to be considered. *O'Dell v. Goodsell* 290

22. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. *O'Dell v. Goodsell*.... 290

23. A municipal corporation is not an insurer of the safety of pedestrians using its sidewalks, but is required only to keep them in a reasonably safe

condition for travel on them by the public. *Anthony v. City of Lincoln* 320
24. Persons using the sidewalks of a municipality are required to exercise ordinary care and caution for their safety and to keep a lookout for danger in their path. *Anthony v. City of Lincoln* 320
25. Where there is an accumulation of debris upon a sidewalk that constitutes an obstruction thereof, placed there by a municipality, in consequence of which a traveler falls and is injured while using the sidewalk, the question of whether or not the municipality was negligent is one of fact to be determined by a jury, when the evidence is such that reasonable minds may draw different conclusions from it. *Anthony v. City of Lincoln* 320
26. What is reasonable care in keeping a sidewalk in a reasonably safe condition for travel by the public must be determined by the particular facts and circumstances of each case by the jury, if reasonable minds may arrive at different conclusions from the evidence. *Anthony v. City of Lincoln* 320
26. Contributory negligence is not imputable to a plaintiff as a matter of law from the fact that he attempts to pass over a sidewalk that is obstructed if the obstruction is such that a man of ordinary intelligence would reasonably believe that with proper care and caution he could pass with safety notwithstanding the defect. *Anthony v. City of Lincoln* 320
28. Previous notice and knowledge of a defect in a sidewalk will not constitute contributory negligence to bar a recovery as a matter of law for injuries received on account of the defect. *Anthony v. City of Lincoln* 320
29. The care required of a pedestrian in walking over a sidewalk is not that he must go around an obstruction or defect, but in passing over it he must use some care and caution beyond the ordinary care exercised by a person walking upon a sidewalk knowing of no defect therein. *Anthony v. City of Lincoln* 320
30. Want of ordinary care, and not knowledge of danger, is the test of contributory negligence. *Anthony v. City of Lincoln* 320
31. In a case where negligence or contributory negligence is interposed as a defense, the court may direct a verdict in favor of the defendant based thereon only if it clearly appears that the negligence

of the plaintiff was more than slight when compared with that of the defendant. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

32. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area illuminated by his lights. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

33. When negligence as a proximate cause is charged against a plaintiff by a defendant in an answer it is sufficient as a charge of contributory negligence. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

34. Ordinarily, the violation of a statute intended to protect the life, health, and safety of employees constitutes actionable negligence, but such negligence must be shown to have been the proximate cause of the injury. *Wertz v. Lincoln Liberty Life Ins. Co.* 451

35. Except where statutes requiring employers to take certain precautions for the protection and safety of their employees expressly abrogate the defense of contributory negligence, a violation of the provisions of such statutes does not ordinarily deprive the employer of the defense of contributory negligence or relieve the employee from exercising due care for his own safety. *Wertz v. Lincoln Liberty Life Ins. Co.* 451

36. Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant, in bringing about the plaintiff's harm. *Wertz v. Lincoln Liberty Life Ins. Co.* 451

37. Plaintiff's contributory negligence may be either an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or conduct which in other respects falls short of the standard to which the reasonable man should conform in order to protect himself from harm. *Wertz v. Lincoln Liberty Life Ins. Co.* 451

38. When the evidence on the issues of negligence or contributory negligence is undisputed, or but one reasonable conclusion can be drawn from the evi-

dence, the question is ordinarily one of law for the court. *Wertz v. Lincoln Liberty Life Ins. Co.* 451

39. It was a question of fact whether or not it was negligence to park and leave unattended a truck in the manner and situation described in the opinion, and it was for the jury to determine whether or not it was contributory negligence for a person to go between a truck and building under the circumstances and at the time as stated therein. *Bolio v. Scholting* 588

40. Where the only issue is the nature and extent of the injuries sustained and the amount of recovery therefor, the inclusion of allegations of negligence in the submission of the issues upon which no evidence has been adduced in support thereof is not prejudicial to the rights of the party charged with such acts of negligence. *Remmenga v. Selk* 625

41. In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Pahl v. Sprague* 681

42. 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. *Pahl v. Sprague* 681

43. A person entering an intersection of two streets is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. If he fails to see an automobile, favored 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 question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pahl v. Sprague* 681

44. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial

court to instruct the jury to return a verdict for defendant or enter a judgment notwithstanding the verdict. *Pahl v. Sprague* 681

45. Where there is no eyewitness and no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown. *Anderson v. Nincehelser* 857

46. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Anderson v. Nincehelser* 857

New Trial.

1. By the terms of the statute providing for motion for judgment notwithstanding the verdict, a motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. *Krepcik v. Interstate Transit Lines* 39

2. Whether the motion for new trial is joined with the motion for judgment notwithstanding the verdict or is prayed for as alternative to the motion for judgment notwithstanding the verdict, they are to be treated as separate motions requiring separate consideration and ruling, except where the grounds of the two are the same. *Krepcik v. Interstate Transit Lines* 39

3. In a case where a motion for judgment notwithstanding the verdict has been joined with a motion for a new trial and the motion for judgment notwithstanding the verdict is sustained the motion for new trial remains for consideration in the event of reversal on appeal of the judgment notwithstanding the verdict. *Krepcik v. Interstate Transit Lines* 39

4. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law," and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appro-

priate motion for new trial has been filed, notwithstanding the fact that no preliminary motion for directed verdict has been made. *In re Estate of Kinsey* 95

5. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the issues in such a case, he has the right to keep the benefit of that verdict and judgment thereon, unless there is prejudicial error in the proceedings by which it is secured. *In re Estate of Kinsey* 95

6. Where an instruction, although erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial. *In re Estate of Kinsey* 95

7. The denial of a motion for a new trial on the ground of newly discovered evidence will not generally be disturbed when based upon conflicting evidence and there is an absence of abuse of legal discretion. *Latham v. State* 113

8. While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. To be entitled to equitable relief by proceedings after the term to vacate or modify a judgment, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under the statute with reference thereto. *Nemetz v. Nemetz* 178
McNally v. McNally 845

9. Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial. *Hickman-Williams Agency v. Haney* 219

10. Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error. *Hickman-Williams Agency v. Haney* 219

11. 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 with-

in the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. *Hickman-Williams Agency v. Haney* 219

12. Where a motion for new trial presents a question or questions of fact which are in dispute, the trial court becomes the judge of such questions of fact, and his decision thereon will not be disturbed on appeal unless clearly wrong. *Schwank v. County of Platte* 273

13. When all of the parties to actions which are consolidated for trial file a motion for new trial or join in an application therefor which is granted by the court in general terms, the order therefor has application to all the parties and all of the issues respectively pleaded by them, and requires a new trial of the entire controversy. *Pahl v. Sprague* 681

14. An order granting or denying a motion for new trial cannot be assigned as error by one who procured, invited, or condoned the making and entry of such order. *Pahl v. Sprague* 681

Officers.

1. It is a presumption of law that public officers will perform their public duties. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

2. When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain public interest, private persons are not necessary parties because they do not have any such rights to protect which are not being protected. *Nebraska Mid-State Reclamation District v. Hall County* 410

3. When a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

4. The Legislature under its police power may properly declare occupants of positions and employees of the state and federal governments ineligible as candidates for delegates to party conventions and caucuses. *State ex rel. Baldwin v. Strain* 763

5. The act of the Legislature making a person ineligible to be a delegate to a county, state, or congressional pre-primary convention, who holds a position or employment under the state or federal

government, is not violative of the Nebraska Constitution. *State ex rel. Baldwin v. Strain* 763

Pardon, Reprieve, and Amnesty.

1. In a proceeding to vacate a parole granted by the district court, the correct practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions. *Carr v. State* 248
2. Technical formality and preciseness of charge are not a prerequisite to judicial investigation of whether or not defendant has observed the conditions of his probation. A statement of the facts showing the claimed violation of his parole, notice to the defendant of a hearing, and a lawful hearing of the charge, are sufficient. *Carr v. State* 248
3. Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole. *Carr v. State* 248

Parent and Child.

1. In a controversy for the custody of an infant of tender years, the court will consider the best interest of the child, and will make such order for its custody as will be for its welfare without reference to the wishes of the parties. *In re Application of Reed* 819
2. The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents, but has its origin in the protection that is due to the incompetent or helpless. *In re Application of Reed* 819

Parties.

1. The right of a party to intervene in an action is absolute, subject only to the condition that he exhibit a pleading containing allegations which demonstrate a right in the subject matter being litigated. *Ash v. City of Omaha* 393
2. A petition in intervention must state such facts as, if conceded to be true, will entitle the applicant to some relief or, in other words, will sustain his right to intermeddle in the proceedings and support a decree and judgment in his favor or in favor of the party whom he desires to assist. *Ash v. City*

of Omaha 393

3. When questions are of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. *Nebraska Mid-State Reclamation District v. Hall County* 410
4. When all of the parties to actions which are consolidated for trial file a motion for new trial or join in an application therefor which is granted by the court in general terms, the order therefor has application to all the parties and all of the issues respectively pleaded by them, and requires a new trial of the entire controversy. *Pahl v. Sprague* 681

Partition.

1. The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as joint tenants, or tenants in common, to them in severalty. *Trowbridge v. Donner* 206
2. In partition cases a trial court is given the power by statute to direct the referee to allot particular portions of the land to particular individuals, and unless so allotted, the shares may be drawn by lot. *Trowbridge v. Donner* 206
3. As between a partition in kind or sale of land for division, courts will favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will. *Trowbridge v. Donner* 206
4. Generally, the burden is on those who seek a sale of the property in lieu of partition in kind, to establish by a preponderance of the evidence the existence of a statutory ground for such sale. *Trowbridge v. Donner* 206
5. A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted thereby. *Trowbridge v. Donner* 206
6. The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of such a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole. *Trowbridge v. Donner* 206
7. The effect of statutory provisions with respect to

partition is to make uncertain whether the property should be partitioned in kind or sold and the proceeds distributed, until a judicial determination of that issue is made by the court. *Trowbridge v. Donner* 206

8. It is the statutory duty of the referee in the first instance to report to the court whether or not it appears that partition in kind can be made without great prejudice to the owners, but when such report is filed it becomes the duty of the trial court to hear and judicially determine that issue. *Trowbridge v. Donner* 206

9. Generally, an adjudication by the trial court that the conditions are such as to require a sale should not be treated lightly, yet if it appears that the property has been decreed to be sold without sufficient cause, it is the duty of the Supreme Court upon appeal therefrom to reverse such judgment. *Trowbridge v. Donner* 206

10. When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate. *Bodeman v. Cary* 506

Partnership.

1. It is a general rule that capital furnished by any partner, in the absence of agreement to the contrary, is a debt owing by the firm to the contributing partner and necessarily is to be repaid him if the firm assets are sufficient after paying the firm liabilities to outsiders. *Baum v. McBride* 152

2. In the absence of an agreement, express or implied, partners share equally in the profits and losses of the business and on dissolution are entitled to the repayment of any capital contributed. *Baum v. McBride* 152

3. Generally when a partner sues his copartner for an accounting the burden of producing evidence on which the full account of the partnership can be stated is primarily upon the plaintiff and if he cannot furnish sufficient evidence to enable the court to state the account his suit necessarily fails. *Baum v. McBride* 152

4. It is the duty of a partner to account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of

the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use of its property. *Baum v. McBride* 152

5. Ordinarily, in the settlement of partnership accounts, interest should not be allowed until after a balance is struck on a settlement between the partners unless there is a different agreement between them or unless, under the peculiar facts and circumstances, the equities demand that interest be charged. *Baum v. McBride* 152

Penalties.

1. An action to recover the penalty provided for failure to publish notice of indebtedness must be brought in equity in behalf of all creditors and against all stockholders. *Kennedy & Parsons Co. v. Schmidt* 637
2. In pursuing the remedy provided by statute for failure of corporation to publish notice of indebtedness, creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court. *Kennedy & Persons Co. v. Schmidt* 637

Pensions.

Evidence examined and held sufficient to establish that the grantor did not make the conveyance to the grantee for the purpose of making herself eligible to receive old age assistance, and under the facts no lien for old age assistance as contemplated by the statute providing for filing of old age assistance liens attached to the real estate so conveyed. *Phillips v. Vandemoer* 145

Perpetuities.

1. In determining whether a case is within the rule against perpetuities, the court is guided by what is possible to occur under the will, rather than what did occur. *Tiehen v. Hebenstreit* 753
2. The rule against perpetuities provides that the longest possible period for vesting of an executory estate is the life or lives in being and 21 years

thereafter plus the ordinary period of gestation. *Tiehen v. Hebenstreit* 753

3. A limitation in favor of a class causes no invalidity under the rule against perpetuities, when, under the language and circumstances of such limitation, the ability of the class to increase in membership is absent and the ability of the class to decrease in membership is certain to end within the maximum period. *Tiehen v. Hebenstreit* 753

Pleading.

1. The objection that there is another action pending between the parties for the same cause may be raised by demurrer to a petition only when the pendency of the former action is shown on its face. *Koehn v. Union Fire Ins. Co.* 254
2. In passing on a demurrer to a petition, the general rule is that only the allegations of fact well pleaded therein may be considered by the court. *Koehn v. Union Fire Ins. Co.* 254
3. The court may not, in passing on a demurrer, assume any fact not alleged in the pleading against which the demurrer is directed, consider any extrinsic fact, or make any finding of fact. *Koehn v. Union Fire Ins. Co.* 254
4. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Farmers Union Cooperative Elevator Federation v. Carter* 266
5. A general demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded facts. *Farmers Union Cooperative Elevator Federation v. Carter* 266
6. When the claimed defect appears upon the face of a petition, a demurrer thereto is not, by the provisions of the code of practice, a proper part of the answer filed in a case, and should be disregarded. *Schwank v. County of Platte* 273
7. A single paragraph of a statement of a cause of action is not subject to demurrer upon the ground that it does not state a cause of action if the pleading as a whole states a cause of action. *Schwank v. County of Platte* 273
8. The statute with respect to amendment of pleadings permits the amendment of pleadings either before or after judgment, by conforming them to the facts

proved, when the amendment does not change substantially the claim or defense, directs the court at every stage of an action to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and provides that no judgment shall be reversed or affected by reason of such error or defect. *Schwank v. County of Platte* 273

9. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed, and others added, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case. *Schwank v. County of Platte* 273

10. When a general denial is interposed to a pleading, coupled with and followed by admissions, the denial yields to the admissions to the extent thereof. *O'Dell v. Goodsell* 290

11. When negligence as a proximate cause is charged against a plaintiff by a defendant in an answer it is sufficient as a charge of contributory negligence. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

12. The right of a party to intervene in an action is absolute, subject only to the condition that he exhibit a pleading containing allegations which demonstrate a right in the subject matter being litigated. *Ask v. City of Omaha* 393

13. A petition in intervention must state such facts as, if conceded to be true, will entitle the applicant to some relief or, in other words, will sustain his right to intermeddle in the proceedings and support a decree and judgment in his favor or in favor of the party whom he desires to assist. *Ash v. City of Omaha* 393

14. Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict, to render judgment for the plaintiff for that sum, without evidence. *Kuhlman v. Farmers Union Co-Operative Assn.* 597

15. Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, the pleading will be

liberally construed in the light of the entire record, and, if possible, sustained. *Bradway v. Higgins* 724

16. Where demurrer to a petition is interposed after trial has commenced, the petition will be regarded as sufficient if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed. *Bradway v. Higgins* 724

17. Fraud is generally a question of fact. To be effective, it must be pleaded by suitable allegations of fact. *Nelson v. Nelson* 741

18. The mere charge of fraud is a conclusion and presents no issue. *Nelson v. Nelson* 741

19. A general demurrer admits the truth of material facts properly pleaded, but does not admit conclusions of law or fact. *Nelson v. Nelson* 741

Prisons.

In an appeal from an order of the district court determining the propriety of an order of the State Fire Marshal condemning premises as a fire hazard the review is de novo as in equity. *Iverson v. Keith County* 565

Process.

To entitle a party to open a judgment rendered against him upon service by publication, it must appear by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. *McNally v. McNally* 845

Property.

The rule in Shelley's case has application as a rule of property where a testator's death occurred prior to the effective date of the Uniform Property Act. *Sandberg v. Heirs of Champlin* 161

Public Service Commissions.

1. Under the Constitution and statutes of Nebraska, the Nebraska State Railway Commission has power to determine a properly presented issue on application of a railroad company for permission to discontinue motor passenger trains on a branch line. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

2. On appeal to the Supreme Court from an order of

the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

3. The jurisdiction of the Nebraska State Railway Commission to regulate transportation of persons and property extends and is limited to intrastate commerce. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

4. Where some inconvenience would result to a small number of the public by discontinuance of the service of branch line of a railroad, but other services existent and prospective could handle all the business handled by the railroad with comparatively little extra trouble and additional expense to the public, and the evidence shows that loss in revenue by continuance of the service of passenger trains on a branch line overbalanced inconvenience to public from discontinuance thereof, it is unreasonable and arbitrary for the Nebraska State Railway Commission to deny application for the railroad to discontinue such branch line service. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

5. An order of the Nebraska State Railway Commission denying permission to discontinue motor passenger trains on a branch line of railroad was based on findings without support in the evidence and consequently unreasonable and arbitrary. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

6. The Nebraska State Railway Commission is authorized to regulate and generally control all railroads engaged in the transportation of freight and passengers within the state. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

7. An application by a railroad company to discontinue the operation of specified trains in the passenger service, for the reason that no public need exists for the service they afford, is a matter within the scope of the powers of the Nebraska State Railway Commission. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

8. On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, of which it has jurisdiction, the only question for determination

is whether the order is arbitrary and unreasonable. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

9. A final order of the Nebraska State Railway Commission, denying a railroad company permission to discontinue motor passenger trains operated at a loss and for the operation of which no public need exists, is unreasonable and arbitrary. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

Railroads.

1. Under the Constitution and statutes of Nebraska, the Nebraska State Railway Commission has power to determine a properly presented issue on application of a railroad company for permission to discontinue motor passenger trains on a branch line. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352
2. The loss of railroad transportation occasioned by operation of motor vehicles on highways constructed and improved at public expense may properly be considered on a contested application to discontinue motor passenger trains operated at a loss on a branch line of railroad. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352
3. Motor passenger trains operated on a branch line of railroad at a substantial loss may properly be discontinued, where adequate public transportation is otherwise furnished, though the main line is operated at a profit and also where the branch line from which the trains will be discontinued is operated at a profit. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352
4. The jurisdiction of the Nebraska State Railway Commission to regulate transportation of persons and property extends and is limited to intrastate commerce. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352
5. Where some inconvenience would result to a small number of the public by discontinuance of the service of branch line of a railroad, but other services existent and prospective could handle all the business handled by the railroad with comparatively little extra trouble and additional expense to the public, and the evidence shows that loss in revenue by continuance of the service of passenger trains on a branch line overbalanced inconvenience to

public from discontinuance thereof, it is unreasonable and arbitrary for the Nebraska State Railway Commission to deny application for the railroad to discontinue such branch line service. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

6. A railroad company is not a common carrier of the United States mail. The collection and delivery of the United States mail is the obligation of the United States government exclusively. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

7. The Nebraska State Railway Commission is authorized to regulate and generally control all railroads engaged in the transportation of freight and passengers within the state. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

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9. A final order of the Nebraska State Railway Commission, denying a railroad company permission to discontinue motor passenger trains operated at a loss and for the operation of which no public need exists, is unreasonable and arbitrary. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 367

10. One of the purposes of the Legislature in enacting the Full Crew Act was to provide for safety in the operation of passenger trains. Safety is required not only for the passengers riding thereon but also for the employees traveling therewith. *Bressler v. Chicago & N. W. Ry. Co.* 732

11. To carry out the purpose of providing safety for passengers and employees, the Full Crew Act provides that passenger trains, depending on their size, must always be manned and operated by a certain number of employees classified according to the duties they perform. *Bressler v. Chicago & N. W. Ry. Co.* 732

12. The Full Crew Act does not actually specify what the duties of a brakeman are but, in the absence thereof, it can only mean such duties as are generally associated with such positions by custom and practice. *Bressler v. Chicago & N. W. Ry. Co.* 732

13. Compliance with the Full Crew Act does not mean

that such employees cannot perform duties other than those of the position to which assigned. If they are qualified to perform the duties of the position to which they are assigned and, during the trip, are at all times available to perform them when need therefor arises and actually do perform them, then the statutory requirements have been met even though they must be assigned to and perform other duties. *Bressler v. Chicago & N. W. Co.* 732

14. The statutory duty of a railroad company to construct or repair a subway viaduct within a city is enforceable by mandamus. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772

Reformation of Instruments.

1. A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent. *Dowding v. Dowding* 61
2. The principles precluding reformation of a voluntary conveyance at the suit of the grantee against the grantor during his lifetime do not ordinarily as a matter of law apply in favor of the grantor's heirs at law after his death, because when the reason for a rule ceases to exist, so should the rule itself. *Dowding v. Dowding* 61
3. Each case where reformation of an instrument is sought must be governed by its own facts and circumstances. If there is equity in plaintiff's case as against the rights asserted by defendants, a reformation should be decreed to rectify a conveyance which is clearly and satisfactorily proved to have by mistake failed to carry out the grantor's intention, but if plaintiff's case is otherwise lacking in the elements that go to move the conscience of a court of equity, relief should be denied. *Dowding v. Dowding* 61
4. Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed. *Kear v. Hausmann* 512
5. In a proceeding to reform a contract on the ground of mutual mistake the burden of proof is on the party interposing that plea. *Kear v. Hausmann* 512
6. A preponderance of evidence sufficient to justify

reformation of a written instrument requires proof that is clear, convincing, and satisfactory. *Kear v. Hausmann* 512

7. A mistake for which a written instrument will be reformed must be mutual. *Kear v. Hausmann* 512

8. A mutual mistake is one common to both parties, each laboring under the same misconception. *Kear v. Hausmann* 512

Replevin.

1. Where the plaintiff in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property. *Hickman-Williams Agency v. Haney* 219
Underwriters Acceptance Corporation v. Dunkin 550

2. In an action of replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned, the measure of damages is the value of the property as proved together with lawful interest thereon from the date of the unlawful taking. *Hickman-Williams Agency v. Haney* 219

Sales.

1. The positive statement of a dealer in livestock, or an assertion or affirmation of fact, as to the quality or condition made in the course of exchange, indicating that he intended to bind himself to its truth, and which was so understood and relied upon by the other party to the exchange, may constitute a warranty. *McGuire v. Thompson* 28

2. A person who has made an exchange of a chattel by oral agreement and who desires to rescind such agreement for fraud or breach of warranty must act promptly, and within a reasonable time, taking all of the circumstances into consideration. *McGuire v. Thompson* 28

3. Evidence that calendars were ordered and shipped justified verdict and judgment for seller. *Brown & Bigelow v. Gordon* 463

4. A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest

for a loan. *Underwriters Acceptance Corporation v. Dunkin* 550

Schools and School Districts.

1. After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district. *Griggs v. School District* 282
2. Statute respecting presumption of regularity of organization of school district applies to jurisdictional as well as to formal defects and irregularities. *Griggs v. School District* 282
3. A school district which has operated as an article 6 school for many years without objection thereto being made and has during such period conducted a high school pursuant to the terms of such particular subdivision, its right to continue to operate thereunder cannot be questioned. *Griggs v. School District* 282
4. A statute places the general power in the school board with the consent and advice of the Superintendent of Public Instruction to establish such branches and grades as the board shall deem best adapted to the school. *State ex rel. Shineman v. Board of Education* 644
5. Statute providing that schools shall be free to certain children relates to the subject of tuition. It does not relate to the subjects of grades, departments, or courses of study. *State ex rel. Shineman v. Board of Education* 644
6. Statute providing for age at which children can be admitted to first grade and kindergarten deals with the subject of minimum-age requirements. It does not require the maintenance of a kindergarten or beginner grade in the schools. *State ex rel. Shineman v. Board of Education* 644

Sheriffs and Constables.

1. By statute, a private citizen may be impressed into service by a sheriff or other ministerial officer, in any county in this state, to assist in apprehending any person charged with or convicted of any offense against the laws of the state. *Anderson v. Nincehelser* 857
2. A private citizen impressed into service as provided

for by statute, and stationed on a public highway to assist in setting up a road block for the purpose of apprehending an escaped prisoner, is required to use reasonable care for his own safety and the safety of others in the performance of his duties in such respect, and his rights on the public highway, under the circumstances, are equal with the rights of an operator of a motor vehicle in the use of the public highway. *Anderson v. Nincehelser* 857

Specific Performance.

1. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform. *Johnson v. Norton* 714
2. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. *Johnson v. Norton* 714
3. Where time is of the essence of a contract for the sale of real estate, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused. *Johnson v. Norton* 714
4. Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties. *Johnson v. Norton* 714

Statutes.

1. The statute with respect to joint bank deposits is in derogation of the common law and consequently all conditions therein contained must be complied with in order to attain the result therein provided. *Young v. McCoy* 138
2. The statute with respect to joint bank deposits is not exclusive and operates only upon situations

coming strictly within its terms. *Young v. McCoy* 138

3. Proceedings for a declaratory judgment extend to the validity of a statute where there is a justiciable, determinable controversy between parties in respect to rights thereunder. *Nebraska Mid-State Reclamation District v. Hall County* 410

4. The statutory provisions for confirmation of proceedings of a reclamation district do not amend or repeal any provision of the Uniform Declaratory Judgments Act, but are simply part of a general act complete within itself which authorizes reclamation districts to prosecute a special confirmatory proceeding in the nature of an action in rem in the district court, there to be construed in the light of the holdings of the Supreme Court under the Uniform Declaratory Judgments Act, which does not exclude the awarding of further relief which is or could be claimed. *Nebraska Mid-State Reclamation District v. Hall County* 410

5. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. *Nebraska Mid-State Reclamation District v. Hall County* 410

6. It is not within the province of courts to annul a legislative act or any part thereof unless its provisions so clearly contravene some provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. *Nebraska Mid-State Reclamation District v. Hall County* 410

7. When a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in this state, in the absence of any indication of a contrary intention on the part of the Legislature. *Nebraska Mid-State Reclamation District v. Hall County* 410

8. The rule with respect to construction of statutes adopted from other states is subject to the further qualification, however, that a construction of such a statute by the state from which it was adopted, is entitled to no greater consideration than previous decisions of the Supreme Court, and will be rejected for reasons which would require the overruling thereof had it been first adopted in this state. *Nebraska Mid-State Reclamation District v. Hall County* 410

9. The provisions of the Reclamation Act do not contravene the Constitution of Nebraska or the Four-

teenth Amendment to the Constitution of the United States. *Nebraska Mid-State Reclamation District v. Hall County* 410

10. The simultaneous repeal and reenactment of a statute in terms or in substance is a mere affirmance of the original act and not a repeal in the strict or constitutional sense. *State ex rel. Shineman v. Board of Education* 644

11. A uniform rule with respect to computation of time is established by statute applicable alike to the construction of statutes and to matters of practice. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

12. As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

13. The phrase "as a matter of course" as used in a section of the Liquor Control Act, means that in the absence of objections as outlined in the act within the three-day period, the Nebraska Liquor Control Commission shall proceed to comply with the statutory procedures. It leaves open no area for the exercise of a discretion. It requires the performance of a purely ministerial duty. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

14. The word "shall" as used in the Liquor Control Act presumes ministerial action and is mandatory. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

15. Special provisions in a statute in regard to a particular subject control general provisions. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

16. Where the language of a statute is clear and unambiguous it is given effect according to its plain terms. *State ex rel. Smith v. Nebraska Liquor Control Commission* 676

17. An act which purports to amend an unconstitutional statute may be held to be amendatory of the valid statute, if such there be, which the unconstitutional act purports to amend and repeal. *State ex rel. Baldwin v. Strain* 763

18. All things proper to carry out the general object stated in the title of a legislative act are deemed to be within the scope of such title. *State ex rel. Baldwin v. Strain* 763

19. The act of 1949 amending the election laws contained but one subject and the same was clearly expressed in the title within the meaning of the Nebraska Constitution. *State ex rel. Baldwin v. Strain* 763
20. The absence of a definition of the words "position or employment" contained in the 1949 act amending the election laws did not invalidate the act. If doubt arises as to their meaning it can be determined upon judicial inquiry. *State ex rel. Baldwin v. Strain* 763
21. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
22. Courts will, when necessary to effectuate the obvious intention of the Legislature, construe conjunctive words as disjunctive. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
23. A legislative act will operate only prospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
24. A general saving clause is all-inclusive, and has the force and effect of saving all pending actions founded upon a statute repealed and all causes of action that accrued thereon prior to any such repeal, except where the repealing statute itself clearly discloses that it was not the intention of the Legislature that such rights and remedies should be saved. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
25. A general saving clause applies as though it were expressly incorporated in a repealing act, unless abrogated therein. *State ex rel. City of Grand Island v. Union Pacific R. R. Co.* 772
26. The Legislature may properly classify counties according to population for purposes of legislation when the classification rests upon reasonable differences of situation or circumstance which call for distinctive legislation as to class. *Midwest Popcorn Co. v. Johnson* 867
27. A statute which becomes operative within 30 days

from the date it takes effect as to existing counties in the class, but specifies no machinery by which it shall become immediately operative in counties subsequently entering the class, does not violate Article III, section 18, of the Nebraska Constitution, prohibiting the passage of local or special laws. *Midwest Popcorn Co. v. Johnson* 867

28. Where a bill has but one general object, no matter how comprehensive that object may be, and contains no matters not germane thereto, and the title clearly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution. *Midwest Popcorn Co. v. Johnson* 867

29. Article III, section 14, of the Constitution, does not require that the title to an act shall be a complete abstract of the bill. If the act contains but one subject and that subject is clearly expressed in the title, the constitutional requirements have been met, even though the title contains duplicitous or extraneous provisions not necessary to its validity. *Midwest Popcorn Co. v. Johnson* 867

30. An invalid appropriation of funds is not subject to injunction where such funds have been expended or have lapsed into the unappropriated funds of the state at the time the suit was commenced. *Midwest Popcorn Co. v. Johnson* 867

31. Where a part of an act is invalid, and the remainder is complete and perfect in all its parts and is capable of execution, it will be upheld where it is evident that the invalid part was not an inducement to the enactment of the remainder. *Midwest Popcorn Co. v. Johnson* 867

32. The attempt to appropriate funds for the salaries of members of the tax appraisal boards or committees contrary to Article III, section 22, of the Constitution, was not an inducing element to the passage of the remainder of the Tax Appraisal Board Act. *Midwest Popcorn Co. v. Johnson* 867

33. The Tax Appraisal Board Act does not change the uniformity requirements as to taxation of property which theretofore existed. It does not therefore violate Article VIII, section 1, of the Constitution. *Midwest Popcorn Co. v. Johnson* 867

34. The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done. *Midwest Popcorn Co. v. Johnson* 867

35. An act which purports to amend a statute which has not become effective will be held to be amendatory of the original statute which the amendatory act purported to repeal. When and if the ineffective statute becomes effective, all will be considered together in determining the intent of the Legislature. *Midwest Popcorn Co. v. Johnson* 867

Taxation.

1. An upset bidder in a tax lien foreclosure, whose bid has not been accepted, has no appealable interest in the litigation. *County of Lancaster v. Schwarz* 15
2. A county engaged in the foreclosure of a tax lien may not appeal from the overruling of its objections to confirmation or its motion to deny confirmation of the sale. As to the county, such an order is not a final order. *County of Lancaster v. Schwarz* 15

Trial.

1. When the driver of an automobile entering an intersection not protected by stop signs looks but fails to see an approaching automobile on his right, and the driver of the car on the right claims that he had the right-of-way but the position of his car is not definitely located in a favored position, the question of which car had the right-of-way is one for the jury. *Costello v. Hild* 1
2. Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles. Whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence. *Costello v. Hild* 1
3. 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. *Costello v. Hild* 1
4. The ruling of the trial court, on matters involving the misconduct of counsel or jury, will not ordinarily be disturbed on appeal where there is evidence to support the findings of the trial court thereon. *McGuire v. Thompson* 28
5. Whether one seeking to rescind a contract on the

ground that it was procured by fraud or duress has acted with reasonable promptness is, ordinarily, a question of fact and in a law action is for the jury to determine. *McGuire v. Thompson* 28

6. Where different minds may reasonably draw different conclusions from evidence the question presented is one of fact for the jury. *Krepcik v. Interstate Transit Lines* 39

7. Ordinarily in a case where on the one hand negligence is charged and on the other contributory negligence, the question of comparison is for the jury. *Krepcik v. Interstate Transit Lines* 39

8. Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant. *Krepcik v. Interstate Transit Lines* 39

9. A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Krepcik v. Interstate Transit Lines* 39
Pahl v. Sprague 681

10. In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. *Krepcik v. Interstate Transit Lines* 39

11. Where on an issue of fact the evidence is conflicting it is error for the court to direct a verdict or to render judgment notwithstanding the verdict with such conflicting evidence as a basis. *Krepcik v. Interstate Transit Lines* 39

12. By the terms of the statute providing for judgment notwithstanding the verdict, when a motion for a directed verdict is made at the close of all the

evidence and is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. *Krepcik v. Interstate Transit Lines* 39

13. By the terms of the statute providing for judgment notwithstanding the verdict, a party who has moved for a directed verdict may within ten days of the reception of the verdict move to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict. *Krepcik v. Interstate Transit Lines* 39

14. By the terms of the statute providing for motion for judgment notwithstanding the verdict, a motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. *Krepcik v. Interstate Transit Lines* 39

15. Whether the motion for new trial is joined with the motion for judgment notwithstanding the verdict or is prayed for as alternative to the motion for judgment notwithstanding the verdict, they are to be treated as separate motions requiring separate consideration and ruling, except where the grounds of the two are the same. *Krepcik v. Interstate Transit Lines* 39

16. In a case where a motion for judgment notwithstanding the verdict has been joined with a motion for a new trial and the motion for judgment notwithstanding the verdict is sustained the motion for a new trial remains for consideration in the event of reversal on appeal of the judgment notwithstanding the verdict. *Krepcik v. Interstate Transit Lines* 39

17. In a case where a motion is made for judgment notwithstanding the verdict and an alternative motion for new trial has been joined with it and the motion for judgment notwithstanding the verdict is sustained and ruling on the motion for new trial is reserved, and the judgment notwithstanding the verdict is reversed on appeal, it is required that the cause be remanded for a determination upon the motion for new trial. *Krepcik v. Interstate Transit Lines* 39

18. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Novak v. Laptad* 87

19. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. *Novak v. Laptad* 87

20. A motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made. *In re Estate of Kinsey* 95

21. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law," and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motion for new trial has been filed, notwithstanding the fact that no preliminary motion for directed verdict has been made. *In re Estate of Kinsey* 95

22. An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *In re Estate of Kinsey* 95

23. In determining whether there is error in the giving of a sentence or part of a sentence in an instruction, it must be considered in connection with the entire instruction of which it is a part and all other instructions given by the court. The true meaning of instructions is to be determined not from a separate phrase, sentence, or paragraph, but by considering all that is said on each subject or branch of the case. *In re Estate of Kinsey* 95

24. Error may not be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto. *Latham v. State* 113

25. An instruction in a criminal case that the jury has no right to reject the testimony of any of the witnesses without good reason, and should not do so unless it finds it irreconcilable with the other

testimony which it finds to be true, is erroneous and ordinarily prejudicial. *Latham v. State* 113

26. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. *Erickson v. Morrison* 133
Remmenga v. Selk 625

27. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them. *Bush v. James* 189
O'Dell v. Goodsell 290
Bolio v. Scholting 588

28. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. *Bush v. James* 189

29. Where the law provides a definite measure of damages the court should instruct the jury specifically how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous. *Hickman-Williams Agency v. Haney* 219

30. It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues that are raised by the pleadings and are supported by the evidence. *Hickman-Williams Agency v. Haney* 219

31. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Clouse v. St. Paul Fire and Marine Ins. Co.* 230

32. 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. *Clouse v. St.*

Paul Fire and Marine Ins. Co. 230
Bolio v. Scholting 588

33. Charges of misconduct by jurors must be substantiated by competent evidence on motion for new trial. The misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and must have influenced the jurors in arriving at a verdict. *Schwank v. County of Platte* 273
34. A statement by a juror of his personal knowledge of a fact not in dispute and not material to the issues is not ordinarily misconduct requiring a new trial. *Schwank v. County of Platte* 273
35. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Schwank v. County of Platte* 273
36. In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics. *O'Dell v. Goodsell* 290
37. A party who requests a trial court to give instructions framed upon a certain theory cannot be heard to complain that the court gave other instructions proceeding upon the same theory. *O'Dell v. Goodsell* 290
38. Where there is a general objection of no proper foundation laid, if there is some particular respect in which the proof of foundation is lacking, the trial court's attention should be specifically directed thereto by the party making the objection. *O'Dell v. Goodsell* 290
39. In determining the correctness of the action of the district court in directing a verdict in an action at law for the defendant, the Supreme Court will consider the evidence and all inferences fairly deducible therefrom most favorably to the plaintiff. *Anthony v. City of Lincoln* 320
40. In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328
41. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it

and direct a verdict against him. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

42. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion, to set aside the verdict, and to render judgment pursuant to the motion for directed verdict. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

43. In considering whether or not a motion by a defendant for directed verdict should have been sustained, the motion must be treated as an admission of the truth of all material and relevant evidence submitted by the plaintiff. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

44. In a case where negligence or contributory negligence is interposed as a defense, the court may direct a verdict in favor of the defendant based thereon only if it clearly appears that the negligence of the plaintiff was more than slight when compared with that of the defendant. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

45. Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

46. It is the duty of the court to instruct on the issues tendered by a defendant in an answer or cross-petition if they are supported by evidence and a failure so to do is prejudicial error. *Hamilton v. Omaha & Council Bluffs St. Ry. Co.* 328

47. Where there is no sufficient or competent evidence to support a cause of action stated in a petition in intervention, such petition must be dismissed. *Ash v. City of Omaha* 393

48. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. *Dunlap v. Welch* 459

49. Where the evidence of a party to a personal injury action is that he was struck from the rear by an automobile, while crossing a street intersection on the crosswalk provided for pedestrian use, it is

prejudicial error for the court to fail to instruct that such party was under no duty to maintain a lookout to the rear to avoid a charge of negligence on his part. *Dunlap v. Welch* 459

50. An error in the instructions which is prejudicial to the rights of the unsuccessful party requires the granting of a new trial. It is only where the successful party was entitled to a directed verdict that such error will not be deemed reversible. *Dunlap v. Welch* 459

51. In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom. Where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Paul v. McGahan* 578

52. In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. *Paul v. McGahan* 578

53. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong. *Bolio v. Scholting* 588

54. The meaning of an instruction, not the phraseology, is the important consideration, and prejudice will not be found when the meaning thereof is reasonably clear. *Bolio v. Scholting* 588

55. Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict, to render judgment for the plaintiff for that sum, without evidence. *Kuhlman v. Farmers Union Co-Operative Assn.* 597

56. In an instruction to a jury that the plaintiff is entitled to recover such damages as "she may have sustained" by reason of the injuries complained of, the use of the word "may" does not introduce an element of conjecture and uncertainty, and such an instruction is not erroneous upon that ground. *Remmenga v. Selk* 625

57. An instruction that damages for future pain and suffering must be proved with reasonable certainty is not required where damages already sustained are alone submitted to the jury. *Remmenga v. Selk* 625
58. The proper method of submitting a case to a jury is by a clear and concise statement of those issues which find support in the evidence and not by substantially copying the pleadings of the parties into the instructions, and if, by doing the latter, it results in prejudice to the complaining party it ordinarily constitutes sufficient grounds for reversal. *Remmenga v. Selk* 625
59. While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought. *Remmenga v. Selk* 625
60. Findings of the district court in a case tried without a jury are entitled to the weight, effect, and consideration of a verdict of a jury. *Wells v. State* 668
61. Findings of the district court in an action at law, in which a jury is waived, have the effect of a verdict of a jury. *Floyd v. Edwards* 673
62. When separate cases are properly consolidated for trial they ordinarily become one case, wherein one verdict and judgment dispose of the entire controversy. *Pahl v. Sprague* 681
63. In order to be entitled to the benefit of the special procedure for judgment notwithstanding the verdict, a party is required not only to timely make a motion for directed verdict but when that motion is refused to thereafter timely file a motion for judgment notwithstanding the verdict. *Pahl v. Sprague* 681
64. In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Pahl v. Sprague* 681
65. In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination. *Pahl v. Sprague* 681
66. If contributory negligence is relied upon by defend-

ant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence, except insofar as the same may appear in the plaintiff's evidence. *Pahl v. Sprague* 681

67. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant or enter a judgment notwithstanding the verdict. *Pahl v. Sprague* 681

68. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism. *Kirkendall v. State* 691

69. Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Kirkendall v. State* 691

70. The court should fully and correctly instruct as to matters of justification interposed by the accused only when there is some evidence tending to put such matters in issue. *Kirkendall v. State* 691

71. 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. *Bradway v Higgins* 724

72. In the absence of a requested instruction thereon it is not error for a trial court in a criminal case to fail to instruct upon lesser included offenses. *Mulder v. State* 795

73. Where misconduct of a prosecutor in argument has not violated the fundamental rights of a defendant, the error is ordinarily cured by timely objection which is sustained, with instructions for the jury to disregard the statement. *Mulder v. State* 795

74. In passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court. *Mulder v. State* 795

75. Affidavits used in the trial of issues of fact must

be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error. *Mulder v. State* 795

76. A motion to dismiss admits the truth of all material and relevant evidence. The party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of a court in granting the motion. *Anderson v. Nincehelser* 857

Trusts.

1. Where the owner of property purports to create a trust inter vivos but no interest passes to the beneficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with. *Young v. McCoy* 138

2. Where property has been acquired by fraud, equity, at the suit of the injured parties, will impress a constructive trust upon such property in their favor and, in the event of a prior transfer by the wrongdoer, will trace the property, if possible, through whatever mutations and impress a trust thereon in the hands of a third person, unless he be a bona fide purchaser for value and without notice. *Meier v. Trosper* 184

3. An antecedent debt is not such consideration as to have the effect of cutting off the trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to the person from whom the fund was received. *Meier v. Trosper* 184

United States.

A railroad company is not a common carrier of the United States mail. The collection and delivery of the United States mail is the obligation of the United States government exclusively. *In re Application of Chicago, Burlington & Quincy R. R. Co.* 352

Usury.

A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price with-

out tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. *Underwriters Acceptance Corporation v. Dunkin* 550

Vendor and Purchaser.

1. Where there are conditions in a contract for the sale of real estate, making time the essence of the contract and providing for a forfeiture in case of default, the acceptance of part payment on the contract is a waiver of the conditions as to all defaults then existing. *Abbas v. Demont* 77
2. Where a vendee is in default under a contract of sale of real estate making time the essence and providing for a forfeiture in case of default, and there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made. *Abbas v. Demont* 77
   Johnson v. Norton 714
3. In an action by a vendee for breach of a contract to sell real estate because vendor cannot convey a good title, if the former prevails, he is entitled to recover for all money paid by him, whether interest or principal, upon said contract, the money paid by him for taxes on the land, for the reasonable value of the improvements that he in good faith placed upon the premises, with interest from the date of each expenditure made by him as aforesaid, and also such a sum as will indemnify him for the loss of his bargain. *Oman v. City of Wayne* 341
4. The market value at the time of the breach is the controlling value. *Oman v. City of Wayne* 341
5. As against the items of damage sustained by the vendee, the vendor is entitled to set off the reasonable rental value of the premises while held by vendee, with interest thereon from the close of each year's possession by the vendee. *Oman v. City of Wayne* 341
6. One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part. *Oman v. City of Wayne* 341
7. A covenant by a vendee to pay, and by the vendor to convey a good title, both to be performed at the same time, are mutually dependent. *Oman v. City of Wayne* 341
8. A contract of sale and purchase of real estate, in

which the time in relation to deferred payments of the purchase price is made of the essence of the contract and a forfeiture provided for nonperformance, may be enforced in accordance with the terms of the express stipulation. *Kear v. Hausmann* 512

9. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. *Johnson v. Norton* 714

10. Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties. *Johnson v. Norton* 714

Waters.

1. Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage. *Pint v. Hahn* 127
Schwank v. County of Platte 273

2. The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners. *Schwank v. County of Platte* 273

3. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty. *Schwank v. County of Platte* 273

4. The owners or proprietors of land bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another. *Schwank v. County of Platte* 273
Courter v. Maloley 476

5. In an action for damages under statute respecting

maintenance of bridges by counties, if the evidence shows that all the damages claimed were caused by accumulation of wrongfully diverted or obstructed floodwaters, without any commingling of damages by waters from other sources, then it is sufficient to sustain a verdict, and if no error appears in the proceedings, a judgment thereon will be affirmed upon appeal. *Schwank v. County of Platte* 273

6. As defined by statute a watercouse is any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, a river, or a brook. *Courter v. Maloley* 476

7. To constitute a watercourse the size of a stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *Courter v. Maloley* 476

8. Surface water includes within its definition such water as is carried off by surface drainage, that is, drainage independently of a watercourse. *Courter v. Maloley* 476

9. Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water. *Courter v. Maloley* 476

10. Where surface waters flow into and become a part of a stream they cease to be surface waters and are then a part of the running water of the stream. *Courter v. Maloley* 476

11. Where running waters of a stream at flood stage spill out upon low lands and become isolated they become classified as surface waters. *Courter v. Maloley* 476

12. Floodwaters which have lost their identity with those of a living stream and have returned to the classification of surface waters are governed by the rules applicable to surface waters. *Courter v. Maloley* 476

13. The flood plane of a live stream is the adjacent lands overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. *Courter v. Maloley* 476

14. The flood plane of a watercourse is regarded as a part of the channel and the water flowing within the channel or its flood plane is characterized as floodwater. *Courter v. Maloley* 476

15. Surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others. *Courter v. Maloley* 476

16. Water flowing in a well-defined watercourse may not, except in the exercise of the power of eminent domain, lawfully be diverted and cast upon the lands of an adjoining proprietor where it was not wont to run according to natural drainage nor may surface waters, except likewise under the power of eminent domain, be lawfully concentrated and discharged through an artificial channel in unusual quantities upon lands of an adjacent owner to his damage. *Courter v. Maloley* 476

17. An owner of land is not required to bear the burden of water diverted from the natural flow of one stream and discharged into another stream thereby causing the latter to overflow its banks and flood his lands. *Courter v. Maloley* 476

18. The right of the owner, without negligence, to protect his land against surface water is a continuing one and the right is commensurate with the necessity for protection. *Courter v. Maloley* 476

19. An easement may be acquired by prescription, or by open, notorious, exclusive, and adverse use for a period of ten years, for the flow of water in a watercourse or its flood plane. The rule however has no application to surface waters. *Courter v. Maloley* 476

Wills.

1. The transfer of a bank deposit to take effect only at the death of the depositor is testamentary in character and void if not executed in accordance with the statute of wills. *Young v. McCoy* 138

2. In a case arising before the effective date of the Uniform Property Act, where a testator by his will has devised a life estate in real property to a person, and at his death to his heirs at law, the word heirs is to be taken as a word of limitation as distinguished from purchase, and such person becomes vested with a fee simple title to the property devised. *Sandberg v. Heirs of Champlin* 161

3. Language of a will, addressed to and concerning only a beneficiary therein, expressing testator's wish, request, desire, or the like, as distinguished from a command, will not ordinarily be construed as mandatory but precatory only, unless from a construction of the entire will it appears that the language used was intended to be and was in fact lawfully testamentary and dispositive of the property to another. *Sandberg v. Heirs of Champlin* 161
4. In the construction of a will the generally accepted literal, natural, and grammatical meaning will be attached to the words used. *Pyne v. Payne* 242
5. The word "casualty" when used in a will means accident, or that which comes by chance, or without design, or without being a foreseen contingency. *Pyne v. Payne* 242
6. The word "casualty" when used in a will does not embrace that which may be anticipated, foreseen, or expected in the ordinary course of events. *Pyne v. Payne* 242
7. 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. *Bodeman v. Cary* 506
Tiehen v. Hebenstreit 753
8. In construing a will, where the will in one clause makes an apparently absolute bequest of property, but a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the second clause is effective and operates to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended, or undisposed property granted for life by the first. *Tiehen v. Hebenstreit* 753
9. A will speaks as of the date of the death of the testator. *Tiehen v. Hebenstreit* 753
10. 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. *Tiehen v. Hebenstreit* 753
11. Since a will speaks from the date of the testator's death, the number of the class will, in the absence of a contrary intention, be determined upon the death of the testator. *Tiehen v. Hebenstreit* 753

Witnesses.

1. Where a witness has signed a statement prepared by a third person and on the witness stand denies its correctness as to a material matter and the statement is offered for the purpose of impeachment, it is not admissible in evidence without a proper foundation. *Costello v. Hild* 1
2. Ordinarily, the proper foundation for the admission of an impeaching statement prepared by a third person must be made by calling the person who prepared the statement or some person cognizant of the facts to testify that it contained a true account of what the witness had said. *Costello v. Hild* 1
3. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record, and are received to aid the court or the jury in estimating the character and credibility of the witness. *Costello v. Hild* 1
4. The "Dead Man" statute prohibits persons having a direct legal interest in the result of any civil action or proceeding from testifying to any transaction or conversation had between the deceased person and the witness, when the adverse party is the representative of a deceased person, and their interest is adverse to that of the representative who makes appropriate objection and does not waive the prohibition. *Dowding v. Dowding* 61
5. A witness may be asked on cross-examination if he has been convicted of a felony. *Latham v. State* 113
6. The inquiry on cross-examination of a defendant in a criminal case when he is a witness whether he has been convicted of a felony is permissible, and if the answer is in the affirmative he may then be asked the number of his convictions, and if an answer is correctly given, the inquiry must end there. *Latham v. State* 113
7. If any answer of defendant upon being interrogated as to previous conviction of a felony is untrue or if he claims he does not know, the fact of his conviction or convictions may be shown, but only by the record thereof. It is error to explore on cross-examination of defendant the details of any charge

of which he has been convicted or the sentence imposed because thereof. *Latham v. State* 113

8. The purpose of the narrow inquiry permitted as to previous conviction of a felony is for impeachment of the defendant as a witness and not to show he is prone to criminal acts, and it should be strictly confined to the limits fixed by the statute as interpreted by the Supreme Court. *Latham v. State* 113

9. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. *Latham v. State* 113

10. In this state no age is fixed by statute below which a child is presumed to be incompetent to testify. This is a matter committed to the sound discretion of the trial judge. *Wells v. State* 668

11. The character of a litigant may be put in issue by evidence of his general reputation in the community where he resides in reference to the particular trait or kind of character involved in the case, but evidence of his real qualities as conceived by the witness or of particular facts concerning the litigant is not admissible. *Wells v. State* 668

Words and Phrases.

1. The word "lightning," in its ordinary and popular sense, applies to any sudden and violent discharge of electricity occurring in the course of nature, between positively and negatively electrified bodies, usually developing in its course the phenomena of light, heat, and disruptive force. *Clouse v. St. Paul Fire and Marine Ins. Co.* 230

2. Under the terms of policies insuring against loss by lightning, appellant was only liable for "direct loss" caused by lightning. "Direct," as so used, means "immediate" or "proximate," as distinguished from "remote" or "incidental." *Clouse v. St. Paul Fire and Marine Ins. Co.* 230

Workmen's Compensation.

1. By statute it is required that claims for personal injuries under the Workmen's Compensation Act shall be barred unless within one year after the accident the parties shall have agreed upon the compensation payable or one of the parties shall have filed a petition in the workmen's compensation

court to determine the question of compensation. *Keenan v. Consumers Public Power District* 54

2. By interpretation and application the limitation of time for bringing action is extended to one year from the date of acquisition of knowledge of the injury where the injury is latent and progressive. *Keenan v. Consumers Public Power District* 54

3. Where an employee suffers an injury, apparently slight, but which is progressive in course, the character of which is ascertainable only by medical men, and medical men are unable to ascertain it up to a certain time, the statute of limitations applying to workmen's compensation actions does not begin to run until it is ascertained. *Keenan v. Consumers Public Power District* 54

4. Under the workmen's compensation law parents are not presumed to be dependents of their minor children but on the facts of the particular case they may be found to be dependents. *McKelvey v. Barton Mills, Inc.* 120

5. Whether or not parents are dependents under the workmen's compensation law is a question determinable on the facts as of the time of the injury. *McKelvey v. Barton Mills, Inc.* 120

6. Dependency in fact of parents upon minor children under the workmen's compensation law is created by contributions for the purpose of support. *McKelvey v. Barton Mills, Inc.* 120

7. If a contribution is made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life, it should be considered as support and the recipient regarded as a dependent. *McKelvey v. Barton Mills, Inc.* 120

8. On any appeal to the Supreme Court in a workmen's compensation case the cause will be considered de novo upon the record. *Beam v. Goodyear Tire and Rubber Co.* 663
Miller v. Schlereth 805

9. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Beam v. Goodyear Tire and Rubber Co.* 663

10. 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 his employment. *Beam v. Goodyear Tire and Rubber Co.* 663

11. The status of employee or independent contractor cannot be determined by any single test or rule, but must be established from a consideration of all the facts and circumstances of the case. *Wilds v. Morehouse* 749

12. An independent contractor is one who renders service in the course of an independent occupation and who regards the will of the one for whom the work is done only as to the result of the work and not as to the means or mode by which it is accomplished. *Wilds v. Morehouse* 749

13. Under the facts stated in the opinion, appellant was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act. *Wilds v. Morehouse* 749

14. In a workmen's compensation case the right of recovery is statutory and unless the case has been brought within the conditions imposed by the statute it must fail. *Miller v. Schlereth* 805

15. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. *Miller v. Schlereth* 805